

BACFI Response to Consultation on the proposed new Code of Conduct



Introduction

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 including “non-practising barristers. BACFI is a Specialist Bar Association, affiliated to the Bar Council but operating independently to represent employed barristers practising outside chambers.

BACFI is keen to play its part as a representative organisation in helping to shape the development of the Bar of England and Wales, by representing the views of its members and pressing for appropriate change. BACFI actively supports the principle of “One Bar”, whilst recognising that there are differences in practising arrangements and the environment in which barristers in the private sector practise.

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

We agree.

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

We repeat the view expressed in our Response to the earlier Consultation on Authorisation to Practise; that all barristers who provide legal services should be fully regulated. It is important that employed barristers can demonstrate to their employers that they are bound by the same Code of Conduct and standards generally as those with practising certificates.

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Moreover, the BSB website states as one of its aims “promoting the high quality training and professional development of all barristers to ensure the highest standards of practice and ethical behaviour” and we believe this is best achieved by full regulation of all by the BSB. We also consider that there is a real regulatory risk in not applying most of the Core Duties to barristers without practising certificates who offer legal services. There will be less regulatory risk in the case of employed barristers, because of the terms of their contracts of employment.

If the Core Duties do not apply to self employed barristers without practising certificates, what Code of Conduct are they bound by?

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?

We do not agree with the proposed dis -application and we have not seen any evidence that our members who have to abide by two Codes of Conduct, for example BSB and SRA rules, have encountered any incompatible rules or conflict. Our members commend the work of the Employed Bar Committee in drafting clear rules to make sure that conflicts do not occur.

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

It would be extremely helpful to know whether there is any evidence of regulatory conflict to date or if there is reason to fear such conflict in the future. We believe that this question cannot be addressed without knowledge of the scale of the problem (if any).

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?

As stated in our response to Q 4, we are not aware of any such conflicts and several of our members are bound by the rules of more than one regulatory body, and we are not aware of any conflicts that have affected our members.

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Q6: Do you have any comments on the introduction?

We very much endorse the stated aim of producing a clear and user friendly set of professional rules.

However, we believe that unless the Code applies and clearly states that it applies to all barristers providing legal services, employers and clients will find it confusing.

There is a typo in 1.5 which should read “ European Lawyers Rules.”

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

We agree that there should be no rule prohibiting media comment and that guidance should be provided instead.

This is unlikely to be a significant issue for employed barristers because an employer is likely to have a media policy stipulating which members of staff can speak to the media, or in the case of a large employer, have its own PR department or use the services of a PR firm, to handle media queries. An employer is unlikely to rely on its in house legal department to handle such matters.

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

We have no comment other than to say that it should be made as clear as possible that the Conduct Rules apply to all barristers providing legal services at all times.

Employed barristers will be bound by the terms of their contract of employment, which may well give examples of misconduct that the employer regards as particularly serious, and the employer will have policy on issues such as equality and diversity and impose a duty to cooperate with any relevant regulator. In a company setting it is neither reasonable nor practicable for the individual barrister to be required to ensure that there is a written policy and implementation plan (para 47). In almost all circumstances there will be adequate policies in place but it will be the responsibility of other employees, such as Human Resource managers to monitor them not the employed barrister.

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

a) A duty to report misconduct

No comment.

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

No specific comment.

c) Equality and diversity

No specific comment.

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

The Conduct Rules must apply to all barristers; but we agree that certain Rules are only applicable to self-employed barristers.

e) Applying CD2 to barristers without practising certifications ('unregistered barristers')

Yes and see our comments in relation to Q15 *et seq.* below.

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

Yes. However, there is a great deal of cross-referencing, which will make these Rules harder for the public in general and clients in particular and of course employers to understand.

Q11: Do you have any specific drafting comments?

See below in our answer to Q26.

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

None save for those mentioned elsewhere.

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

We agree, subject to the proposed major revisions to the CPD requirements, which we hope will result from the current review.

