

Amendments to the Bar Code of Conduct – The Structure of Self-employed Practice

For approval by the Legal Services Board

In accordance with the requirements set out in the LSB's consultation paper, "Designating new approved regulators and approving rule changes", the BSB wishes to provide the information below to support its application to revise the Code of Conduct.

Any queries about this application should be made to:

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1. The proposed alteration

The BSB formed an Alternative Business Structures Working Group in 2007 to consider the implications of the Legal Services Act 2007 for the ways in which barristers are permitted to practise. The work of that group has been thorough and detailed, including two consultations on various aspects of the possible impacts of the Legal Services Act.

At its meeting in November 2009, the Bar Standards Board considered the reports of the group and took significant decisions in order to open up the legal services market so that consumers have access to even better value, quality, legal services in fulfillment of the Regulatory Objectives of the Legal Services Act.

The decisions made at the November 2009 Board meeting were as follows:

Sharing premises

- a) Self-employed barristers should be permitted to share premises and office facilities with others provided that:
 - There is complete separation between the provision of services by the barrister and the services provided by any other person with whom the barrister shares the premises or facilities.
 - Nothing is done that might reasonably create the impression that there is any sharing of work, income or profits of the business. This is to ensure that chambers and individual barristers do not allow clients to be misled about the nature of the relationship of the sharers.
 - The barrister has effective arrangements in place to protect the confidentiality of the clients' affairs.
 - There is no general referral arrangement or understanding between the barrister and the person/people with whom they are sharing. Any referrals

that do take place must be made at arm's length and in the best interests of the client. This rule ensures that referrals are only made on an individual basis, when it is in the client's best interest.

- Records are kept of referrals between the barrister and other persons with whom the premises are shared; and the rationale for such referrals as are made is reasonable;
 - Prior notification in writing of the sharing must be given to the Bar Standards Board by the barrister.
- b) Self-employed barristers should be permitted to share premises or facilities with any entity that is controlled by them and is used as permitted and ancillary to self-employed practice.

Investigating or collecting evidence and taking witness statements

- c) Self-employed barristers should be permitted to investigate and collect evidence and take witness statements. However, a barrister must not accept a brief to conduct a case in court if he/she has investigated or collected evidence for that case, unless the barrister reasonably believes that the investigation and collection of that evidence is unlikely to be challenged.

Attendance at police stations

- d) Self-employed barristers should be permitted to attend at police stations to advise suspects and interviewees, provided that they have complied with relevant training requirements imposed by the BSB in respect of such work. However, a self-employed barrister must not conduct in court any criminal proceedings if he/she has attended at a police station for any defendant in connection with those proceedings or associated proceedings unless he/she reasonably believes that nothing said, done, heard or seen by him/her at the police station might require him/her to give evidence in those proceedings.

Conduct of correspondence

- e) Self-employed barristers should be permitted to conduct correspondence provided that the barrister:
- is satisfied that it is in the lay client's best interests that he/she does so and that he/she has adequate systems, experience and resources in place appropriately to manage the correspondence
 - has adequate insurance cover in the event that the lay client suffers loss resulting from the conduct of correspondence

Where a barrister conducts correspondence and he/she is aware that another party has a solicitor or barrister representing them, the barrister must not correspond directly with that party.

- f) It is not appropriate to apply different provisions to civil and criminal work; standards should be the same for both. Different examples for different specialisms will be provided in the guidance that will accompany the Code amendments.

Following that meeting, the working group has developed guidance for barristers who wish to use these new freedoms. The final versions of the code amendments and the guidance were approved in December 2009. Please see annexes 1 and 2 for the proposed amendments to the code of conduct and the guidance that facilitate these recommendations.

2. Details of Existing Regulatory Arrangements

Sharing premises

The current code prevents self-employed barristers from sharing office facilities:

“403.1 A self-employed barrister must not practise from the office of or in any unincorporated association (including any arrangement which involves sharing the administration of his practice) with any person other than a self-employed barrister or any of the following:

(a) a registered European lawyer;

(b) subject to compliance with the Foreign Lawyers (Chambers) Rules (reproduced in Annex H) and with the consent of the Bar Council a foreign lawyer;

(c) a non-practising barrister

(d) a person who is:

(i) a lawyer from a jurisdiction other than England and Wales;

(ii) a retired judge; or

(iii) an employed barrister⁴

to the extent that that person is practising as an arbitrator or mediator.⁵”

Investigating or collecting evidence and taking witness statements

Rule 401 (b) currently prevents self-employed barristers from collecting evidence and taking witness statements:

“401 A self-employed barrister whether or not he is acting for a fee:

(a) may supply legal services only if appointed by the Court or is instructed:

