



CRIMINAL BAR ASSOCIATION

Response

To The Bar Standards Board Consultation Paper entitled “Review of the Code of Conduct”

Introduction

1. The Criminal Bar Association (“the CBA”) represents about 3,600 employed and self-employed members of the Bar who appear to prosecute and defend the most serious criminal cases across the whole of England and Wales. It is the largest specialist bar association. The high 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 guarantee the delivery of justice in our courts; ensuring that those who are guilty are convicted and those who are not are acquitted.
2. The Bar Standards Board published its consultation paper entitled “Review of the Code of Conduct” in January 2011. The consultation period ends on 21 April 2011.
3. The CBA welcomes the opportunity to comment on the proposed changes to the Code of Conduct. We answer each question in turn, as posed in the Consultation Paper.

Q1: Do you agree with the approach adopted for guidance in the new Code?

4. The CBA agrees with the approach to guidance in the new Code. The CBA seeks reassurance that any future guidance issued by the BSB that does not appear in the Code will be widely communicated to the profession.
5. Forthcoming further guidance should be announced in advance of its being issued, so that barristers are put on notice that there are to be changes or developments. The CBA does not think that such an announcement should be restricted to a mention on the BSB website. It will need to be more widely circulated than that; specialist bar associations and the circuits may be able to assist in this regard.
6. Similarly, when the guidance itself is issued, it should not just be published on the BSB website; electronic copies should be disseminated as widely as possible.

Q2: Do you agree with the approach to the application of the Rules?

7. Yes.

Q3: In particular, do you agree with the approach to the dis-application of Rules relating to barristers employed by or managers of a Recognised Body not regulated by the Bar Standards Board?

8. Yes.

Q4: Do you think that our approach to regulatory conflicts is sufficient?

9. Yes.

Q5: The Board does not believe that there are any regulatory conflicts. Do you agree or are there any conflicts that we have not identified?

10. No regulatory conflicts have been identified by the CBA.

Q6: Do you have any comments on the introduction?

11. The CBA has no comments to make about the introduction.

Q7: Do you agree that there should be no rule prohibiting media comment, and that guidance should be provided instead?

12. It is impossible to form a firm view about the merits of any guidance in the abstract without seeing any draft proposals. It may be that the approach to be adopted in respect of media comment will depend on such matters as the stage that proceedings have reached. Comment during the currency of proceedings and before the conclusion of any jury trial is fraught with difficulties. Comment after the conclusion of proceedings may be less problematic. It is difficult to envisage how such guidance could be drafted with sufficient clarity to be of any real benefit.

13. More fundamentally, even in the absence of the proposed guidance, the CBA does not agree that the current rule prohibiting media

comment should be changed. The current rule works well in practice and the CBA can see no good reason why this position should change. The status quo appears to be working properly.

14. There is increasing concern within the profession and the judiciary about the impact of media comment on jury trials in general and in particular the use of the internet and social networking sites by serving jurors. Prior to the advent of the internet, the passage of time removed much of the sting of adverse media comment. The internet ensures that historic media comment is readily available to anyone interested in researching the issue.
15. It is almost impossible to police a juror's use of the internet during a trial. For instance, where a defendant is acquitted of serious criminal charges and is subsequently arrested, charged and tried in separate criminal proceedings, it is likely that the media reporting of that first trial and acquittal will be accessible via an internet search using the name of the defendant. The CBA considers that the dangers posed to the fairness of criminal trials through the availability of information on the internet are significant enough without adding to that problem through media comment by barristers.
16. The protection that the current rule affords is particularly valuable to those working within the criminal justice system. Criminal barristers will often find themselves instructed in cases which attract strong media comment and arouse public hostility; be it in relation to their client, their instructions, or the nature of the alleged offence. The Cab Rank rule precludes barristers from refusing instructions even though they may have strong negative views about the issues that arise, such as in cases concerning terrorism, animal rights, or paedophiles.

