

Legal Services Commission's Response to the Bar Standards Boards (BSB) 2nd Consultation on the Review of the Code of Conduct:

Introduction

1. The Legal Services Commission (LSC) is a non-departmental public body sponsored by the Ministry of Justice (MoJ). The LSC is the biggest single purchaser of legal services in England and Wales with an annual spend of £2.1 billion. We are responsible for the delivery of civil and criminal legal aid and the development of community legal services.
2. The LSC has the responsibility for contracting and funding providers of publicly funded services and, for assuring quality services. The LSC's vision is resolutely focused on clients, delivering positive outcomes and providing value for money. The LSC is committed to ensuring that clients have access to quality legal services that meet their needs, and that providers deliver client-focused quality services that represent value for money.

General

3. The LSC welcomes the opportunity to respond to this second consultation on the review of the Code of Conduct and looks forward to responding to the further consultation on the practising rules in the latter half of 2009.
4. The LSC fully supports the introduction of core duties that set out the overriding principles of professional conduct and standards. The core duties and responsibilities of barristers are made even clearer by the addition of an introduction to the code, which is a clear and accurate summary of the role and responsibilities of barristers. The correlation with other regulators such as the Solicitors Regulatory Authority (SRA) and the Financial Service Authority (FSA) will also undoubtedly ensure clarity and consistency for clients, consumers and members of the profession.
5. This profession has historically been reliant on the market and, individual barristers and Chambers reputation to assure quality. If the BSB have concerns about quality in an increasingly complicated market then they should introduce robust and proportionate methods to measure this within their quality assurance agenda. The conduct rules alone are not sufficient. The key here is not just the rules but whether any mechanism exists for ensuring they are enforced.
6. The Code of Conduct goes some way to outlining quality but it is not a substitute for quality assurance. Introduction of a common quality standard, coupled with effective marketing is essential if we are to maintain a sustainable market offering high quality advocacy services. Lack of any form of quality standard will undoubtedly have a profound

impact on those offering highly specialised high quality services as they may be unwilling or unable to compete on price. As a consequence those that offer such a service may have no choice but to exit the market resulting in a decline in standards and a reduced choice for clients.

7. This consultation poses two significant questions for the LSC. Primarily, we do not accept the perception that the market looks after itself (in terms of competence to act and quality of service) and suggest it cannot be relied upon. The LSC as the largest purchaser of legal services in the world require further assurances of the quality and value of services being purchased. The LSC considers this to be the role for the regulatory bodies and the oversight regulator, but also sees the benefit to collaborating on the development of such a standard in order to ensure that what is developed satisfies the purchaser's requirements.
8. In response to these concerns the LSC and MoJ have been working closely with the professional regulators and the representative arms of the profession in the development of a Quality Assurance Scheme for Advocates (QAA). The competencies and the requirements of QAA compliment and enhance (in the public interest) the conduct rules and practice rules to enable confidence in all providers of advocacy services.
9. The second question relates to this consultation papers lack of detail regarding what processes or mechanisms are to be put in place for monitoring or identifying breaches of the conduct rules. This paper implies reluctance for individual barristers to embark on reporting instances of misconduct (save for the exceptions not detailed) and it is therefore difficult to comprehend how misconduct will be identified. The LSC is keen to work with the BSB in order to develop a mechanism or process to identify breaches or monitor compliance. Such a process could be made to dovetail with QAA and link to re-accreditation, in respect of quality.
10. This consultation paper states that there is little or no evidence to suggest that there are a significant number of barristers who are not competent to practice. The LSC does not disagree with this statement but queries that as barristers are not duty bound to report misconduct and there is no formal process for identifying breaches this is not surprising. Without the duty to report misconduct or an alternative mechanism for identifying a barrister competence, we cannot have a high degree of confidence as to the reliability of such a statement. Furthermore, the advocacy profession is a service that consumers have difficulty in judging for themselves the quality of service received. It is also a service that cannot be adequately judged until after the event, which in this profession would not be in the clients best interests, especially if resulting in loss of liberty.
11. The LSC has recently read the report of the BSB's chamber monitoring pilot against compliance with the Code of Conduct. This is but one possible method of monitoring compliance and the LSC welcomed the initiative of the BSB to be increasingly more involved in ensuring the code is complied with and concentrating on areas such as Equality and Diversity

that require more proactive regulatory direction in order to ensure improvements. However, the LSC would like more detail in relation to how the regulator intends to ensure compliance by individual barristers.

