CHANCERY BAR

RESPONSE TO BSB CONSULTATION ON REFORMS TO THE DISCIPLINARY TRIBUNAL SYSTEM

The Chancery Bar Association is one of the longest established Bar Associations and represents the interests of over 1,100 members handling the full breadth of Chancery work at all levels of seniority, both in London and throughout England and Wales. It is recognised by the Bar Council as a Specialist Bar Association. Full membership of the Association is restricted to those barristers whose practice consists primarily of Chancery work, but there are also academic and overseas members whose teaching, research or practice consists primarily of Chancery work.

Chancery work is that which is traditionally dealt with by the Chancery Division of the High Court of Justice, which sits in London and in regional centres outside London. The Chancery Division attracts high profile, complex and, increasingly, international disputes. In London alone it has a workload of some 4,000 issued claims a year, in addition to the workload of the Bankruptcy Court and the Companies Court. The Companies Court itself deals with some 12,000 cases each year and the Bankruptcy Court some 17,000

Our members offer specialist expertise in advocacy, mediation and advisory work across the whole spectrum of finance, property, and business law. As advocates they litigate in all courts in England and Wales, as well as abroad

Q1: Do you agree with the changes to terminology and the clarification of roles outlined above? Are there other changes in these areas that you consider would be beneficial?

Yes. We welcome the updating of the Regulations to ensure that they are up to date, accurate and reflect current practice.

There are no other changes that occur to us as being beneficial.

Q2: Do you agree with the changes that have been made to the "Directions" section (at rE106 – rE126) and the Standard Directions at Annex 6 of the revised Regulations?

Broadly yes, subject to the points made below. As currently drafted the "Directions" section of the Regulations is hard to follow, especially for those not familiar with the procedures of the Tribunal. The proposed changes which streamline and simply the procedures to be followed are therefore welcome.

We query how the referral of the agreed non-standard directions to the President under rE111 would work in practice. It is only where the agreed non-standard directions would prevent BTAS from carrying out any function given to it by the Regulations that the said directions must be referred to the President in order for a Directions Judge to be appointed to endorse them. Who is to decide whether or not the agreed non-standard directions would prevent BTAS from carrying out its functions such that a referral is required? If it is envisaged that the BSB is to be under a duty to consider whether rE111 is engaged and if so to make the referral itself, we consider that the Regulations ought to expressly so provide.

We further query whether the inclusion of a new provision at rE126 requiring endorsement by a Directions Judge of any agreement between the parties to vary the terms of any previously agreed (or deemed) directions is necessary or advisable. We can see that there would be justification for requiring judicial endorsement of any proposed agreed variation to directions that might prejudice a hearing date or otherwise impact on the operational function of BTAS. However, imposing a blanket requirement upon the parties to obtain endorsement to any agreed variation seems to us to be excessive and likely to result in unnecessary

additional expense and or delays. In our view rE126 ought to be qualified in a similar way to rE111, namely that the parties ought to be able to agree variations to directions save where that would have the effect of preventing BTAS from carrying out any function given to it by the Regulations and or otherwise impacting the just and efficient conduct of the case.

We particularly welcome the inclusion of the express provision in rE123 that oral hearings before a Directions Judge will be in private. This is important, given that Directions hearings occur at an early stage of proceedings and could result in charges being dismissed.

We do not support the inclusion of a new rE168. We appreciate that non or late compliance with directions can be problematic and as such we would welcome proposals that would encourage compliance. The proposed rE168 would give the Tribunal an express power to exclude evidence or draw an adverse inference against a party in the event of non-compliance with directions. In the context of disciplinary tribunal proceedings, which could result in a barrister or other regulated entity being disbarred or otherwise reprimanded, the imposition of such a sanction could result in the barrister or other entity being prevented from fully defending him or herself against a charge (so far as he or she was prevented from advancing evidence in his or her defence and or otherwise having adverse inferences drawn against him or her). This would be contrary to natural justice and we consider that the sanction proposed is a disproportionate response to the desire to promote a culture of compliance. We would likewise be concerned by the imposition of any such sanction on the BSB, given that the BSB's function is to protect the public interest and to maintain professional integrity. We consider that alternative sanctions, such as costs sanctions, ought to be explored as an alternative in an effort to bring about the desired culture of compliance, which of course we would welcome.

