

RESPONSE OF THE SOUTH EASTERN CIRCUIT TO THE BAR STANDARDS BOARD AND COMPLAINTS COMMISSIONER'S STRATEGIC REVIEW OF COMPLAINTS AND DISCIPLINARY PROCESSES

GENERAL RESPONSE

1. The members of the South Eastern Circuit recognise the importance of an efficient, strong and fair disciplinary/regulatory body. The Bar prides itself on its professionalism and integrity and succeeds because of it – barristers more than anyone involved in the legal system have an interest in ensuring that the highest standards are met and maintained. The observations of Lord Bingham LCJ in Bolton v The Law Society (1994) 1 WLR 512 at 518 concerning trust and integrity are intended to be of general application to both solicitors and barristers. The Bar as a whole takes its professional obligations seriously. Barristers know that they succeed because, and only if, they retain the trust of Courts and Tribunals and the confidence of their clients. The Bar also competes against a solicitor's profession which vastly outnumbers the Bar. Further, solicitors, lay clients, judges and tribunal chairs are scrutinising the conduct of barristers. Such scrutiny usually means that poor service and any misconduct are picked up at an early stage.
2. It is worth remembering that members of the Bar are instructed by **professional clients** whether that be an independent solicitor or a solicitor employed by a government body or institution/company. Those instructing solicitors are free to instruct whomever they want and, if they are doing their jobs correctly, only competent barristers

will continue to be instructed by them. To that extent the profession is not only self regulated but is also regulated by the strong effect of consumer scrutiny.

3. The Circuit believes that the disciplinary committees themselves are shining examples of independence, integrity and openness. The panels are unique in that they are presided over by members of the judiciary – no one can seriously maintain that the committees are or give the appearance of ‘looking after their own’. The system is efficient [compared to other professions] and cost effective.
4. Complaints against barristers fall into three main categories:
 - (i) Complaints instigated by the PCC itself - usually to do with failure by a barrister to comply with what may best be described as regulatory requirements [for example failing to obtain a practising certificate or complete the required number of Continuing Professional Development Hours]
 - (ii) Complaints instigated by barristers or judges about the professional standards of other barristers.
 - (iii) Complaints by lay clients.

REGULATORY COMPLAINTS

5. These complaints are self-generated and are dealt with, on the whole, expeditiously. In most cases they do not relate to issues of professional integrity but are in part debt collection exercises – for example in order to collect overdue subscriptions. It is recognised

that in appropriate circumstances disciplinary procedures may be the only way to force payment – however automatic reference to the PCC must create a mountain of paper which could perhaps have been avoided by a telephone call.²

COMPLAINTS BY BARRISTERS OR JUDGES

6. It is worth noting that the Bar exercises self discipline in that its own members assist in its regulation by reporting to the PCC fellow barristers who fall below the required standards. Fortunately such complaints are rare [possibly because it is known they are made] and are dealt with expeditiously. The Bar is also unique in that in contentious matters there is a judge of some description presiding. Judges have and do complain about the barristers who appear before them. Again such complaints are rare, no doubt because those that fall short of the ethical standards required are found out quickly and reported.

COMPLAINTS BY LAY CLIENTS

7. These sorts of complaints have increased in recent years: in part the increase may be explained since the immunity conferred by the courts in Rondel v Worsley was lifted, and there is a perception that financial recompense may result for a successful complainant³.

² . In one case brought to our attention a barrister was reported to the PCC for not having a practising certificate when he had paid and the cheque had been cashed. The complaint was generated because the Bar Council had received the payment 3 days after the deadline and therefore required him to pay a penalty of £25. They did not actually issue the certificate and took no action for a whole year before discovering the debt and raising a complaint that the barrister had technically been practising without a certificate. The barrister paid the £25 when the error was pointed out and the committee took no action.