(i) by a professional client; or

(ii) by a licensed access client, in which case he must comply with the Licensed Access Rules (reproduced in Annex F1); or

(iii) subject to paragraph 204(c), by or on behalf of any other lay client, in which case he must comply with the Public Access Rules (reproduced in Annex F2); or

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

- (i) undertake the management administration or general conduct of a lay client's affairs;*
- (ii) conduct litigation or inter-partes work (for example the conduct of correspondence with an opposite party, instructing any expert witness or other person on behalf of his lay client or accepting personal liability for the payment of any such person);***
- (iii) investigate or collect evidence for use in any Court;***
- (iv) except as permitted by paragraph 707, or by the Public Access Rules ,take any proof of evidence in any criminal case;***
- (v) 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.*
- (vi) act as a supervisor for the purposes of section 84(2) of the Immigration and Asylum Act 1999.*

(c) must not supply legal services for reward otherwise than in the course of his practice except as permitted by paragraph 806.¹

Attendance at police stations

Rule 401(b) (v) currently prohibits self-employed barristers from attending 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:

“401 A self-employed barrister whether or not he is acting for a fee:

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

- (v) 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.”*

Conduct of correspondence

Rule 401 (b) (ii) currently prohibits all self-employed barristers from conducting correspondence:

“401 A self-employed barrister whether or not he is acting for a fee:

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

- (ii) *conduct litigation or inter-partes work (for example the conduct of correspondence with an opposite party, instructing any expert witness or other person on behalf of his lay client or accepting personal liability for the payment of any such person);”*

3. Nature and effect of the proposed alteration

The proposed amendments to the code of conduct will enable self-employed barristers to:

- a) Share office premises and facilities with others (and entities controlled by them), subject to restrictions.
- b) Investigate and collect evidence and take witness statements. However, a barrister must not accept a brief to conduct a case in court if he/she has investigated or collected evidence for that case, unless the barrister reasonably believes that the investigation and collection of that evidence is unlikely to be challenged.
- c) Attend at police stations to advise suspects and interviewees, provided that they have complied with relevant training requirements imposed by the BSB in respect of such work. However, a self-employed barrister must not conduct in court any criminal proceedings if he/she has attended at a police station for any defendant in connection with those proceedings or associated proceedings unless he/she reasonably believes that nothing said, done, heard or seen by him/her at the police station might require him/her to give evidence in those proceedings. Barristers will need to develop new skills to undertake this work and the BSB is considering whether to impose specific training requirements. For publicly funded work, the LSC requires solicitors to fulfil a number of requirements, for example the specification for the 2010 Standard Crime Contact states that a Crime Category Supervisor should hold the Police Station Qualification part of the Criminal Litigation Accreditation Scheme.¹ At present, these qualifications are not open to barristers but the BSB is discussing their extension to barristers.
- d) Conduct correspondence provided that the barrister:
 - is satisfied that it is in the lay client’s best interests that he/she does so and that he/she has adequate systems, experience and resources in place appropriately to manage the correspondence
 - has adequate insurance cover in the event that the lay client suffers loss resulting from the conduct of correspondence

¹ Unless the solicitor meets the requirements in route 3 – 250 case hour route.

4. Why we wish to make the alterations

The proposed code amendments facilitate and promote the regulatory objectives enshrined in the Act by removing unnecessary restrictions on how self-employed barristers may practise. See section 5 below.

5. The regulatory objectives

Whilst the various regulatory objectives have to be considered as a whole, the BSB particularly views the objectives of protecting and promoting the public interest, *improving* access to justice, protecting and *promoting* the interest of consumers, *promoting* competition in the provision of legal services, and encouraging an independent, strong, diverse and effective legal profession as being more effectively and appropriately achieved by amending the code to facilitate the recommendations set out in section 1 above.

Providing barristers with greater flexibility in relation to the services they are permitted to provide will promote competition in relation to advocacy and related services, will create wider consumer choice for such services and will improve access to justice and diversity within the profession.

Protecting and promoting the public interest

Safeguarding the public interest has been one of the primary concerns of the BSB as it seeks to facilitate the objectives of the Act. Promoting the public interest has also been a priority and it is the Board's belief that permitting barristers to carry out certain activities that were previously prohibited will enhance the access to those services by consumers and that this is very much in the public interest. Widening the types of service that barristers are permitted to provide will also have the capacity to make the market for the provision of legal services more competitive which, in turn, could be reflected in more competitive pricing in that market and lower prices for consumers.

Permitting self-employed barristers to share office premises with others is intended to enable barristers to make use of any surplus space and to reduce administrative costs, which could ultimately result in lower prices for consumers. In addition, permitting self-employed barristers to share premises with others will enable a wider range of services to be provided from the same premises, which will also benefit customers.