12. Although not explicitly asked, the LSC would like to take this opportunity to comment on Rule 701 (f) and conduct rule 910, which relates to time recording and record keeping. The LSC, Crown Prosecution Service (CPS) and Attorney General have set out proposals for rules on time recording and record keeping for billing (presently rules 701(f)) and associated sanctions for breach (presently rule 901). We continue to assert that the profession should be required to maintain records of time incurred, and that those records should be electronic and held for three years for provision to the government body.
13. We are disappointed that so far the BSB has not accepted these proposals, as we consider the measure to be proportionate and beneficial to the taxpayer in demonstrating proper use of public funds.
14. The LSC also considers that the maintenance of computerised time recording records for private clients would also be appropriate. Individual clients are not in an economic position to insist on such arrangements and would benefit from such a professional rule.
15. We note that the BSB have proposed that the present combination of the Code of Conduct and the Practice Management Guidelines provided 'apt' protection to the LSC and CPS. We are pleased that the BSB recognise the importance of compliance with the 'existing rules' and intend to remind the profession of the 'importance of compliance with Rule 701(f)'. We would seek confirmation of the enforcement actions the BSB intend to take to ensure these rules are complied with.
16. However, we note that the Practice Management Guidelines are only guidelines, and we would ask the BSB whether they will be enforcing these Guidelines.
17. We also note that the BSB consider it is open to the LSC and CPS to impose conditions by contract or VHCC Terms of Appointment. We take it that the BSB consider that there can be no objection in principle to the LSC applying the Practice Management Guidelines as well as the Rules to work undertaken under legal aid.

Question 1 - 4

18. As stated above, the LSC agrees in principle for the requirement of an introduction and considers the introduction to be appropriate. The application of the conduct rules also appears sensible as it may become impossible or prejudicial to apply the rules to all barristers once the practice rules have been defined and finalised. The conduct rules themselves appear generic and are consistent with the Legal Services Act objectives and principles of regulation and the SRA's core duties, which in

turn apply equally to all law categories. Therefore, the LSC is satisfied that the rules generically apply across category.

Question 5 and 6

19. The core duties are akin to the professional principles detailed in the Legal Services Act with the welcomed addition of the rule not to discriminate against any person. As stated, the duties are also consistent with the core duties of the SRA and thus satisfy the reasoning behind the implementation of the act, which was to ensure consistency between regulators of legal services.
20. All duties appear equally important and therefore the order should not be preference related but should carry equal weight in relation to precedence. The LSC has recently contributed to the Lord Hunts Legal Regulation Review with the view that regulation should 1) operate in the public interest 2) operate independently 3) be capable of supporting an open and competitive market providing best value 4) include robust quality assurance systems that have the confidence of all consumers (private and publicly funded clients alike) and 5) promote access to a diverse legal profession.

Question 7 - 12

21. No suggested amendments to section 1.
22. As for section 2 the LSC agrees with the approach adopted in respect of the conduct likely to diminish public confidence. The LSC considers that the rule in relation to banning a barrister from expressing personal opinions to the press or media should be removed, so as to be consistent with the solicitors approach. Solicitor advocates are not bound by such a rule and if dressed in robes and expressing personal opinion the public would not be able to distinguish between a barrister or solicitor. The LSC questions how many breaches there have been of this rule to date, other than the highly publicised Peter Herbert tribunal following the Victoria Climbié case, and whether by expressing personal opinion actually generally diminishes public confidence in the administration of justice? It would also question whether refusing a barrister the right to express an opinion would contravene the fundamental right to freedom of expression or contravene article 14 of the human rights convention – protection from discrimination – given the rule does not apply equally to solicitor advocates within the same role. For these reasons there would need to be significant public interest reasons for not permitting a barrister to express a personal opinion.
23. In relation to section 4, the LSC is pleased that the BSB recognises the need for enhanced quality assurance in a highly competitive market. The LSC is currently working closely with the BSB and others on a Quality Assurance Scheme for Advocates. Such a scheme will ensure common standards for employed, self-employed, prosecution and defence

advocate. The scheme is currently aimed at criminal defence advocates only, but it is intended to expand to all areas of advocacy. The LSC is grateful for the representation and continued support for this scheme and intends to continue to work collaboratively on a recognisable quality standard, which will benefit individual advocates, consumers and the purchaser in ensuring quality of service.

24. Through various previous consultation responses we have expressed the view that the cab-rank- rule is not applied consistently in practice. Although the rule has good intentions, the exceptions to its application render the rule unenforceable as a conduct or practicing rule.

Questions 12 - 13

25. The LSC is of the opinion that all steps described should be taken. All barristers should have a positive duty to take reasonable steps to prevent discrimination by others and where possible the conduct rules should impose a positive obligation for barristers to promote equality and diversity in their professional dealings. As both of these suggestions apply only to individual barristers there should also be a responsibility on chambers (Rule 6.03 of the Solicitors Code) for a member of chambers to adopt and implement an appropriate policy for preventing discrimination and promoting equality and diversity. A chambers monitoring process (as has just been piloted by the BSB) could then be rolled out to ensure compliance.

Question 14

26. No comments or suggested amendments to section 6.

Question 15 –16

27. Reporting serious misconduct should be a responsibility for all barristers but the LSC shares the BSB's concerns in relation to reporting all instances of misconduct. The recent example of R v Yeu & others and the subsequent rebuttal by advocates, adequately demonstrates the subjectivity involved and the possible impact on the two arms of the profession, plus the possibility of tactical reporting against opponents. As well as a duty to report misconduct it should equally be a conduct rule not to falsely report misconduct, any penalty for doing so should be severe.
28. As mentioned above a mechanism should be put in place to allow a consistent approach to reporting instances of misconduct. Given the BSB's recent survey results highlighting the public's lack of trust in the profession this could be an additional step to ensure public confidence.