

Bar Standards Board Standards Committee

Review of the Code of Conduct

*Response of the Bar Association for
Commerce Finance & Industry*

(BACFI)

1. Preamble

BACFI welcomes a comprehensive review of the Code of Conduct (the 'Code').

The opportunity should be taken to consider the way in which the Code is structured. It has to an extent grown in a piecemeal fashion.

The basis of the Code was to regulate barristers in self-employed practice. When it was first published in 1981 employed barristers had few rights. As they acquired more rights from time to time, the Code had bits added to govern the exercise of those rights. If anything is not covered or is inadequately covered by such additions by default, reference has to be made to a Code designed for the self-employed.

Further major developments to the profession are in the offing with Alternative Business Structures ABSs, The regulation of barristers in ABSs should be considered at this early stage.

BACFI advocates that a new Code should be structured in such a way that sets out common obligations for all barristers. This should begin with a definition of a barrister and in so doing recognise the different forms of practice and of qualification. The Code should be all embracing and aim to include all those who have been called to the bar.

Under the common obligations, the Code should set out in separate sections regulations which peculiarly apply to the self-employed bar and the employed bar in all its forms

2. Answers to the Questions

Drafting the Code

Q1.

Reference is made to the Preamble. It is agreed that the structure of the Code be amended to adopt a structure of core principles supported by more detailed rules and guidelines.

Q2&3.

It is agreed that the values set out in para 20 are the appropriate starting point for these principles. It is difficult to expand on them and, in any event, such principles whilst being comprehensive should be kept to a minimum. A long list can only serve to confuse a member of the public.

Q4.

Reference is made to the Preamble.

Quality & Entry Requirements

BACFI makes a general comment on the relationship of 3A and 3B of the Consultation Paper and refers to the final section of para 36. There are a substantial number of barristers who have been called who cannot meet fully the required training regulations to whom a review is most important. It may be that it is intended to do so but BACFI emphasises that requirements for training should be considered as an integral part of a new code.

Business Structures

Q5 para 53(1)

BACFI adopts the argument in para 48. Access to justice would be improved by a relaxation of the restrictions on barristers' work and in relation to business structures. It would give greater scope for competition which should lead to more affordable access to justice. This is not only in the public interest but also in the interests of the bar if it is to be able to compete successfully. An inability to compete can only lead to a much contracted and elitist branch of the profession.

A relaxation of restrictions should not be at the expense of standards. However, if the road of core principles is followed they will provide an overriding protection. It is therefore considered to be a question of great significance.

Para 53(2)

This is a valid and important question. Essentially it is one of cost versus quality of service. Reference is made back to 53(1) and the protection which would be afforded by core principles.

Para 53(3)

This is a valid question. The question has been interpreted as asking if the question is valid.

Para 53(4)

A valid question but justifiable to whom? As being in the public interest or to members of the profession. An example would be any relaxation which leads to handling client's money. This might be regarded in the public interest if properly regulated. However, the bar might take the view that the additional cost of regulation would not justify a relaxation.

Para 53(5)

A valid question. Referring back to 53(4), an underlying factor is the cost of additional regulation. A fundamental question is does the bar or a section of it want relaxation in order to compete in a more open market? If so, are they prepared to pay for additional regulation?

Para 53(6)

A valid question.

Para 53(7)

A valid question, but perhaps it should be phrased in such a way or attention drawn to the fact that the cab rank rule has, in reality, already been abrogated by various sections of the bar in reliance on the rules concerning appropriate fees for the work.

An alternative question would be whether the cab rank rule is necessary in the light of increased competition for legal services today.

Para 53(8)

A valid question but it is the lawyers who will be subject to regulation and any other profession by their regulatory body, so would the organisation need to be regulated? Perhaps the question should be rephrased to take that into account.

Para 53(9)

A valid question that is tied to 53(8).

The general answer to Q5 is therefore, that they are the right questions to ask, but subject to the detailed comments above. It is agreed that this area is a key part of the review.

Q6

No, the BSB should look at structures which involve other professions at an early stage. It is of great importance to employed barristers and non-practising barristers in commerce, finance and industry as well as to other professionals with whom they might work.

Acceptance of Work & Institutions and Client Care

Q7&8

No. BACFI will wish to comment on these issues when detailed consultation takes place.

Duties of Employees and the Administration of Chambers

Q9

Yes. Whilst it is accepted that certain areas of the Code should be given priority these are important issues which should be dealt with.

Maintaining Independence, Integrity and Duties to the Court

Q10

The review should be comprehensive and these duties should be reviewed. Yes it could be left until later in the review.

Q11

BACFI has no suggestions to make in answer.

Employed Barristers and Non-Practising Barristers Offering Legal Services

Q12

A valid question.

Q13

The issue of non-practising barristers (npbs) should not be delayed. A substantial number of people fall into this category and the number is increasing. Many work in what will be ABSs and reference is made to the response to Q6.

Disciplinary Rules

Q14

Yes. They should be reviewed as a part of a comprehensive review but in the context of the Commissioner's review.

Other Issues

Q15

Not specifically, but as stated above the review should be comprehensive.

Q16

Yes, apart from the issue of npbs as in question 13.