CHANCERY BAR

Response of the Chancery Bar Association to the Bar Tribunals and Adjudication Service's consultation on Sentencing Guidelines.

The Association

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.

This response is the official response of the Association to the consultation of the Bar Tribunals and Adjudication Service on Sentencing Guidelines. It has been written by the Chairman, Tim Fancourt QC together with two members of the association with experience appearing before the Tribunals.

The Response

Q 1 - We agree.

Q2 - We agree.

Q3 – We agree.

Q4 – We consider it should be called "Sentencing Guidance".

Q5 - Yes. However, for the benefit of lay members of the Panel, it may be helpful, at Step 1, to state that an assessment of seriousness is essentially the product of assessing culpability and harm, before turning to the personal mitigating and aggravating features of the offence

or offender. Otherwise it looks as if seriousness is one factor and culpability another and harm another. In addition, the checklist's invitation to "reflect on any equality and diversity factors within the case" seems so vague as to be actually unhelpful.

Q6 - The type of punishment and a provisional view on the amount of any fine should be determined without regard to the barrister's financial circumstances. The panel should then take into account the barrister's financial means when considering whether it is appropriate to reduce the amount of the fine (not increase). It would be inappropriate for the information to be collected before the hearing (in the absence of an indication that the barrister will be admitting the charge(s)) for the reasons identified in the Bar Council's response.

There is a further consideration on the amount of fine relating to assessing any element of benefit to the barrister from the conduct complained of. Para 6.11 of the guidance suggests that the fine might be increased as a means of removing ill-gotten gains from the barrister. But the fine should not directly reflect the amount of any financial benefit derived, merely the fact that the conduct was done for the purpose of making substantial benefit. That is because in such a case the disciplinary proceedings are likely to be followed by (or proceed in parallel with) Ombudsman proceedings following from a service complaint, and the order made by the Ombudsman will be likely to include a requirement to reimburse the client or otherwise make compensation reflecting the loss that the client suffered. If the fine is increased on this account, there is a real danger of double punishment. Query whether there is a memorandum of understanding between the front line regulators and the Ombudsman about how to proceed in such cases.

Q7 - Assessment of costs should follow the determination of the amount of the fine, which should not take account of any order for costs that may be made subsequently. The right approach to costs is to consider what is appropriate having regard to the barrister's financial position in the light of the fine that has just been imposed. In any event, the Bar Standards Board is not able to recover its preparatory costs by reason of Regulation 31 of the Disciplinary Tribunal Regulations. It is only able to recover its costs of the hearing itself (which are limited – prosecutors act pro bono). Moreover, as from April 2013 the BSB is not

able to recover lay panel members' fees, shorthand writers' fees or tribunal clerk's fees as these are now the responsibility of the Bar Tribunal and Advisory Service. So, going forward, the BSB is only able to recover witness expenses and other incidental costs (eg obtaining a transcript). The costs orders made prior to April 2013 were low (compared to the *Matthews* case) and are likely to be lower going forward.

Q8 - No. The guidance does not distinguish between an inadvertent or trivial (first) breach and serious/deliberate/recurrent breaches. A fine of £600 fine is too great for the case of a first time offender who miscalculates by half an hour, or does the 12th hour late in early January (rather than late December) if either of those circumstances were to form the basis of a charge. There should be a separate starting point of advice as to future conduct for cases involving a first trivial or inadvertent breach.

Q9 - Yes.

Q10 - No. There are a wide variety of offences and circumstances in which it would be appropriate and in the public interest. It should be applied in any case in which the Panel thinks that a more serious sanction is not merited. Using an expression such as "exceptional circumstances" just creates an interpretative difficulty and an extra layer of complexity that is unnecessary.

Q11 - There should be separate guidance for failure to pay BMIF premium because of the potential risk to the public for such a failure.

Q12 – The Association agrees with the response of the Bar Council to this question.

Q13 - No.

Q14 – The Association has the following comments about the proposed structure and/or content of the guidance.

(1) Paragraph 4.2 is incorrectly expressed. It is not that if a barrister fails to follow guidance he has to show how his obligations under the Code have been met: it is if he is facing a charge of breach of the Code and has not followed guidance. As worded, it tends to imply that a failure to follow guidance could of itself lead to a barrister being required to explain himself, which is not right.

(2) There needs to be some guidance about how proceedings interact with any service complaint that the client is pursuing at the same time, so far as the appropriateness of any sanction (particularly a financial sanction) is concerned: see under Q6 above.

(3) The guidance under section A2 seems rather muddled as to whether a charge of permitting the court to be misled or advancing a hopeless or improper argument is being addressed. It is presumed that it is intended to be the latter. It is unclear what is meant by "unsupported submissions".

(4) In all cases under section B, where the barrister has been convicted of a criminal offence, there were divided views as to the appropriate starting points. The majority considered that there should be a presumption against a fine, on the basis that condign punishment has already been meted out by the Court; that the emphasis at the Tribunal should be on protection of the public, not punishment, and the appropriate sanction is therefore a reprimand or advice, if the matter is venial, or a suspension if the matter is so serious that it is incompatible with practice as a barrister. The minority considered that the guidance was correct; that the criminal justice system was dealing with criminal liability only; that in disciplinary proceedings, the protection of the public and enforcement of professional standards were primarily important and the proposed starting points promoted both aims/approaches as well as promoting public and professional confidence in the disciplinary process

(5) In Section C5 Failure to comply with a Court Judgment, leaving aside the circumstances in which the barrister is litigating personally, it is not clear what this section is aimed at. How would a barrister be in breach of a Court Order? Orders are directed at parties.

(6) Section C6 is a muddle (overcharging) - is this meant to be negotiating an excessively large fee, or charging the client twice for the same work or for work that was not done? It surely needs to be made clear that it is the latter, not the former? Overcharging is an unfortunate word to choose. “Improper conduct relating to fees" would be more appropriate.

(7) Section E1 - poor administration: this deals with changes in the new Code relating to responsibility for the systems and administration in chambers. Anyone may be liable, but blameworthiness depends on degree of involvement and responsibility for the systems. In this light, the comment that "fines for heads of chambers would not normally be appropriate given the collective nature of chambers" looks very odd. It should be heads of chambers, or heads of management committee, etc, who have the primary responsibility for the systems, albeit that all barristers in chambers are to a degree responsible for the way that chambers operate.

(7) The Guidance fails to deal with a matter that is of some importance, as a change in the Code, namely the obligation of a barrister to blow the whistle on himself, where he has committed any breach of the Code, or on another barrister who has committed a breach. Given that this is one of the main changes in the new Code, there ought to be some guidance on how to approach sentencing.