Response from the Bar Association for Commerce Finance and Industry ("BACFI") to the Bar Standards Board consultation "Authorisation to Practise Arrangements"

About BACFI

The Bar Association for Commerce, Finance and Industry was founded in 1965 to promote the interests and professional status of barristers employed in commerce, finance and industry. BACFI is a Specialist Bar Association, affiliated to the Bar Council but operating independently to represent employed and non-practising barristers working outside chambers. It is represented on the Bar Council and its General Management committee and has members on several Bar Council and BSB committees and working groups.

BACFI merged with the Employed and Non-Practising Bar Association (ENPBA) in 2004 and has many non-practising barristers among its members. BACFI is keen to play its part as a representative organisation in helping shape the development of the Bar of England and Wales. BACFI actively supports the objective of an independent and high quality legal profession, accessible to all. We take the view that whilst the public interest must be paramount in reviewing regulatory arrangements, the interests of the members of the profession must also be taken into account.

Introduction

The Legal Services Act 2007 provides a new definition of regulated legal activities that eclipses the old Code of Conduct definitions. It is clear that it will be in the public interest to ensure that the authorisations of the different kinds of barrister are clearly explained and that an accessible and comprehensive Register is maintained, to avoid any confusion.

There is a growing number of individuals (20,000 by the BSB's own estimate but we believe to be very many more) who have been properly and formally called to the Bar by their Inns yet who cannot (because of the limited availability of pupillages) obtain a full practising certificate and, if they were called after 1 January 2002, use the title "barrister" when providing legal services to an employer. As the Consultation Paper highlights there are several different categories of employed barrister leading to confusion among practitioners let alone the public and employers. Also adding to the confusion is that the

term “non-practising barrister” is used by the Bar Council and the Bar Standards Board[1] to mean any barrister without a practising certificate. However, such a barrister is not allowed to use the title in connection with the provision of legal services, leading to several being subject to disciplinary proceedings through inadvertent use of the term. We feel that the Review which produced this Paper was a golden opportunity to solve once and for all the problem caused by using the same title for the academic qualification as a barrister and the right to practise as such. We are disappointed that this opportunity has not been seized and we give our views in our Response to Part V below.

Part lll: Development of an authorisation to practise regime.

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

It is naturally vital that the public should be able quickly and accurately to check the status of a barrister. An on line register is clearly the most efficient way of providing this and for making the necessary timely amendments. The Register should record the names and status of all barristers (including those without practising certificates) for whom the Bar Council has any contact details.

Specific comments:

- A period of grace is essential. Renewal notices may be sent at a time when a barrister has just moved chambers or employers; or when he or she is ill or working abroad. Changes of name on marriage or divorce may also delay the renewal process.
- Renewal notices should be sent to both home and business addresses/e-mails.
- Given that practice without authorisation is now a criminal offence, we believe that there should be no removal from the Register for failure to renew until the full grace period has elapsed.
- Likewise an appeal mechanism is important. This could be restricted to cases where the barrister alleges that the purported removal from the Register is the BSB’s fault. A successful appeal should result in a backdating of the register entry.

[1] See Press Release dated 29 March 2010 concerning the appointment of the Bar Council’s Communications Officer http://www.barcouncil.org.uk/news/press/800.html which uses the term “a qualified (non-practising) barrister”

See also terminology used by the Bar Council Records department which confused one barrister who was the subject of a BSB complaint for using the title “non-practising barrister” on a business card. In the same week as he received the BSB’s complaint he received a letter from Records stating “Our records show that you are a non-practising barrister and, as such, you do not require a Practising Certificate”

Q.2 Do you think it is reasonable for barristers who do not comply with the authorisation requirements in a timely manner to no longer be authorised to practise (and therefore be removed from the Barristers' Register)?

Yes, after the expiry of a reasonable period of grace and the conclusion of any appeal.

Q.3 Do you agree that it is unnecessary to have an appeal mechanism against the decision not to renew an individual's authorisation to practise if they do not comply with the requirements?

No. There must be an appeal mechanism, see above.

Q.4 Is it appropriate to have a one month grace period?

Yes, for reasons above.

Q.5 Do you agree with the arrangements described in Proposal 2? Do you have any suggested alternatives and/or improvements to the proposal?

We agree that removal from the Register for failure to complete CPD requirements would be disproportionate. The current CPD regime has caused some considerable concerns in the past and it is hoped that these will be reflected in the outcome of the ongoing Review of CPD.

Q.6 Do you think that Proposal 2 provides adequate regulatory safeguards for users of legal services?

Yes. Any CPD regime will have shortcomings and the requirement for professional indemnity insurance adequately protects the public.

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

No, for the reasons given in the paper.

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 an incentive to comply in a timely manner?

No. The professional misconduct regime provides an adequate incentive. Many employed barristers in the commercial sector have difficulty finding suitable courses. If the BSB has the power to decide that a course which has been claimed in good faith is not relevant to the barrister's practice and this results in non-compliance being recorded on a public register, then this seems a disproportionate penalty.

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

No. We believe it is preferable for all matters concerning a barrister's authorisation to practise to be dealt with personally by the individual concerned. As indicated above, it

will be vital for the BSB to collect and maintain personal e-mail and home addresses as well as business addresses.

