

REGULATION OF BARRISTERS IN CHAMBERS: THE BAR STANDARDS BOARD'S RESPONSE TO CONSULTATIONS

Introduction

1. In October 2023 the Bar Standards Board initiated a second round of consultation¹ on how, as the regulator, we should set out and clarify expectations of chambers. The Bar Standards Board received 22 written responses to the consultation and also engaged directly with barristers, clerks and practice managers at eight roundtables held across England and Wales. The consultation responses are summarised in the document at annex A. The Bar Standards Board is very grateful to everyone who took part. This document sets out the Bar Standards Board's decisions in the light of the consultations.

Summary

2. Our consultations have underlined the important role which chambers can play in fulfilling many of the regulatory objectives which the Bar Standards Board must promote in taking forward our functions. While barristers acting in their own capacity can have a limited impact beyond their own individual practice on standards, equality, access and a range of other important objectives, barristers acting collectively as members of chambers can make an important difference. Accordingly, the Bar Standards Board will continue to regulate aspects of barristers' practice management where it is proportionate to do so in the public interest.
3. Many chambers are already effective forces for high standards, for diversity and inclusion and for service to consumers. The aim of this initiative is to support all chambers in emulating best practice and to do so, not by adding to regulation, but by making it easier to comply with existing regulations. Accordingly, the Bar Standards Board has decided to:
 - i. bring together and clarify regulatory requirements of barristers' practice management in chambers in a dedicated section of the BSB website with links to good practice guidance on the Bar Council and other relevant sites;
 - ii. frame rules bearing on practice management primarily in terms of outcomes to give chambers freedom to pursue those outcomes in ways which are sensitive to their own circumstances, but, as we have proposed with the *Equality Rules*, mandate policies or other interventions where we judge these essential to the achievement of the outcomes we seek;

¹ <https://www.barstandardsboard.org.uk/resources/press-releases/the-bar-standards-board-issues-a-consultation-on-the-regulation-of-barristers-in-chambers.html>

- iii. encourage chambers, particularly small and medium chambers, lacking significant administrative support to draw on the guidance and good practice available within the profession and to collaborate with other chambers where they can do so without detriment to competition in the provision of barristers' services;
- iv. develop an approach to supervision by the Bar Standards Board which aims to facilitate compliance with our requirements, but does not rule out enforcement action in cases of persistent non-compliance;
- v. propose a revision of our current definition of what constitutes a chambers to reflect current working practices and constitutional arrangements, but to give chambers discretion over their own internal governance arrangements provided those arrangements enable effective leadership and oversight in the areas covered by our regulations.

Background: the importance of chambers and our powers

4. We set out in our October 2023 Consultation Document why chambers have an important role to play in ensuring that the Bar as a profession meets consumers' needs and supports the rule of law. We said that:

Through their governance arrangements and the services they provide, chambers gain regular insights into standards of work; they directly influence equality and inclusion within the profession through their recruitment decisions and through the allocation of work; they facilitate access to barristers' services; they often (though not always) set chambers-wide standards to ensure compliance with anti-money laundering and sanctions requirements.

5. The responses to our consultation and the discussions we have held in all the Circuits strongly endorse the important role of chambers.

6. It follows that, as the regulator of the profession, the Bar Standards Board is bound to take an interest in how effectively chambers discharge their functions. We also set out the legal basis for this interest in our Consultation Document. We said that:

Under the Legal Services Act 2007, the Bar Standards Board exercises the regulatory functions previously exercised by, and delegated to it, by the Bar Council. In exercising its regulatory functions, the Bar Standards Board must have regard to the regulatory objectives² set out in section 1 of the Act. These objectives go to the public interest and embrace not only the independence, strength and diversity of the profession, but also the interests of consumers and the promotion of competition and access to justice. For its part, the Bar Council retains its representative functions on behalf of the profession and, in that capacity, also publishes much useful guidance to barristers and to chambers. The respective interests of the Bar Standards Board, as regulator,

² Legal Services Act 2007, available at <https://www.legislation.gov.uk/ukpga/2007/29/contents>

and of the Bar Council, as representative body, will often overlap, although we seek to avoid unnecessary duplication of activity where we share a common analysis and objectives.