If, contrary to our views, this provision is retained, it must at the very minimum be made clear that such an order could only be made in the most

exceptional circumstances and not so as to materially prejudice the ability of a respondent to defend him or herself.

Q3: Do you agree with the list of those people who may be treated by the Tribunal as "vulnerable witnesses" (r.E176) and should the list be extended to include reference to victims of other types of allegations, and not just allegations of a violent or sexual nature?

Yes, we agree with the list of people who may be treated by the Tribunal as "vulnerable witnesses". We do not consider that it is necessary to extend the list further, particularly in light of the inclusion of rE181 which enables any witness who would otherwise fall outside of the list to apply for similar measures to be put in place where that is desirable.

We agree that in many, if not most, cases falling within rE179 (i.e. those involving allegations of a sexual or violent nature) that an order preventing the respondent from cross examining the witness in person is likely to be appropriate, subject to appropriate safeguards to ensure that a legally qualified person is appointed to conduct such cross examination. However, there may be cases in which such provision is unnecessary (say, for example, if the witness did not feel intimidated and consented to being cross examined by the respondent in person). We query whether a blanket restriction is necessary and or desirable. It should be noted that as drafted rE179 goes further than the explanation of that provision given at paragraph 32 of the Consultation Paper in that the Tribunal is not given the power to make a direction preventing a respondent from cross examining a vulnerable witness; rather the Tribunal is required, in limited cases only, to make that direction.

There may well be other cases where it would be inappropriate for a respondent to cross examine a vulnerable witness in person (e.g. in intimidation cases). This is arguably covered by the wide power at rE177. However we consider that it would be preferable to include an additional power expressly as a new paragraph 6 to rE178 in similar terms to rE179

to make that clear. There should be no doubt that in appropriate cases (even in those not involving allegations of a violent or sexual nature) the Tribunal could make an order preventing a respondent from cross examining a vulnerable witness in person (subject to a legally qualified person being appointed to do so in his or her place).

There is additionally the point that the Tribunal does not have the power to make an order in similar terms to rE179 (i.e. preventing cross examination in person) when a person who is not on the "list" of vulnerable witnesses makes an application under rE181 on the ground that the measure is desirable. Arguably there might be cases (albeit rare) where the Tribunal would consider it desirable to make such an order and we consider that it ought to have such power, provided that safeguards were in place to ensure that the witness was cross examined by a legally qualified person. We consider that this omission may have an adverse equality impact (see our answer to Question 19 below). If such a power were included in rE178 expressly, then the Tribunal would also have power to make such an order on application under rE181 where it would desirable to do so.

Q4: Do you have any comments on the changes to the Regulations outlined above in Section B which are not subject to specific questions?

Other than as covered by our answers above, no.

Q5: Do you agree that Tribunals should be given the power to refer matters back to the BSB for consideration of the imposition of administrative sanctions?

Yes.

We agree that the gap identified in paragraph 39 of the Consultation Paper needs to be bridged in order to promote the Regulatory Objective by

promoting adherence to the professional principles, through maintaining proper standards of work and integrity within the profession. It is unacceptable that a respondent who is guilty of a breach of the Handbook which would otherwise justify the imposition of an administrative sanction might be seen to have been let of the hook in a clear case and where the imposition of a sanction was in the public interest, simply because more substantial charges had not been upheld by the Tribunal.

We agree that a referral back to the BSB would need to be based on the public interest and the risk posed by the conduct, not simply because a finding could be made on the lower standard of proof. Another factor that should be taken into account in deciding whether or not to refer the matter back is the fact that the respondent will already have been subject to disciplinary proceedings in which he or she will have been cleared, which burden might in itself be deemed in many cases to be a sufficient sanction in the event of some lesser infringement of the Handbook.

Whilst this proposal may result in some inevitable lengthening of the process in cases where the matter has to be referred back to the BSB, this is in our view the least bad option. We are strongly of the view that it would be unacceptable for some but not all administrative sanctions to be made public as the perception would remain be that a sanction placed in the public domain was of a more serious nature than one dealt with administratively by the BSB. It would be wrong as a matter of principle and natural justice if the effect and consequences for the respondent of an administrative sanction imposed by a Tribunal would differ from an administrative sanction imposed by the BSB.