The Board is mindful that there cannot be any evidence that these benefits will unfold as envisaged, and has therefore sought to incorporate measures which will ensure that the interests of users of such services remain paramount and suffer no detriment in allowing a more permissive regulatory regime. In particular, it has introduced safeguards designed to ensure that customers are not misled about the relationship between barristers and those with whom they share premises and that any references are made on an arms length basis in the interests of the customer.

Supporting the constitutional principles of the rule of law

The proposed Code amendments do not have any adverse impact on this regulatory objective. Both the Code changes themselves and the accompanying guidance seek to maintain the high standards of professional conduct traditionally associated with the Bar which seek to protect and support the constitutional principles of the rule of law. There are

safeguards to avoid the problems which would arise if barristers who have taken witness statements or advised at the police station undertook the advocacy in the same case in circumstances where their actions might be challenged and they might as a result be required to give evidence, thus causing them to have to stand down to the inconvenience of the court and their clients.

Improving access to justice

The proposed Code amendments compliment the LDP code amendments that have already been submitted to the LSB and have the capacity to improve access to justice because they enable a greater diversity of routes for consumers who wish to gain access to legal services.

Protecting and promoting the interests of consumers

The proposed Code amendments have the protection and promotion of the interests of the consumer at their heart. The BSB has considered this aspect of its reforms long and hard and only when convinced that the consumer will suffer no detriment, have the reforms been agreed. These changes will enable consumers to access certain legal services through a greater diversity of providers, in a more competitive market which should ensure competitive pricing thus enhancing value for money for consumers. There will be scope for barristers to do more of the work themselves without necessarily involving solicitors as well which will be more convenient for customers as well as reducing costs. Before conducting correspondence, barristers are required to consider whether conducting correspondence themselves is in the best interests of the client. The Code amendments seek to permit barristers to deliver new services in this new market whilst at the same time obliging them to maintain high professional standards of work.

Promoting competition in the provision of services

Permitting barristers to provide a wider range of services to clients will also have the capacity to make the market for the provision of legal services more competitive which, in turn, could be reflected in more competitive pricing in that market and lower prices for consumers.

Encouraging an independent, strong, diverse and effective legal profession:

Allowing barristers to offer new types of service in different, innovative ways in response to changing client requirements can serve to promote competition in the supply of barristers' services and the supply of legal services more generally.

Please see annex 3, the initial equality and diversity impact assessment accompanying the recommendations, for further information on how the recommendations link to this regulatory objective.

Increasing public understanding of the citizen's legal rights and duties

In particular, the guidance accompanying the proposed Code changes seeks to ensure barristers' continuing duties to the client; to ensure that there is clarity for the client in relation barristers sharing office facilities with others and to mitigate the risk of a perception developing that barristers lack independence. Barristers will be obliged to act transparently and offer explanation to clients throughout the process of acting for them whatever service

they are providing. Over time, this should demystify legal services as a greater number of users become aware of and comfortable with buying such services.

Promoting and maintaining adherence to the professional principles

The proposed Code amendments and accompanying guidance are intended to enhance the high standards of professional conduct associated with the Bar. They oblige barristers to maintain their independence and to act in the clients' best interests when conducting correspondence. As an additional safeguard, for example, barristers sharing premises with others are not permitted to enter into any referral arrangement or understanding with the person / people with whom they are sharing. This is to ensure that any referrals that do take place are made at arm's length and in the best interest of the client on a case by case basis. The changes will enable barristers to undertake new roles. The guidance reminds barristers of their duty not to undertake work for which they are not competent and the BSB will be laying down specific training requirements in the case of police station work (for which the LSC also imposes its own requirements)

6. The better regulation principles

Proportionality

The BSB carefully considered all of the options for achieving policy objectives before developing the attached code amendments and guidance. It concluded that the existing total prohibitions were disproportionate to the risks involved and that those risks could be effectively managed in other ways which were less restrictive. The code amendments in relation to conducting correspondence, investigating or collecting evidence and taking witness statements and attending on clients at police stations place barristers in the same position as other lawyers, such as solicitors, who are currently permitted to carry out these activities. The safeguards introduced for barristers who wish to share premises with others are proportionate in relation to the risks (for example the risk that clients will be misled into thinking that the barristers have some responsibility for, or endorse the services provided by others). Similarly the safeguards in relation to not undertaking the advocacy role in a case in which the barrister's earlier involvement in taking witness statements or advising at a police station are proportionate to the risk of having to withdraw at a late stage while still allowing barristers to undertake this work in most circumstances.