The Bar Standards Board, in exercising its regulatory functions - defined by s 27(1) of the Legal Services Act 2007 as any functions which it has “under or in relation to its regulatory arrangements, or in connection with the making or alteration of those arrangements” – has elected to make rules which deal with how chambers, as associations of barristers, should operate. This reflects the important role which chambers play. These rules are generally expressed as practice management obligations on individual barristers which those barristers can only meet through their participation in chambers. Our Equality, Public Access and Transparency rules are good examples.

7. We set out below how the Bar Standards Board now intends to approach the regulation of barristers’ practice management in the light of our consultations.

Consolidating and clarifying regulatory expectations and requirements

8. A near universal message of our consultations and roundtables was that chambers would find it helpful to have a consolidated set of regulatory requirements. Accordingly, the Bar Standards Board will establish this Autumn a dedicated section of its website on which we shall set out all the regulatory requirements which bear on barristers’ practice management. This dedicated section will cover:

- **Standards:** the role we expect chambers to play in dealing with complaints, brokering feedback to barristers on their performance and in supporting barristers’ professional development, including Continuing Professional Development.
- **Pupillage:** the requirements we impose on chambers providing pupillage through the provisions of the Authorisation Framework, including in relation to fair recruitment.
- **Equality & inclusion:** the implementation of our Equality Rules³, on which we are currently consulting.
- **Bullying and harassment:** the promotion of a culture in which bullying and harassment are not tolerated and which fosters the reporting of unacceptable behaviour in line with guidance⁴ published by the Bar Standards Board in October 2022.

³ The current Equality Rules can be found here:

<https://www.barstandardsboard.org.uk/uploads/assets/8020c32b-01e7-47ae-9b93675cbffd0fe8/d4187f73-840b-4a9f-9557c2db3e412e03/02020401-BSB-Equality-Rules-Extract-2019-website.pdf>

⁴ Bar Standards Board, Addressing Bullying and Harassment at the Bar Report, available at

<https://www.barstandardsboard.org.uk/uploads/assets/81339cf0-2422-4f74-8535b5e37d988793/7e20e7e9-c55a-4c7d-a3785ecd663d9708/Bullying-and-harassment-report.pdf>

- **Well-being:** safeguarding the well-being of barristers and an inclusive working culture in line with the Bar Standards Board's October 2022 commitment to wellbeing⁵.
 - **Access:** our transparency rules⁶ governing the provision of information to consumers about the cost and nature of the services provided through chambers and any development of those rules we may make in the light of our market study of on-line comparison.
 - **Sanctions and anti-money laundering:** our guidance on good practice – and the division of responsibility between barristers and chambers – in implementing legislation on sanctions and anti-money laundering.
 - **Information security:** our expectations of chambers in managing risks to the security of the personal data held by barristers.
9. Many of those consulted also stated that it would be helpful if the Bar Standards Board website gave direct access to relevant good practice guidance produced by the Bar Council and other professional bodies. We understand the desire for a *one stop shop* approach. However, as the regulator, we cannot endorse guidance produced by other organisations. We shall, however, provide links from these pages to other relevant websites, including the website recently established by the Bar Council to support chambers, and, to the extent possible, will organise our own material so as to facilitate easy read access to the Bar Council site.

Framing regulation: outcomes versus rules

10. Views were more mixed on how the Bar Standards Board should frame its practice management regulations. Larger and better resourced chambers tended to favour an emphasis on outcomes which give discretion to chambers to adopt approaches appropriate to their own circumstances and challenges. Smaller and medium chambers tended to want the certainty that came with precise rules. All would, however, probably agree with the head of chambers at one of our roundtables who stated that the Bar Standards Board should regulate only where it was necessary to the public interest and where the regulation itself was clear and proportionate.
11. We agree. We have, therefore, concluded that our public interest objectives are best fulfilled through a judicious mixture of clear outcomes reinforced, where necessary, with the prescription of rules mandating policies or interventions essential to the delivery of those outcomes. This is, for example, the approach we have taken in consulting on revisions to our *Equality Rules*.
12. By taking this approach, we expect chambers to discuss how the outcomes we seek in the public interest can best be fulfilled in their own circumstances and to

⁵ BSB commitment to wellbeing, available at <https://www.barstandardsboard.org.uk/uploads/assets/2a1fb3c3-5b5e-47ae-9b260f7931146d10/78600755-390f-43f8-b366bcd96a56087a/BSB-commitment-to-wellbeing.pdf>

⁶ Bar Standards Board, Transparency Rules, available at <https://www.barstandardsboard.org.uk/for-barristers/compliance-with-your-obligations/transparency-rules.html>

gather relevant evidence. We recognise that smaller chambers may well wish to draw on examples of model policies or approaches, but would underline that we shall expect to see consideration of the fitness for purpose of such policies for the chambers concerned and appropriate adaptations made to reflect each chambers' unique challenges and governance.