³ We know of one high profile recent complaint in which the complainant was seeking very large damages, and hoped to obtain them as a result of a successful prosecution by the Bar Council against the barrister. The prosecution of the barrister failed on the grounds that there was no evidential basis

They are uniquely difficult because they are often motivated by malice. The complainant, it should be remembered, has already had what is presumed to be a fair hearing at first instance and has had the opportunity [at least] to appeal. Disappointed lay clients [especially in the criminal field] will often grasp at every last straw and the competence or otherwise of their counsel is usually the last. Similarly a disappointed litigant may use a complaint against counsel on the opposing side as a means to further an underlying litigation grievance.

8. The Court of Appeal [Criminal Division] has well established procedures for dealing with such grounds of appeal – including a review of the whole case in order to ensure that a defendant has been competently represented [something which is easily done by looking at the transcripts]. Allegations that [for example] they were pressured into pleading guilty or not giving evidence are dealt with through equally well established procedures and are again usually easily resolved by the court looking at the solicitor’s attendance notes of the relevant conference with counsel.

THE QUESTIONS POSED BY THE OFFICE OF THE COMPLAINTS COMMISSIONER

“1. What are the strengths and weaknesses of the current system for handling complaints and allegations of misconduct against barristers?”

whatsoever for the alleged conflict of interest which was relied upon to sustain the prosecution. But the motivation for the complaint was financial.

We spoke to a number of barristers who prosecute for the PCC and barristers who have been the subject of complaints to the PCC. Generally they were satisfied with the system. Some prosecuting barristers felt that the PCC occasionally over prosecuted. Barristers who had been complained about by lay clients were stoical although many pointed out that the proper arena for such a complaint was almost always the appellate courts. Unfounded complaints by lay clients cause the greatest stress because they tend to take longer to resolve – for example, transcripts of the original hearings have to be obtained.

When compared with other professional disciplinary systems we were impressed by the quality of decision making in the system and the low costs of running the system. The high level of judicial representation on the tribunals is unique – in serious cases they are frequently presided over by a High Court Judge. This provides decision makers of the highest standard this country has to offer. And for free. The panel, prosecuting counsel and defence counsel all give the services free of charge. In the GMC or Police Disciplinary Tribunals counsel are paid, and the regulatory costs therefore correspondingly higher. We believe that the BSB must do whatever it can to keep the assistance which the Bar and the judiciary provides, and to keep it on a volunteer basis. In order to do this the BSB's own secretariat must be efficient, and well run, so as to cause as little administrative burden as possible to the barristers and judges who are involved in the process.

Its main strength is that it is independent and is seen to be independent. Unlike, for example, the GMC the committees are chaired by the judiciary. The criticism “It's just doctors protecting their own” may

occasionally be levelled at the GMC [fairly or unfairly] but it cannot be levelled at our system.

We have had the following concerns raised with us about the current system:

(i) Delay. Although the secretariat tries to move cases through as quickly as possible, delays of weeks or months can occur, and are extremely corrosive for a professional person facing a complaint. More particularly if [as is often the case] the complaint turns out to be unjustified, a career is effectively put on hold pending its outcome. Obviously, having the complaint hanging over a barrister's head can be acutely stressful. It is worth keeping in mind the tenor of the words of the Master of the Rolls in Biss v Lambeth Southwark and Lewisham Area Health Authority (1978) 1 WLR 383 at 389 e-f that there is prejudice to a professional person in having professional complaints hanging over their heads. Equally, a bona fide complainant wishes to see matters dealt with swiftly. We therefore urge the BSB to ensure that complaints handling is speedy. Delay has been a cause of concern.

(ii) Goal Posts moving and large amount of paper work. It is not uncommon for a barrister to answer a complaint fully as presented only to find that when his answers are sent back to a complainant and a different complaint then emerges which then requires a further round of document retrieval, detailed reading and correspondence from the barrister concerned. This process can become protracted. We suggest that a Complainant must be asked to set out all matters which are to form the basis of any complaint, and that it should be made clear that the Bar Council wishes to receive all concerns expressed before asking the

barrister to comment. There must be a limit to the rounds of correspondence then required.

