



The Bar Council

Bar Council response to Call for Evidence to help improve BSB Handbook

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Bar Standards Board's "Call for Evidence to help improve BSB Handbook"¹.
2. The Bar Council represents over 16,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board (BSB).

Overview

4. The Bar Council notes that the BSB Handbook was introduced in January 2014 following extensive consideration by both the BSB and Bar Council of various issues, including formal consultation by the BSB, and the Bar Council's full response to that consultation². Along with addressing a number of specific issues at length, the Bar

¹ Available here: <https://www.barstandardsboard.org.uk/resources/call-for-evidence-to-help-improve-bsb-handbook.html>

² Bar Council (2012) RESPONSE OF THE BAR COUNCIL TO THE BAR STANDARDS BOARD'S CONSULTATION PAPER ON THE NEW BSB HANDBOOK

Council's more general comments on the new approach as proposed in 2012 can be summarised as follows:

- 4.1. Agreement with many, but not all of the proposed changes
 - 4.2. Emphasis on the need for caution in implementing far-reaching changes, acknowledging that many consequences will be unintentional
 - 4.3. Strongly objecting to addition of the two new Core Duties, relating the management of one's practice and providing a competent standard of work and service (now CD7 and CD10), on the basis that these should not be elevated to the level of a Core Duty
 - 4.4. Noting that a greater degree of clarity is preferable to outcomes-focused regulation, regulatory trends notwithstanding
 - 4.5. Noting that while the Bar Council remained unpersuaded as to the need for 'outcomes' in the Handbook, the presentation of and balance between rules and guidance were both appropriate and easier to follow than the previous Code of Conduct, and
 - 4.6. Welcoming the non-prescriptive approach for management of chambers, where an approach for one model of chambers may be more appropriate than another approach for another model of chambers.
5. The Bar Council is still persuaded of its previously stated views as described above. In particular, the outcomes in the BSB Handbook are generally seen as somewhat vague, and not particularly useful for practical interpretation of a barrister's conduct in any given scenario. The Core Duties, rules and guidance are of much more practical use than the outcomes, and the current balance is largely appropriate.
6. We are aware from the BSB's open event on 16 October 2019, that the BSB is considering the optimum balance between the more prescriptive rules-based approach, and the principles-based approach:
- 6.1. The Bar Council notes the potential benefits of prescriptive rules and guidance as providing certainty in clear boundaries, along with often useful tools which preclude each barrister needing to 'reinvent the wheel' (e.g. in producing certain chambers' policies or wording to be used in interactions with clients). Prescriptive rules and guidance may also be of benefit to the public, in assisting their understanding of a barrister's ethical obligations, and determining what they may reasonably expect.

6.2. There are also benefits to the principles-based approach, including greater responsibility and ability for both the profession and the regulator to make judgement calls as appropriate in different circumstances, flexibility within application of principles over time while principles themselves remain unlikely to change, and minimising the risk of ‘loopholes’.

7. In the Bar Council’s view, there is currently a reasonable balance between principles enshrined in the Core Duties, and the more prescriptive rules and guidance. There seems at present to be little, if any, evidence to warrant any large scale change to this balance.

8. There is no doubt, also, that the superseding of the previous Code of Conduct and Annexes with the BSB Handbook in 2014 was a significant change, to which the profession is to a large extent still adjusting. Barristers rely on the current BSB Handbook to inform their ethical conduct in their day-to-day practice. Since its inauguration, a considerable amount of training, also, has been delivered by the Bar Council, Specialist Bar Associations and chambers themselves, to the profession, to aid understanding of the BSB Handbook and its application. It is the view of the Bar Council that a fundamental reconsideration of the approach will likely bring further, avoidable confusion and disruption to the profession and their practice.

9. Ethical Advisors on the Ethical Enquiries Service (EES) also rely on the Handbook in their daily advice to barristers by phone and email. This service is frequently utilised by the profession: receiving approximately 500 telephone and 50 written enquiries from barristers every month. Advisors undertake a comprehensive internal programme of training in order to advise barristers on the EES, as well as ongoing training to ensure their continued competence in advising on ethical issues. The Bar Council has, furthermore, published 138 documents to date on the Ethics and Practice Hub³ to assist barristers. These are reviewed annually to ensure consistency with the BSB Handbook. To fundamentally change the BSB’s approach as set out in the current BSB Handbook would result in significant disruption to Advisors’ ability to assist barristers on the EES, and on barristers’ ability to rely on both the BSB’s guidance and the Bar Council’s library of advice documents published on the Ethics Hub.

10. For these reasons, the Bar Council therefore urges the BSB not to implement any significant change in their approach from the current BSB Handbook at this stage, unless there is evidence and justification for such change.

11. Furthermore, the Bar Council notes the frequency with which the BSB Handbook is amended by the BSB; three versions have been issued this year alone. Such frequency of updates risks being overwhelming to the practising Bar. The

³ Available here: <https://www.barcouncilethics.co.uk/>

dangers of such continual amendment may ultimately be counter-productive to effective regulation.

12. We have responded further below with comments on specific issues of concern in the current version of the BSB Handbook.