17. Currently, barristers are protected from any pressure to express a view or an opinion about the case to the media. The CBA considers that this rule protects barristers from allegations that their independence has been compromised.
18. However, if the rule prohibiting media comment was removed, then barristers may find themselves under some pressure to engage in interviews or to provide commentary to media outlets. The danger is that a barrister will be expected to provide supportive comments about a client to the media. It may become the norm to comment on a case. The lay client may want to see previous examples of supportive media comment by a barrister prior to instructing that barrister.
19. Those instructed in cases that arouse public outrage may find that they wish to respond to public criticism of their submissions or questioning. Those who publicly offer personal support for a cause will be seen as representatives of that cause, not independent professionals.
20. The fact that solicitor advocates are not subject to the same prohibition on media comment is not a good enough reason to remove the protection that the rule affords to the Bar.

Q8: Do you have any comments on the revised drafting of the Conduct Rules?

21. The CBA considers the Conduct Rules to have been drafted in a clear and comprehensible way.

Q9: In particular, do you agree with the drafting of the rules in relation to:

a) A duty to report misconduct

22. No. The CBA is very concerned by the prospect of the introduction of a positive duty to report misconduct.
23. This proposal has given rise to particular controversy at the Criminal Bar because of the nature of the role that we perform. Most criminal barristers spend their professional lives in court. The duty to report seems to ignore the first port of call in relation to any misconduct at Court: the trial judge.
24. The argument advanced for the introduction of this duty is that absent such a duty, the interests of the lay client (the defendant and possibly the victim, the family of the victim or perhaps witnesses) may be prejudiced in some way. Further, it is argued in the consultation paper that since other professional bodies are under such a duty, then so should the Bar.
25. As to that latter point, the Bar is different from other professional bodies. Doctors, accountants, teachers, for example, do not conduct their professional lives before Judges.
26. One of the arguments in favour of this proposed duty is that solicitor advocates are subject to a duty to report and that there should be some form of consistent approach by the Bar. The CBA invites the BSB to disclose the number of relevant comparable complaints that have been made to the SRA by solicitor advocates against other solicitor advocates which relate to the conduct of or quality of advocacy before the Crown Court.
27. We suspect that there have been few if any such reports of professional misconduct of this type. If so, any argument for reform

based upon the need for parity between the approach of the Bar and other professions is a matter of form rather than substance.

28. The CBA cannot think of any examples where the interests of the lay client have been prejudiced by the absence of a positive duty on a barrister to report misconduct by another barrister to the BSB. There are no examples of cases cited in support of this proposal where the existence of such a duty would have prevented an injustice or protected a defendant from a particular failure or improper act.
29. It is important to have regard to the practical implications of this proposal. The main focus of the professional life of a criminal barrister is courtroom advocacy or preparation for trials. The professional work of a criminal barrister is conducted under the supervision of a Judge. Where there has been misconduct by a criminal barrister, the act of reporting someone to the BSB is not, and should not be the first port of call; if there is an issue that concerns the running of the trial or pre-trial case management, this should be reported immediately to the trial judge. The trial judge, unlike the BSB, is in a position to take immediate remedial action if necessary.
30. So, for instance, if a barrister becomes aware of serious misconduct, the duty to protect the interests of a lay client (whether the client of that barrister or of the barrister committing the misconduct) is discharged by the reporting of the matter to the trial judge. If a barrister knows that another barrister has misled the court or behaved in a seriously unprofessional manner at court or in the conduct of pre-trial preparation then the Judge is in the best position to deal with the issue.
31. The Judge is under no duty to report misconduct to the BSB no doubt for reasons of judicial independence. S/he is entitled to

exercise his or her professional discretion as to whether the conduct should be reported to the BSB. The CBA can see no reason why a criminal barrister should be under mandatory duty to report misconduct where, for instance, the trial judge to whom the conduct has been reported has decided not to report the barrister at fault.