Q6: Do you agree the power to impose deferred sentences should be removed from the Regulations?

Yes. We do not fully understand the rationale or policy behind deferred sentences. If the appropriate sanction for a proven charge is a fine,

condition/ and or suspension from practice, then that sanction should be imposed to promote the Regulatory Objectives. It should, in our view, be expected that a barrister will desist from further incidents of professional misconduct without needing to be incentivised to do so. It strikes us that the whole policy behind deferred sentences in the disciplinary context is somewhat dubious. Further, we agree that the resources and costs that the imposition and regulation of such sentences entails could be better employed elsewhere.

Q7: Do you agree that the formal restrictions on the BSB mounting appeals against decisions of Tribunals should be removed?

Not as proposed.

We are not entirely convinced by this proposal and we consider that it requires further consideration before the existing restrictions are lifted and or revised.

In principle we consider that the BSB should exercise considerable restraint in taking appeals against respondents given the burden that the process imposes on a respondent who has been successful in defending him or herself at first instance. There ought to be defined circumstances in which it is appropriate for the BSB to take such a step and these ought to reflect the underlying policy.

We agree that the overriding criterion against which the taking of any appeal by the BSB should be judged is "the public interest" and that the current provisions may not be sufficiently "outcomes" focussed. The inquiry therefore needs to be as to what circumstances are likely to justify an appeal as being in the public interest. The Consultation Paper does not address this inquiry in any detail.

We are concerned that, at the same time as lifting the restrictions, the decision as to whether or not an appeal is justified will remain entirely

within the BSB (either the Chair of the BSB or the Chair of the PCC) and that little attempt has been made to articulate the grounds on which pursuing an appeal will be deemed appropriate in the public interest. For example, we would have thought that it will rarely, if ever, be in the public interest for an appeal to be taken against a finding in a respondent's favour on the facts or simply because the BSB would have preferred a more stringent sanction to have been imposed. We would be concerned by any suggestion that the BSB might seek to appeal such decisions by reference to the "public interest" simply because it considers that the result ought to have been different.

We consider that it would be preferable if the detail as to the grounds on which an appeal can be taken by the BSB were in the Regulations themselves and not contained in a separate policy document.

We therefore suggest that greater consideration is given to (i) the policy behind the existing restrictions (which is hinted at but not dealt with in the Consultation Paper); and (ii) how that policy can be better reflected in a newly drafted provision that seeks to draw the right balance between allowing appeals where they are truly in the public interest and the need to protect respondents against duplication of process.

Q8: Do you agree with the removal of the regulations in relation to the involvement of the Inns of Court in the disciplinary system except in relation to the pronouncement of disbarments?

Yes.

Q9: Do you agree with the proposed amendments to streamline the reporting process?

Yes.

Q10: Do you agree with the proposal to remove reference to the full list of bodies to which the final report should be sent and allow the distribution of such reports to be determined at the discretion of BTAS/ the President?

Yes, provided the criterion for the decision to distribute is the public interest.

Q11: Do you agree with the BSB's current approach to the publication of decisions of Disciplinary Tribunals online, or are you of the view that our approach should be amended to allow for the publication of all Tribunal decisions online, even where a Tribunal dismiss a finding.

We are strongly in favour the BSB's current approach to the publication of decisions online and do not support any departure from it. We are not in favour of an amended approach which would involve full non-anonymization in all cases, even those in which a Tribunal dismisses the charges. We consider that anonymization is required to protect a respondent against whom a charge has not been upheld where the material is online. Full publication is likely to lead to reputational damage. The current approach means that the substance of all decisions is available online. That is sufficient to protect the public interest and provide sufficient transparency as to the work of the BSB and BTAS. There is no public interest in requiring non anonymised publication where the charge is not upheld and the respondent does not consent.

Q12: Do you agree with the changes introduced, which allow for the granting of a fresh hearing on application in any circumstance

where the respondent has a good reason for not attending the original hearing?

Yes. We very much welcome these changes which are required on the grounds of fairness.

Q13: Do you agree with the amendment to the Regulations limiting the hourly rate that self-representing barristers can claim to the rate applicable to litigants in person under the CPRs?

No.