13. We look forward to responding to the full consultation that the BSB expects to publish in early 2020 on any proposed revision to the current Handbook.

Specific Issues in the current BSB Handbook⁴

14. Ordering of the BSB Handbook: Generally, the Bar Council is of the view that the current ordering of rules and guidance is not intuitive and would benefit from a more logical ordering. For example, the Cab Rank Rule (rC29-30) could appear prior to the rules on accepting and returning instructions (rC21, 25-26).

15. Core Duties 7 and 10: The Bar Council remains of the view expressed in our 2012 response to the BSB's consultation at that time: that Core Duties should only consist of duties which are fundamental to a barrister's duty as a barrister. In our view, Core Duties 7 and 10 are not on par with the remaining eight Core Duties, and should instead be captured in rules and guidance.

16. g1: This guidance point provides as follows:

gC1 The Core Duties are not presented in order of precedence, subject to the following:

*.1 CD1 overrides any other core duty, if and to the extent the two are inconsistent. Rules **rC3.5 and rC4** deal specifically with the relationship between **CD1, CD2 and CD6** and you should refer to those rules and to the related Guidance; [emphasis added]*

Core Duties 1, 2, 4 and 6 provide as follows:

CD1 You must observe your duty to the court in the administration of justice [CD1].

CD2 You must act in the best interests of each client [CD2].

CD4 You must maintain your independence [CD4].

CD6 You must keep the affairs of each client confidential [CD6].

Rule C3 provides as follows:

⁴ All references in the current response relate to the BSB Handbook: Fourth edition updated September 2019.

rC3 You owe a duty to the court to act with independence in the interests of justice.
This duty overrides any inconsistent obligations which you may have (other than obligations under the criminal law). It includes the following specific obligations which apply whether you are acting as an advocate or are otherwise involved in the conduct of litigation in whatever role (with the exception of Rule C3.1 below, which applies when acting as an advocate):

- .1 you must not knowingly or recklessly mislead or attempt to mislead the court;*
- .2 you must not abuse your role as an advocate;*
- .3 you must take reasonable steps to avoid wasting the court's time;*
- .4 you must take reasonable steps to ensure that the court has before it all relevant decisions and legislative provisions;*
- .5 you must ensure that your ability to act independently is not compromised.***

rC4 Your duty to act in the best interests of each client is subject to your duty to the court. [emphasis added]

rC3, rC3.5 and rC4 are referring to the barrister's duty of independence in the interests of justice, their duty to maintain their independence and how those duties relate to and override their duty to act in their client's best interests. They do not immediately appear to be referring to the barrister's duty of confidentiality. As such, it would appear that the the references in gC1 should refer to CD4, rather than CD6.

17. rC30.9.c: We have previously asked the BSB to remove reference to the date "2012" from this rule. Retaining the date "2012" implies that it is only the 2012 version of the Standard Contractual Terms to which this rule applies, and that any updates the Bar Council makes to the Standard Contractual Terms may not fall within the remit of this rule. Of particular pertinence is the Bar Council's updated version of the Standard Contractual Terms for the GDPR. Retaining the reference to 2012 in the rule leaves barristers in uncertainty as to whether the BSB considers that the updated terms are captured by this rule, or whether it is only the now outdated version published in 2012 that is captured. Removing the date "2012" will, furthermore, enable any future updated versions to be appropriately captured.

18. gC4.2: In relation to the accidental misleading of the court, this guidance point is clear as it relates to the barrister's duty to correct the position while s/he remains instructed. It is not clear, however, if and how this may apply after the barrister ceases to act.

19. gC96.10: We note that the definition of what constitutes serious misconduct includes at point.10 “conduct that poses a serious risk to the public”. Some examples of what this is intended to capture would be welcome.

20. rC110: We note the absence in this rule of a differentiation between the situation of sole practitioner chambers, and chambers with more than one member. It is currently unclear, therefore, whether sole practitioners are equally obliged as all chambers to possess, for example, a parental leave policy, a harassment policy, a flexible working policy and a Data Diversity Officer, among other obligations. While common sense would seem to render such obligations redundant, the absence of an exemption in the rule leaves sole practitioners in uncertainty on these points.

21. rS12-rS15: We note that these provisions are worded in a particularly complex manner, such that the extensive cross-referencing renders it difficult to ascertain which rules and authorisations apply to various groups specified.

22. rS20-22: Similarly, the qualified person rules are complex and difficult to follow. These rules contain multiple variations which are dependent on on what type of employed barrister one may be (i.e. the need for a qualified person for one or three years in rS20 and rS21) and what type of legal services one intends to provide (i.e. three different categories of qualified person in rS22).

23. gS3: We note that rS24 states whom a self-employed barrister may be instructed by. gS3 expands on “professional client” to specifically note that foreign lawyers are included. It would be useful to add each of the following to this guidance point, as both represent areas of confusion:

23.1. practising barristers acting on their own behalf, and

23.2. those such as solicitors who are authorised by other approved regulators acting on their own behalf, with cross-reference to the cab-rank rule exemption at rC30.7.c as necessary.

Bar Council
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