(iii) Lack of explanation. Concerns are expressed that where a complaint is dismissed (or there are delays) there has been a lack of adequate explanation given to the barrister concerned.

“2. How can the system for handling complaints against barristers be developed to ensure that it is sufficiently independent from barristers themselves?”

The question implies that it is not already sufficiently independent. If anything our committees with their lay membership and judicial presiders are a model of an independent regulatory tribunal. The steps taken since the decision In re P have ensured that the tribunal system is compliant with Article 6 of the ECHR. If the question implies that barristers should not sit at all on Tribunals which determine complaints it is misconceived. A profession should be seen to be enforcing its own Code of Conduct and dealing firmly with those who transgress. Equally, barrister members of Tribunals bring much needed experience and expertise to the process. By way of analogy, no one could seriously suggest that a GMC panel could function without doctors on the panel.

“3. How can the current systems be more responsive to the interest and needs of complainants without prejudice to a barrister’s legitimate rights of *[sic]* fair hearing?”

The current system is [like any good disciplinary system] designed to deal with complaints. The “interest and needs of the complainant” are

catered for. They can complain. Their complaint is investigated and if found proved sanctions are imposed on the barrister. Apart from being informed as to the procedure involved, and the progress of their complaint, being able to attend any hearing, and being dealt with courteously by the disciplinary body it is hard to see what other “interests and needs” there are.

It seems to us that this question is pregnant with assumptions that are not supported by any evidence. The question then asks for comments on the following areas:

“The initial handling of complaints and their referral to the Complaints Commissioner”

This question is of course directed at complainants.

The work of the Conduct Committee

Lay witnesses are a rare occurrence before the committees. We believe that every measure that can be put in place to make their attendance more comfortable should be. We do not see why [in principle] a witness could not give evidence via a video link rather than travel many miles to attend a hearing. We believe that all venues are equipped to deal with the disabled.

There is also in place a form of mediation overseen by the Complaints Commissioner. This system allows for some complaints to be resolved at an early stage – the conduct complained of may be resolved by an apology by the barrister.

Equally some complaints are withdrawn after a fuller explanation by the barrister of why [for example] he/she did what he/she did.

The operation and make-up of summary hearings and disciplinary tribunals

The make up of the tribunals cannot be [by their very nature] responsive to the interest and needs only of complainants. They are there to discover what the facts are and have to be impartial and independent from the barrister **and the complainant**. We are surprised that such a question has been asked. The government has had to make substantial changes to the way that courts martial are conducted in recent years precisely because they were not perceived to be independent of the ‘complainant’. All disciplinary Tribunals must, self evidently be independent of the complainant and the respondent.

“5. How could the transparency of existing processes be improved?”

There is a risk that “transparency” is becoming a convenient and over used term in regulatory and disciplinary circles. We take transparent as meaning “*adj* **1a** transmitting light without appreciable scattering so that bodies lying beyond are entirely visible. **b** fine or sheer enough to be seen through. **2a** free from pretence or deceit. **b** easily detected or seen through. **c** readily understood. **d**. open to public scrutiny; not clandestine”

We are of course in favour of the processes being “free from pretence or deceit”, “readily understood” and that they be “open to public scrutiny”.

We believe they already are. The system should be clearly explained in the BSB's documents, and the hearings open to the public (save where matters which are privileged or confidential require parts of a hearing also to be confidential). Again we believe that this already occurs.

“6. How could the evidence-base (or ability to gather relevant information in an objective way) of complaints handling be improved?”

Statistics as to complaints should be kept (and we believe they are). These should demonstrate (i) the nature of the complaint, (ii) the source of the complaint (iii) its progress (tracking the time), and (iv) its resolution. The material should be collated and distributed when the Complaints Commissioner publishes an annual report. We believe this already occurs. Insofar as it does not, it should. We do not see any value in asking people who have not encountered the system, or had cause to complain, what their views are. The best source of evidence is from those who have had to deal with barristers and who are not satisfied with the service received. (This is a good source but the evidence received may not be informed nor of good quality, since one must allow for the fact that in this area some complaints are motivated by disappointed litigants who are unwilling to accept the judgment of a Court or a jury.).