We do not consider that a useful analogy can be drawn with the provisions of the CPR relating to the levels of costs recoverable by barristers when they are acting as litigants in person. There are very different considerations facing a barrister subject to a professional charge from those in normal litigation to which he or she may be a party.

We understand the BSB's concern of being exposed to large costs claims that, in turn, may potentially lead to increased burdens which are funded by the profession as a whole through the PCF. However, we do not understand on what basis the BSB's additional exposure to such costs is said likely to result in increased insurance premiums for the profession. We cannot see the connection here.

Further we query how well founded this concern regarding costs exposure is in any event. We are concerned that the possible ramifications of this proposed amendment have not been fully thought out. We would have thought that in most cases the barrister respondent will be insured by Bar Mutual and that therefore separate counsel is likely to be instructed on his or her behalf at a level of experience appropriate to the case. If the BSB does not win the case, it will be liable for the respondent's counsel's fees in the usual way. Why then, should a barrister respondent be in any worse

situation (or the BSB in any better situation) simply because he or she decides to conduct his or her own defence?

We are particularly troubled by the following scenario. Take a Queen's Counsel who specialises in professional disciplinary work, who is subject to serious charges and, for his or her own personal reasons, wishes to conduct the defence of the case personally. The fact that the barrister could face disbarment or other serious professional sanction might well lead such a barrister to consider that he or she is the best person to conduct his or her own defence which is likely to be of paramount importance to him or her. We consider that such a barrister should have the right to do so without being out of pocket in the event that he or she is successful compared to the situation he or she would have been in had another counsel been instructed on his or her behalf.

In the above scenario the QC should be able to recover his or her time based on his or her own hourly rate albeit capped by reference to the professional hourly rates of a barrister who might be expected to conduct such a case ordinarily. That would be sufficient to stop, for example, top commercial or chancery silks claiming full rates for appearing in person in respect of minor charges that might reasonably be expected to be dealt with by junior counsel. In other words the usual rule ought to be that the costs recoverable should in the first instance be based on the time spent by the respondent barrister at his or her normal professional rates, albeit capped by reference to what would be allowed on a normal assessment of costs as being proportionate and reasonable for the case in question.

There is, in our view, no good reason to cap the respondent's recoverable costs to an arbitrary figure of two-thirds of the amount which would have been allowed if the barrister had been represented, by reference to CPR 46.5. Neither is there justification for making a barrister prove an actual financial loss that will be almost impossible for him or her to show.

Litigation governed by the CPR is an entirely different animal from disciplinary proceedings. The respondent has no choice but to defend him or herself. There should be no bars, procedural or financial, to a barrister having the ability to successfully conduct his or her own defence fully particularly where his or her reputation and or livelihood is at stake. The principle established in *London Scottish Benefit Society v Chorley* (1884) 12 QBD 452 should continue to apply.

We note that this proposal appears to stem from a recent decision of the *Administrative Court in R v Disciplinary Tribunal of the Council of the Inns of Court ex. p. Sivandandan* [2014] EWHC 1570 (Admin) allowing the fees of an unregistered barrister on a full basis. We would be concerned to ensure that this "hard case" is not being employed in order to make "bad law" so far as the real complaint of the BSS is that a non-practising barrister recovered fees against the BSB based on a large number of hours spent (the number of which it is noted were agreed by the BSB).

Most barristers whom the BSB regulates are registered and, if they were not defending charges brought against them, would be undertaking fee paying work or at least offering themselves as being available to undertake such work. There is further the point that many barristers have fixed overheads and expenses that they are liable for regardless of whether or not they are earning. The principle that "time is money" which underpins the principle in *London Scottish Benefit Society v Chorley* is a truisim for the majority of barristers whom the BSB regulates.