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

This question does not seem to relate to the preceding paragraph which covers the Register. We agree with the details to be provided on the Register.

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

As a general comment, we consider that the proposals for dealing with unregistered barristers to be unworkable. There are a number of barristers in this category, and we believe the numbers will increase markedly now that the QLTT route to requalification as a solicitor has been closed. We are concerned that the suggested disclosure provisions will be very difficult, if not impossible to enforce and to police.

Currently enforcement is carried out through complaints or the BSB occasionally becoming aware of infringements. We do not think this is satisfactory both in terms of protection of the public and for the barristers themselves who will find it difficult to know how to present themselves to employers and clients. We comment on the suggested guidance in more detail below. We believe that the only long term solution is to defer call until all the professional stages of training (pupillage) have been completed. In the meantime we repeat the view expressed throughout this Response, as well as in our Response to the earlier Consultation on Authorisation to Practise, that all barristers providing legal services should be fully regulated. We do not subscribe to the view expressed recently by Nick Green that it is healthy to have a waiting room of hopeful paralegals.

We are disappointed that the option for tiered permissions set out in the previous Consultation Paper has not been adopted. This is used in other professions, for example nursing, to explain exactly what the person is entitled to do. We believe it is more important and constructive and helpful to clients and prospective clients, to state what a particular barrister can do rather than what he or she cannot do.

These are the key reasons we disagree with the new proposals in respect of unregistered barristers, and we would appreciate an opportunity to discuss this further.

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We also appreciate the desire to have an objective rather than a subjective test; but to require all unregistered barristers to obtain a disclaimer is to penalise those who would never hold themselves out as a barrister. It takes no account of the position of the barrister, who through no lack of competence has been unable to obtain the training needed to acquire practising status. In this respect we reiterate our concerns about the difficulties of private sector employers in providing pupillages. The Wood Review did not recommend any improvements and in fact made matters worse, by introducing additional elements of discretion in the approval process. We understand that the forthcoming Education Review will re-examine the approach to training of the entire legal profession, and hope it will introduce a more flexible professional stage training regime, including for the Bar.

We find the guidance in Annex 2 difficult to follow and fear that many will feel inclined to ignore it.

It is not clear which provisions apply to barristers providing services only to their employer. For example, in relation to para 9.4, many companies use the title “counsel” for their lawyers, some of whom may be unregistered barristers. Likewise, some solicitors have a rank of “counsel” which may be used for barristers as well as solicitors. We assume that such barristers if unregistered would be regulated by the SRA.

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

Whilst on paper the proposals appear to provide adequate safeguards we believe that the sheer number of unregistered barristers presents a significant regulatory risk for the profession. There is no indication of how enforcement will be carried out other than through the present system of dealing with complaints. We repeat our belief that the only proper safeguard is full regulation. We realise that this would create a significant burden for the BSB; but this is the consequence of the decision not to introduce deferral of call.

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?

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In view of the definition of small business, we consider that the proposals should not apply to small businesses and charities which are the type of organisations needing low cost legal services. The type of disclaimer proposed would deter many from using an unregistered barrister. We believe that the holding out provisions and the duty not to mislead provide adequate safeguards.

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

In addition to the comments above, we make the following points:

Rule 7: As stated elsewhere, we believe that all barristers supplying legal services should be bound by all the relevant rules of the Code of Conduct.

Rule 10: We do not understand the reference to being called prior to 31 July 2000, as it is our understanding that s 206 applies only to those called before that date.

Rule 32.1: Given modern communication methods, the requirement that the Qualified Person should be in the same office should be removed. Many companies and other organisations such as the Armed Forces have employees in many different offices but also have sophisticated communication tools such as video conferencing, webcams etc. The emphasis should be on the quality of the supervision rather than where the individuals are located.