32. Similarly, if the alleged misconduct concerns serious misconduct in chambers unconnected to any particular case, then a barrister should report it immediately to the Head of Chambers and/or management committee, rather than to the BSB. There may be an argument for the introduction of a duty on the Head of Chambers to report serious professional misconduct to the BSB, depending on the standard of proof required and the level of seriousness.
33. The CBA is concerned that the direction of some of the proposed changes to the code of conduct seems to involve the displacement or by-passing of the important role of the Head of Chambers. Reporting misconduct within chambers, particularly where the perpetrator is a senior member of chambers can put a more junior member of chambers or a pupil or a member of staff in a very difficult position. That position is not eased by making the victim of misconduct liable to professional misconduct proceedings before the BSB for not reporting it.. The better approach is that the complaint is made first of all to the Head of Chambers who, if s/he ignores it, can be the subject of professional censure.
34. It is not difficult to see how the positive obligation to report misconduct could also lead to perverse results; should a barrister who has been harassed by a colleague in chambers really be penalised if they do not report that misconduct from which they have suffered to the BSB rather than reporting it to the Head of Chambers?

35. The contrary argument may be that the proposed duty would remove any such dilemma and give some comfort to the victim that s/he had no choice but to report the matter to the BSB. This is a somewhat circular argument. Such a duty might well have the opposite effect to that intended; that a barrister remains silent about misconduct such as harassment to avoid reporting the matter to the BSB for a number of reasons.
36. Should a barrister be penalised for not reporting that a fellow member of the Bar had taken illicit drugs in their spare time? The imposition of this duty would effectively impose an obligation to report private behaviour, which would be beyond that expected of an ordinary civilian at criminal law.
37. This issue raises questions about what is meant by 'serious' misconduct. It is unclear what level of proof or knowledge should trigger the duty.
38. If this duty extends to misconduct in the conduct of a barrister's private life, does the duty apply to each and every barrister who becomes aware of private misconduct on the part of another barrister? What should be the position if, for instance, at a private party, one barrister assaults another barrister witnessed by other members of the Bar? None of them is under any duty to report the matter to the police, but the victim and witnesses commit a professional offence if they fail to report the matter to the BSB if this amounts to serious professional misconduct.
39. The imposition of a duty to co-operate with the BSB or the Legal Ombudsman will ensure that any barrister who has witnessed professional misconduct will be under an obligation to assist with any investigation into misconduct and, if necessary, provide evidence of what that barrister witnessed. The CBA submits that this should be the extent of the duty imposed on the Bar.

40. The CBA suggests that instead of imposing this blanket duty to report, which may be counter-productive and which may be more observed in the breach, the BSB should consider imposing a duty on Heads of Chambers to report serious professional misconduct where the matter is too serious to be dealt with by internal disciplinary measures alone or to report instances of internal disciplinary findings to the BSB for their own records and consideration.
41. A member of the Bar may choose to report an allegation of misconduct on the part of another barrister to the BSB. S/he should not be the subject of disciplinary action if s/he chooses not to do so. The duty owed by a barrister to the Court will require most instances of misconduct at the criminal bar to be reported to the trial judge. In the absence of any evidence of the existence of a widespread problem of unreported serious professional misconduct on the part of members of the Bar, the CBA suggests that this proposal is unnecessary and potentially divisive.

b) A duty to co-operate with the regulator and the Legal Ombudsman

42. Yes

c) Equality and Diversity

43. The duty should be on the management committee and the head and deputy head of chambers, not on individual members.

d) The application of the Conduct Rules to self employed and employed practising barristers

44. Yes, the Conduct Rules should apply to the self employed and employed Bar.

**e) Applying CD2 to barristers without practising certificates
(‘unregistered barristers’)**

45. Yes

Q10: Do you agree with the proposed approach to the drafting to the Practising Rules?

46. Yes

Q11: Do you have any specific drafting comments?

47. No.

Q12: Are there any omissions or unnecessary additions within the Practising Rules?

48. None noted

Q13: Do you agree with the above proposal to link CPD requirements to the renewal of practising certificates?

49. The CBA is very concerned that if this proposal is to be implemented, that sufficient safeguards are put in place. It is a criminal offence to practice without a valid practising certificate. The possibility of a situation arising whereby a barrister would be at

risk of incurring a criminal sanction because they had inadvertently failed to comply with the CPD requirements must be minimised.