In the *Sivandandan* case Moses LJ with whom Collins LJ agreed, stated held that the CPRs were "*not even persuasive*" in this context and continued as follows at paragraphs 18 and 19,

> "On what basis, therefore, can it be said that the CPR should apply? After all, if a defendant barrister acting in person is going to be deprived of costs assessed on a *London Scottish Benefit Society* basis then the barrister will employ another barrister or solicitor and barrister, and claim his costs in the normal way. The successful barrister may lose a proportion, or perhaps, in an extreme case, all of those costs, if he or she has brought the proceedings on themselves. But otherwise, it seems to me that to apply CPR 48.6(6) is merely an invitation to incur extra costs which may be saved where a barrister acts on his

> or her own behalf. In those circumstances, and in the absence of any particular reason given by Mr Post QC as to why the CPR should be persuasive, the correct basis of assessing these costs is in accordance with the Bar Standard Board's own rules, namely, to award such costs as the tribunal thinks fit"
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> "I bear well in mind the important public duty which the Bar Standards Board fulfils, but where in general should the costs lie in those cases where a barrister has been wrongly charged, has not brought the proceedings on himself, and where the charges have been dismissed? Should the cost fall on the barrister, or on the Bar at large? It seems to be there can only be one answer to that question and that the financial loss the barrister has incurred includes the expenditure of his own professional skill".

The above passage is not referred to in the Consultation Paper. It suggests that applying the provisions of the CPRs may actually result in the BSB facing greater liability for successful respondents' costs than is currently the case. No consideration has been given in the Consultation Paper to this possible adverse ramification of the proposed change which would, in turn, impact on the levels of the PCF.

We therefore are not in favour with this proposed amendment to the costs regime.

Q14: Do you have any other comments on any of the proposed amendments to the Regulations set out in Section C above which are not specifically covered by specific questions?

No.

Q15: What are your views on potential changes to the current regime for claiming BSB costs, taking into account the alternative approaches set out at paragraphs 75 – 77

In principle we can see that there are good arguments in favour of the BSB being able to recover some costs from unsuccessful respondents, especially were this saving in turn passed onto the profession as a whole through reductions in the PCF.

Our provisional view is that if the BSB were able to recover preparatory costs that this saving ought to be applied in reduction of the burden to the profession as a whole through the PCF rather than being paid to a legal charity.

We consider that removing the ability of either party to claim costs is a significant step that would require detailed further consultation. We would not wish to express a view one way or the other before detailed consideration had been given to the impact of such proposals on the likely levels of insurance premiums (both with Bar Mutual and top up providers). We would also be concerned that such proposals could operate unfairly to respondents who had successfully defended charges at considerable cost to themselves.

Q.16: What are your views on removing the jurisdiction of five-person Tribunal panel and replacing them with three person panels potentially Chaired by a Judge.

We do not have any provisional views on this suggestion but we would welcome further discussion and consultation in respect of it. There would be merit in undertaking further research and investigation to ensure that the current system is not unduly cumbersome or expensive. Our overriding concern however, would be to ensure that the quality of decision making in serious cases was not compromised in any way. We would welcome the opportunity in due course to consider the evidence to be gathered as to the impact on such a change on the quality of decision making.

Q.17: Do you agree that the decision to re-admit a barrister to the Bar following disbarment should be a matter for the BSB as the regulator and taken by Tribunals and not the Inns of Court?

As a matter of principle, yes.

Q.18: Do you support the introduction of "settlement agreements" as an alternative means of determining the outcome of disciplinary cases.

Yes (albeit provisionally and subject to seeing the detail in further consultation).

Our provisional view is that the approval of "regulatory settlement agreements" is a potentially useful alternative way of dealing with professional misconduct allegations in a cost effective and expeditious way. It is in the public interest for respondents to be encouraged to accept charges of misconduct at an early stage where it is appropriate for them to do so.

Careful consideration will need to be given the procedures proposed to be implemented in due course to ensure that the settlement approval procedure itself does not become cumbersome and also that sufficient safeguards are put in place to ensure that the process is transparent and promotes rather than undermines the public interest.

Q19: Do you consider that any of the proposed change to the Regulations could create adverse impacts for any of the equality groups?

We consider that Q3 has the potential to create adverse impacts so far as there were persons who were not on the list of vulnerable witnesses but who might, for reasons connected to a protected characteristic, require the adoption of similar measures. For example, if a respondent was charged with professional misconduct by engaging in racially motivated conduct

against a witness, the Tribunal would have no power to prevent the respondent from cross examining the witness personally as the regulations are currently drafted. Our suggested approach would overcome this and enable the Tribunal to make such an order where appropriate.

No other such adverse impacts have occurred to us in preparing this response.

Camilla Lamont and Edward Denehan

For and on behalf of the Chancery Bar Association

2 October 2015