Accountability

The BSB has issued two consultation papers on the proposed changes and all those affected were consulted before decisions were taken. The BSB carried out a number of road shows in connection with the first consultation paper. The code amendments and guidance attached to this application represent the result of that process and take into account the wide range of responses that we received from a range of different respondents.

Consistency

Permitting barristers to conducting correspondence, investigate or collect evidence and take witness statements and attend on clients at police stations will ensure that the BSB is consistent with the other approved regulators, for example solicitors and other lawyers are currently permitted to carry out these activities. The proposals made in this application facilitate the Legal Services Act 2007.

Transparency

Two consultation papers were issued before the proposals were developed, to ensure that stakeholders' views and expertise were taken into account. Guidance has been developed to accompany the code amendments to ensure that those regulated are made aware of their obligations and to provide examples of best practice. The guidance and the code amendments attached to this application will be posted on the BSB website and sent to all of the other approved regulators.

Targeting

The amendments to the code of conduct will be systematically reviewed to ensure that they are still necessary and effective.

7. Desired outcome

The desired outcome of this application is that the proposed amendments are accepted by the LSB and put into effect as early as possible. The proposals facilitate the Legal Services Act 2007 and promote the regulatory objectives enshrined in the Act.

8. Other regulators

The BSB has issued 2 consultation papers on the proposed changes and all of the other approved regulators were invited to provide comments. The responses that we received from other regulators have been carefully considered and taken into account in the final version of the code changes and the guidance. In addition, numerous discussions have taken place with the SRA in relation to the code amendments.

We are currently in discussions with the Law Society and the SRA in relation to extending eligibility of the Police Station Qualification (PSQ) assessment and the Criminal Litigation Accreditation Scheme to barristers. We will also be having discussions with the LSC

The BSB will be publishing the code amendments and guidance on its website and will also be circulating the two documents to the other approved regulators at the same time the application is submitted to the LSB.

9. Date of implementation

We would like to implement the amendments to the code of conduct as soon as possible. We have attended meetings with the LSB to discuss the proposed code amendments prior to submitting this application and also consulted other approved regulators. We therefore do not anticipate that there will be many objections to our proposals from other regulators. Should we receive any, we will amend our application as appropriate.

10. Consultation Processes Undertaken

In February 2008 the Bar Standards Board ("the Board") published a first consultation paper on the implications of the Legal Services Act 2007 ("the Act") for the regulation of the Bar in England and Wales. Most of the paper was concerned with issues relating to practice in the new business structures permitted by the Act and in partnerships and to the regulation of business entities and their members. However, Part V of the paper also raised questions regarding the structure of self-employed practice.

The consultation paper observed that although the Act had no direct implications for the self-employed Bar the relaxations that it encouraged regarding the supply of legal services made

it appropriate to consider whether current restrictions relating to the supply of such services by the self-employed Bar should also be relaxed.

In August 2009, having considered in detail the responses to the first consultation paper, the Board published its further consultation paper on 'The Structure of Self-employed Practice.' The purpose of this consultation paper was to seek views on the proposed amendments to the code which relax the restrictions relating to the supply of services by the self-employed Bar.

The consultations were sent to the profession, consumer groups, minority legal groups and other regulators. The code amendments and guidance attached to this application represent the result of that process and take into account the wide range of responses that we received from a range of different respondents.

The consultation papers and the responses are published on our website:

First consultation paper:

[Consultation letter - Legal Services Act 2007 - Regulation implications](#)

[Consultation paper - Legal Services Act 2007 - Regulation implications](#)

[Legal Services Act Responses](#)

[Legal Services Act 2007 - Summary of responses](#)

[Legal Services Act 2007 - Summary of responses - Appendix A](#)

[Legal Services Act 2007 - Summary of responses - Appendix B](#)

[Legal Services Act 2007 - Summary of responses - Appendix C](#)

[Legal Services Act 2007 - Summary of responses - Appendix D](#)

Second consultation paper:

[Consultation Letter - The Structure of Self-employed Practice](#)

[Consultation Paper - The Structure of Self-Employed Practice](#)

[Consultation responses](#)

11. Other explanatory material

The Board considered the recommendations of the ABS working group at its meeting in November. The full report that was sent to the board can be found at:

<http://www.barstandardsboard.org.uk/assets/documents/BSB%20paper%20104%20191109.pdf>

Minutes of the Board meeting can be found at: [Minutes 17/12/09](#)

The Board also considered various issues in relation to this application at its December 2009 meeting, the minutes can be found at: [Minutes 17/12/09](#)

Please see annex 3 for the initial equality and diversity impact assessment.

Bar Standards Board

February 2010