50. More information is required as to what opportunities barristers will have to be able to make up any shortfall in the number of CPD points obtained before they are at risk of not being able to renew their practicing certificate. How does the BSB propose to accommodate those barristers who have been out of practice for an extended period of time, for example because they have been on maternity/paternity leave, or because they have been unwell?.
51. It is unclear as to what would happen, in a situation where a barrister had applied for a new practising certificate on the basis that they had thought they had complied with their CPD requirements the previous year, but for some reason, were found not to have done so; would their practising certificate be invalid, and so put them at risk of criminal sanction?
52. The CBA would argue that a failure to complete CPD requirements is already properly dealt with as a misconduct issue by the BSB, which already invokes draconian penalties. There is no need to link it to practising certificates. If the failure to complete CPD requirements does in fact impact on the fitness of a barrister to practice, then the BSB has the power to suspend a barrister from practice pending compliance.

Q14: Do you have any comments on the way in which the authorisation to practise arrangements have been reflected in the Code?

53. No.

Q15: Do you agree with the new proposals in respect of unregistered barristers?

54. The CBA takes the view that it would also be easier for the BSB to enforce if the new proposals applied to all unregistered barristers in the same way, regardless of the size of the organisation employing the unregistered barrister or the nature or status of the unregistered barrister's employment.

55. Save for those observations, the CBA agrees with the new proposals.

Q16: Do you think that the proposals provide adequate safeguards for clients and potential clients?

56. Subject to what is set out in response to Q15 above, yes.

Q17: Do you think that rule 87 should apply to clients which are small businesses and other organisations as well as to clients who are individuals

57. Yes. Small or new businesses are just as likely to be in need of protection as individuals, and indeed, may in fact involve individuals trading under a company name. Rather than try and distinguish between those groups that are more vulnerable from those who are not, it would be far more practical for Rule 87 to be applied to all clients.

Q18: Do you have any comments on how these new proposals are reflected in the Practising Rules?

58. No

Q19: Do you think that the prohibition on dual qualification should continue?

59. Yes it should continue.

Q20: If not, should there be any restrictions or safeguards introduced, and if so, what should they be?

60. Not applicable in light of our answer to question 19 above.

Q21 Do you agree that the information which a dual qualified barrister is required to give if he wishes to call himself as a barrister even though he is not practising as a barrister should be limited to explaining that he is not practising as a barrister?

61. The CBA agrees that prohibition should remain. The CBA agrees with the proposals for disclosure.

Q22 Do you agree with how it is proposed to deal with legal aid fees for the purpose of the cab rank rule?

62. There are concerns within the profession that the removal of this assurance of comfort from the Code of Conduct may amount to the first step down the road of preventing the Bar Council from issuing such guidance in the future. The CBA seeks reassurance that the

removal of the guidance from the Code will not mean that the BSB will at some future date ignore the guidance in deciding whether a refusal to accept a brief is justified by the level of fees provided by public funding.

Q23 Do you agree that all members of Chambers should be collectively responsible for the administration of Chambers?

63. The CBA does not agree that individual members of chamber should be personally responsible for its proper administration. It is suggested that this is another example of the proposed diminution of the role of Head of Chambers within these draft codes. The default position should be that a Head of Chambers is accountable for the proper administration of chambers. It is often the case that a particular set of chambers may delegate the responsibility for administration to another person or body within chambers. However, the idea that any single member of chambers could influence other members of chambers to ensure compliance is impractical. A single member of chambers should not be personally responsible for anything more than the efficient administration of their own individual practices.
64. Further, it is not clear what end the Bar Council hopes to achieve. The CBA has concerns that if the purpose of this proposal is to generate greater accountability, that in fact it would prove counterproductive. Were a set of chambers' administrative procedures to fail, there would no longer be one person who could be properly charged with remedying the situation.

65. Personal responsibilities as outlined by paragraphs 66 and 67 are reasonable and clearly drafted.
66. The CBA does not, however, agree with the proposals at paragraphs 68 and 69; the removal of the Head of Chambers as the person or body having the ultimate responsibility for the proper administration of chambers is a retrograde step.

Q24 If so, do you agree with the approach proposed?

67. Please see our answer in relation to question 23.

Q25 Do you agree that the existing requirement for barristers subject to the three year rule to have the same principal place of business as a qualified person should remain?

68. Yes. The CBA agrees that the existing requirement for barristers subject to the three year rule to have the same principal place of business as a qualified person should remain.

Q26 Do you have any comments on the Practising Certificate Rules?