Part lV: Barristers without full entitlements to practise

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

Although the Code does not put a time limit on 1102 applications, we do not object to this provision terminating on 31 December 2011 provided that the same criteria are used for waiver applications as would have been applied to applications under 1102.

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?

Yes.

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.

Yes, provided the BSB has made reasonable efforts to contact them and obtain this information.

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.

Yes.

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

Yes provide that the interpretation of the "qualified person" requirement in the Employed Barristers (Conduct of Litigation) Rules recognises that the qualified person need not be located in the same office as the employed barrister provided that he/she is able to provide the necessary supervision.

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?

Yes. We agree with the conclusion in the paper that continuing the present arrangements will not pose any risk to the public.

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?

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

This is a specialised field and we suggest it might be worth considering whether practising barristers should have some additional authorisation from the Immigration Services Commissioner or be required to undertake training in the field of immigration law.

Part V: Barristers not permitted to practise

Since the 2000 Code was introduced, BACFI has been active in trying to address the issues caused by the effective disenfranchisement of large number of barristers. The transitional provisions in the Code were intended to allow those without the necessary professional training to gain full practising status. However this proved illusory in many cases in view of the lack of pupillages (particularly for older people) and the rigid criteria applied by the Bar Council and then the Bar Standards Board in granting waivers. Even those with extensive experience, if such experience did not include a significant amount of court room work, were unable to obtain full practising status. The changes introduced in 2005 which included the notorious "206 rule", were the result of almost 4 years work by a small group of Bar Council nominees (Geoffrey Vos and Mark Stobbs) and senior BACFI and ENPBA members ("the Vos discussions"). The changes were inevitably a compromise with which neither group was satisfied and the 206 regime has proved to be a problem particularly in the immigration field.

In this paper, unless otherwise stated, we use the term "npbs" to mean barristers without practising certificates who are providing non-reserved legal services, mainly in employment but also as self-employed consultants. We are not concerned with those who are genuinely non-practising because they are either retired or not doing legal work at all.

The growth in the number of npbs is likely to accelerate as pupillage numbers remain static or even diminish. The recently published BSB Pupillage Review states that there is no need to increase the number of pupillages currently available nor does it recommend and significant changes to the training regime. [2] This conclusion seems to be based on tenancy and employment opportunities for newly qualified barristers. The Review does not consider the requirement for alternative training opportunities for more senior barristers as recommended by the Richards Working Group (see para 11 of Annex 2 to the present Consultation Paper). Also, as the qualification criteria for the QLTT route change from September 2010, the number of barristers seeking pupillage will further escalate and there will be a corresponding increase in the number of npbs.

As the Consultation Paper highlights there have been several attempts to tackle the issue but without any satisfactory conclusion. Deferral of call was rejected as have all proposals to allow npbs to use a title which properly reflects their status. Just because successive groups have not been able to find a satisfactory solution does not seem to be a good reason to continue to treat npbs as having no professional status. Npbs remain members of their Inns and we believe should be subject to the core duties in the new Code of Conduct. In this connection, we would deplore the BSB's suggestion in para 132 that all non-practising barristers should only be subject to the core Code duty relating to public confidence. The new core duties were drafted specifically to apply to all barristers and to change this now would be a retrograde step. All barristers are entitled to expect

[2] *Bar Standards Board Pupillage Report, May 2010.*

that they will be treated as professionals and with courtesy and consideration which unfortunately has not always been the case. It is a great pity that the complaints which have arisen in relation to immigration services have effectively had the result of condemning all npbs some of whom are extremely experienced lawyers. We therefore take issue with the statement in para 101 that most barristers in this category are less highly trained than "practising" barristers. This may be true of younger npbs but there are many more who have in effect "learned on the job" and may be much more competent than a barrister with a pupillage who has only just completed three years supervised practice.

BACFI has consistently held the view that all barristers providing legal services should be regulated by the BSB. We do not think it is in the public interest that there is a large (and increasing) number of barristers providing non-reserved legal services who will be free to offer legal services to companies and the public, albeit without being entitled to use the title "barrister". We consider that npbs should as a minimum carry insurance, undertake CPD and be subject to the core duties of the Code. We find the suggested disclaimer regime unwieldy and impossible to operate in practice. It appears to be a continuation of the "206 regime" which did not find favour with either the regulator or the regulated.

We therefore favour the option set out in para 121 of a system of tiered permissions to bring those who supply non-reserved legal services within the regulatory ambit. It should not be outside the capability of the BSB to find a title which would not confuse the public but yet indicate that those so authorised have a legal qualification. Many different titles were canvassed during the Vos discussions referred to above. The register should be the definitive point of reference for setting out the entitlements of each barrister.