Rule 39.1: Similarly to our comment in relation to Rule 32.1 above, the requirement that the barrister can only conduct litigation if there is a qualified person in the same office should be removed. In addition, most employed barristers will have access to external firms of solicitors and will be able to make use of their expertise. An entity may have several Qualified Persons on their staff, but they may well be based in different offices

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

As we understand it there is no prohibition on dual **qualification**, only dual **practice**. We have many members who are qualified as both barristers and solicitors but choose to be regulated by the BSB. We therefore assume the question refers to dual practice.

Dual qualification and dual practice have existed successfully in many Commonwealth countries for many years. Barristers working in firms of solicitors have no difficulty in dealing with any minor conflict of interest arising from dual qualification.

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

The most important safeguard is clarity. It must be clear to every actual and prospective client which hat the relevant lawyer is wearing in relation to any matter.

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

Yes. Please see our response to Q 20.

Q 22: Do you agree with how it is proposed to deal with legal aid fees for the purpose of the cab rank rule?

No comment.

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

No comment.

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

No comment.

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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?

We make the same comment as with the requirement for the qualified person under Rules 32.1 and 39.1, namely that with modern communication methods supervision for the purposes of the 3 year rule can be adequately performed by someone within a business or other entity who is not in the same physical location. In fact for an employed barrister, effective supervision is more likely to be performed by the barrister's line manager who may in fact be a solicitor.

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

We are concerned that the introduction of limited practising certificates for those employed barristers without rights of audience will be viewed as downgrading those barristers who in the past have held a full practising certificate. As we have mentioned in the past, employed barristers working in companies rarely require rights of audience.

This change will be regarded by many of our members as contrary to the "One Bar" principle which is strongly supported by the Bar Council. It is not clear what the effect of a limited practising certificate will be, other than simply a description of the rights of the individual barrister, which we assume will be listed on the certificate but we assume, not on the register. However, some employers may question the credentials of a lawyer with only a limited practising certificate. Their employment prospects may be limited accordingly. Although the idea of limited certificates was published as a policy decision, it was not mooted in the original Authorisation to Practise Consultation Paper. In fact, the original paper concluded that it was only necessary to make minor changes to some of the categories of employed barristers with restricted rights. Also, although in the past we have advocated equal Practising Certificate Fees for the employed and self employed Bar, if limited practising certificates are introduced, employed barristers are unlikely to be willing to pay the same fee. We suggest this proposal needs further thought.

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

No comment.

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

Publication and disclosure help promote public confidence in barristers and the legal profession as a whole.

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

No comment.

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

We agree.

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

We agree.

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

No comment.

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

We agree.

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

No comment.

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

We agree.

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

We do not agree that an NFA determination should be published to anyone, unless the barrister himself requests it. If the Board has decided that there is no infringement then that should be the end of the matter.

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 good reason to do so? If so, why?

We would welcome clarification of what any such publication or disclosure would be intended to achieve.

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

We have no further comment.

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

Not all members of the public and clients can use a computer, nor does everyone have access to the Internet, so adequate provision must be made for these individuals to access the Code easily and without charge.

However, we agree that it must always be possible to access the current Code on the internet, with a clear date stamp. We also think that previous versions of the Code should be available on the internet, so that it is easy for all to verify which rules were applicable at any given date.

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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?

As mentioned throughout this response, some of the proposals contained in the Code will have a detrimental effect on the standing of non practising barristers and employed barristers. Various proposals will undermine the standing and credibility of the employed barrister and prejudice the chances of employment in commerce and industry of young barristers, whether or not they have completed pupillage. They are already at a disadvantage to young solicitors, who are regarded as more experienced and commercially aware, and therefore desirable, by the time they have completed the two year training contract than the barrister who has completed one year of pupillage.

We urge a rethink and recommend that all barristers supplying legal services should be bound by all the relevant rules of the Code of Conduct, to enhance the standing of those individuals and their regulator, the BSB.

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

No comment.

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

No comment.

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

No comment.

Conclusion

We would be pleased to attend a meeting to discuss these matters further, or to supply evidence to illustrate our concerns.