69. The CBA has no comment on the Practising Certificate rules.

Q27 Do you have any comments on the content and drafting of the Compliance Rules?

70. The CBA has no comment as to the drafting of the Compliance Rules.

Q28 Do you agree with the purposes of publication and disclosure? Do you consider that any other purposes are served by publication?

71. The CBA agrees with the purposes of publication and disclosure cited.

Q29 Do you agree with the concerns identified? Can you identify any further concerns?

72. The CBA agrees with the purposes of publication and disclosure cited.

Q30 Do you agree with the Board's proposal as to publication of findings of professional misconduct? If not, why not?

73. No. The CBA considers that some aspects of the proposed length of publication of findings is not commensurate with the level of penalty imposed; that unnecessarily lengthy publication periods would not assist the public good whilst severely prejudicing the barrister subject to the finding.

74. The CBA believes that for an offence attracting a three month suspension the finding should be published for two years; for offences attracting suspensions of three months to less than 12 months, a five year period would be appropriate.

75. The CBA agrees that it is in the public interest that a penalty of disbarment should be published for life. However, if the BSB finds that any act or acts of misconduct merits the imposition of a 12 month suspension or more but falls short of meriting disbarment, it would be illogical and prejudicial for the publication period to mirror the period for disbarment. The CBA suggests a publication period of 7 years for an offence attracting a penalty of 12 months suspension or more that falls short of disbarment.

Q31 Do you agree with the Board's proposal as to the disclosure of findings of professional misconduct? If not, why not?

76. Yes.

Q32 Do you agree with the Board's proposal as to the publication and disclosure of findings of IPS? If not, why not?

77. Yes

Q33 Do you agree with the Board's proposals as to publication and disclosure of conditions imposed by Fitness to Practise panels? If not, why not?

78. Yes

Q34 Do you agree with the Board's proposal as to the publication and disclosure of findings of IPS? If not, why not?

79. Yes

Q35 Do you agree with the Board's proposal neither to publish nor disclose findings under para 901.1. If not, why not?

80. Yes

Q36 Do you agree with the Board's proposal as to the publication and disclosure of NFA determinations? If not, why not?

81. No. The CBA can see no logical reason to disclose cases where no further action is taken when certain cases that do involve further action and a finding of guilt, but which attract only a fixed penalty, are not to be disclosed. A decision not to proceed for reasons other than the merits should be dealt with for the purposes of disclosure in the same way as an acquittal or a decision not to proceed on the merits. The duty to disclose should not be dependent upon the reasons given by a disciplinary committee for not proceeding. It puts a barrister in an invidious position to be forced to ask for a full hearing in order to avoid disclosure that would follow from a basis of discontinuance. A complaint that has not been proved should not be published.

Q37 Do you consider that there should be a residual power in the Complaints Committee, or in some other body, to publish or

disclose findings where there is a good reason to do so? If so, why?

82. No. If the BSB cannot think of circumstances where such a power would be required, it cannot properly be regarded as necessary.

Q38 Do you have any further comments to make on the Board's proposed publication and disclosure policy?

83. No.

Q39 Do you agree that the Code should be principally web based?

84. Yes. The CBA agrees that by being principally web based, this will increase the ready availability of the Code to the maximum number of barristers. It will also be easier to ensure that the Code is kept up to date, and that the version accessed by a barrister will be the current version.

Q40 Do you think that the new Code of Conduct gives rise to any negative consequences for any group and, if so, how could they be mitigated?

85. The CBA is concerned that the new proposals in relation to the duty to report misconduct could disproportionately affect younger barristers for the reasons given above .

86. Q41 Does the Code provide opportunities to promote greater equality, and if so, how?

87. This is not apparent to the CBA.

Q42 Do you have any comments on equality and diversity issues that may arise from the new Code of Conduct?

88. No.

Q43 Do you have any comments on the proposed timetable for publication?

89. The current timetable envisaged allows for further additions to the Code to be made between April and August 2011. However, it is not apparent that any further consultation period has been considered in the timetable. If there are to be further changes or additions to the Code, in addition to those outlined in this paper, sufficient time should be allowed for further consultation to take place.

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