“The existing complaints handling arrangements rely on the professionalism and skills of Bar Standards board office-holders and officials, and independent lay and barrister members of the Conduct Committee and other Committees and panels. How might these skills be developed to ensure excellent services to complainants and barristers alike”

Is it being suggested that the above mentioned participants are not already acting with “professionalism and skill”? If so, on what evidence? Any person who serves on the BSB must have a sound grounding in the Bar Code of Conduct and the workings of the Court and Tribunal system. We believe this to be the case with the officials and barristers who have hitherto provided their services to the PCC. That said we agree that every person who serves must be given a joiner’s pack of materials, and some induction training so as to ensure familiarity with the Code, the work of the Bar, and the Disciplinary Process.

“8. How might the Complaints Commissioner and others more effectively feed back to the profession the learning gained from the resolution of complaints?”

An annual report is all that is required. The Complaints Commissioner and the BSB can include in their reports such statistics or case reports (suitably anonymised) as they see fit. Decisions of the committees are published.

“What proposals do you have for improving the flexibility of the current arrangements to ensure that the system is effective without being unnecessarily bureaucratic?”

We believe that the current arrangements are effective and are not unnecessarily bureaucratic.⁴

⁴ We do however think that some self-generated complaints could be dealt with more expeditiously by removing them from the complaints procedure altogether – see our comments under the heading “REGULATORY COMPLAINTS”.

“10. Are there lessons from the way in which complaints and discipline are handled by other professions which have direct relevance to the present system of complaints handling and discipline management for barristers?”

We have spoken to counsel who prosecute and defend in cases before other professional disciplinary bodies such as the General Medical Council, Police Disciplinary Tribunals, the Solicitors Disciplinary Tribunal, and the General Dental Council. In general those that have also prosecuted for the PCC said that our system was more efficient and certainly more expeditious than these bodies. Cases in front of the GMC can often take 3 or 4 years from complaint to adjudication – some more. This is unacceptable.

A closer comparison is with the solicitors system. Although our system is cheaper to run, and speedier in disposition, we still manage to have a larger panel [five rather than 3] and uniquely our panels are presided over by a judge ensuring high quality decision making and independence.

CONCLUSIONS

Public confidence will exist in the regulatory and disciplinary system for the Bar if it operates, and is seen to operate, firmly, fairly and speedily. If the system does operate in this way the public will have confidence in it, as we believe the public already does. The Bar Code of Conduct is modern and well developed and requires of practising barristers that they discharge their duties both in the interests of their clients, and independently – in the interests of the Court. The Bar has developed modern policies and guidance on wide ranging regulatory issues such as

training and diversity, drawing on the leading experts in the relevant fields to do so (for example the diversity work has been undertaken by some of the country's leading diversity experts).

We think there may be a belief lying behind the questions in this consultation that the Bar's Code, or professional guidance issued by the Bar Council, or the BSB's regulatory policies which must be designed to ensure effective compliance with the Code, require large and expensive consultation before they can even be formulated. If so, there is no basis for such a belief. Members of the South Eastern Circuit have practised and advised in matters across a range of differently regulated professions both in this country and abroad, and the Circuit has within its membership many of the leading experts in the field. The Code and Guidance which apply to the Bar are considered to be advanced, modern and designed to serve the public interest. Of course they must be reviewed and adapted as circumstances require, but there is no need to invest large sums in surveys and research to do this now simply because the regulatory and representative functions of the Bar Council have been separated.

We consider that the crucial test for the effectiveness of the BSB as regulator of the profession will be in its demonstrating that it enforces the Code, that the profession complies with it, and (perhaps most important) that the BSB can deal with the complaints side of its work firmly, fairly and speedily. If the BSB succeeds in these aspects of its work the public will have confidence in it.

20th November 2006