The suggested term "Barrister not permitted to Practise" used in Part V and elsewhere in this consultation paper is both misleading to the public and wholly offensive to those concerned. The natural connotation is that barristers who are *not permitted to practise* have either been disbarred or restricted in their professional activities for some other disciplinary reason. This will not of course be the case, and it is entirely invidious that the public should be given the impression that it is. As indicated above, the register should set out individual entitlements. For a business card or letterhead as a preliminary suggestion we offer " barrister without a practising certificate" or "barrister with limited practising rights". As an additional safeguard for protection of the consumer public, the right of an npb to use any title including the word barrister could be restricted to those providing services to an employer, those employed in another regulated profession (e.g. solicitors' firms) and those providing service to companies or other non-consumer bodies.

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 suggest alternative proposals to protect the public in these circumstances.

Clearer guidance is certainly needed. The coming into force of the Legal Services Act provides the BSB with an excellent opportunity to ensure that the Code reflects the law and does not contain additional arcana to confuse the public.

The current holding out rules are not satisfactory and the line to be drawn between "legal services" and what is regarded as non-legal services is blurred. Under the current proposals any npb who has written a book or given a lecture, quite properly using the title barrister, will have to get a signed disclaimer if at any time in the future he supplies legal services as he or she cannot guarantee that his client may not have read the book or seen reference to his lecture. Even under the present regime, the rules are unworkable. Many self-employed consultants give lectures or seminars and it is difficult to decide whether they are offering legal advice in doing so.

We suggest that applying the tiered approach will enable all barristers to indicate their entitlements without the need for disclaimers. The register forms the definitive reference point. Provided sufficient publicity is given to the register and individuals planning to instruct a barrister direct are strongly advised to consult the register then we feel the public will be adequately protected. This means however that all barristers providing legal services must be listed in the register which it appears (from para 131) is not currently envisaged.

The FSA requires the addition of the words "regulated by the FSA" on business cards, letterheads and brochures, to inform the public. The BSB could introduce a similar requirement and include details of what this means in publicity material and on the register.

The confusion and complaints in relation to those registered under paras 206.1/2 and 808.4 of the Code would disappear if these provisions were removed. The new Code should specify quite simply that a barrister who does not hold a practising certificate may not undertake reserved legal activities and must describe himself for all purposes as a "barrister without a practising certificate" (or whatever term is agreed) and never as simply a barrister.

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

For reasons given above, we do not believe that the current or proposed disclaimer system is helpful to the public. Unscrupulous barristers may in fact do what is suggested in para 129 and get the disclaimer signed in all cases simply to use the title. The more vulnerable the client the less likely they are to understand the impact of the disclaimer. It should be any barrister's duty under the Code to ensure that neither his clients nor his employers are misled as to his status or legal rights to conduct particular legal work. The Act contains (sec 17) a widely drafted passing off provision with criminal sanctions and the Code should reflect this precisely.

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?

See Q20 above. The Code should specifically prohibit (in the terms of the Act) any barrister pretending to be authorised to conduct any reserved legal services (including immigration services) if he is not legally authorised.

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?

No, for reasons given above. Paras 206 and 808 should be removed and those currently registered brought into line with the proposals for other npbs. The Register should be universal in its scope and all barristers providing legal services should be required to register with the BSB and confirm their status annually. As indicated in para 132, the Register should explain what it means if an individual is not registered; i.e. that that barrister may be retired or engaged in a totally different profession, may not have any professional insurance and may not be in contact with the BSB at all.

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.

As the paper admits, barristers working for other regulated firms present very little risk to the public. The arrangements in para 137 thus relate to the preservation of the reputation of the Bar. As explained above, the proposals we would make for allowing npbs to use a title reflecting their status and the suggestions we make for ensuring that the Code and the Register reflect status and legal entitlement to practise (or not) will adequately inform the public and preserve the reputation of our profession. Sadly, it is accepted that the numbers of barristers who have been unable to secure pupillage and thus aspire to full practice in due course will continue to rise. Depriving these people of the title they have earned and which has been awarded by their Inn is, as the BSB itself concluded in 2007 (in its Report on Deferral of Call) simply unfair.

Q.24 Do you agree that a barrister who are 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?

As we have already indicated, this title is offensive and extremely misleading. Employers and potential employers will see from an individual's c.v. his or her status and qualifications, and will be able to check these against the Register. The onus in law (reflected in the Code) will remain on the individual not to claim entitlements or authorisations to which he is not entitled. If there is a need to use a title then the employed npbs should be able to use the same title as we propose for other barristers without a full practising certificate.

Q25 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?

As we are sure the BSB will be aware, employed and non practising barristers include a significant percentage of women, those with disabilities, ethnic minorities, older people and those from disadvantaged backgrounds, many of whom have in the past found it especially difficult to obtain pupillages, enter chambers or remain in self employed practice. This group will continue to grow. All barristers are proud of their profession and most would wish to continue to be associated with it. We believe that proper recognition of the growing group of nbps will constitute a welcome reflection of the BSB's commitment to encouraging a strong, diverse and effective legal profession.

Conclusion

As the principal organisation representing non-practising barristers providing legal services in business, BACFI would welcome the opportunity to discuss with the BSB how the very large number of nbps in this sector can be regulated in a way which protects the public and is fair to those npbs concerned. There seems to be a view that many of these barristers do not want to be regulated. This is not our experience and does a disservice to those who have been trying, sometimes for many years, to obtain a practising certificate.

BACFI
May 2010