Support for small and medium chambers

13. There are currently close to 400 chambers in existence with more than one barrister. Of these, just under two-thirds have 50 barristers or fewer. Most of these small and medium chambers, though not all, lack significant administrative support. This is, in other words, a very fragmented market with a heavy reliance on the voluntary commitment of barristers themselves for the governance and administration of chambers.
14. We are, nevertheless, clear that our regulations must generally apply to all chambers. This is not least because women barristers and barristers from minoritised backgrounds tend to be more heavily represented in small and medium chambers. However, there will be some specific exceptions. For example, chambers that consist of a sole practitioner cannot sensibly apply rules which require the monitoring of how work is allocated among a number of barristers. Other rules – for example, bearing on the transparency of costs – apply universally, including to sole practitioners.
15. Recognising the lack of critical mass of many chambers, we, therefore, invited views during the course of our consultation on how best to provide support to those chambers lacking professional administrative support. Responses varied widely. Some chambers saw no difficulty with sharing good practice and their own policies and processes with others and commented on the vitality of local support networks. Others were hesitant on grounds of competition about collaborating with other chambers. There was little or no interest in, or enthusiasm for, mergers between chambers as a route to building critical mass.
16. It is not the role of the Bar Standards Board, as regulator, to dictate how barristers in chambers should go about meeting their regulatory obligations (provided they do) and, accordingly, we have come to the conclusion that we should not endorse any particular approach. It may, however, be helpful to state that we do not regard collaboration between chambers in developing policies or administrative practices as intrinsically anti-competitive provided such collaboration does not inhibit competition between self-employed barristers as to the fees they charge, as to the quality of the service they provide and as to the quality of their professional advice. We note, in this context, that barristers are as much in competition with other barristers within chambers as they are with barristers in other chambers.
17. Equally, though we do not intend as a regulator actively to promote mergers between chambers, we do not regard mergers as an inappropriate response to regulatory expectations. It is, of course, for the barristers within a chambers to decide for themselves whether merger would bring benefits for them and for consumers, but merger is a well-established route to critical mass and economy

of scale in other areas of economic activity – subject, of course, to maintaining competition both nationally and regionally. We expect as part of our new strategy to the end of the decade to undertake more research into the market for barristers’ services and the role of chambers in promoting competition.

Supervision by the Bar Standards Board: promoting compliance

18. We shall expect chambers, whatever their size, to meet all our regulatory obligations. Indeed, we already do so for some well-established regulations such as our Transparency Rules and will continue to take enforcement action against chambers which fall short. We do, however, recognise that full compliance with our regulations across the board may take time, especially where we are revising regulation, as with the *Equality Rules*, or developing our view of chambers’ responsibilities as with the handling of complaints and promotion of high standards.
19. It follows that enforcement will not generally be our first response. We shall look to develop a graduated approach to supervision, aiming to work with engaged chambers to foster compliance and only resorting to enforcement where chambers fail to engage constructively or are persistently non-compliant. Where the Bar Standards Board does take enforcement action, the targeting of that action will be determined by the facts of a specific case. We should, for example, take into account the allocation of responsibilities within a chambers and the role played by individual barristers within the framework of the chambers’ governance arrangements.
20. Consistent with this graduated approach, we have decided against an approach based on publicising chambers’ compliance. We judge that naming and shaming chambers which are not fully compliant will work against openness with the regulator and the supportive approach to compliance we want to promote. Equally, we do not favour published kitemarks for the reasons set out in our October consultation document: such schemes – like Barmark – tend to favour well-resourced chambers, to be expensive to administer and to lose momentum over time.
21. We also confirm our decision – widely supported - not to repeat a comprehensive regulatory survey of chambers every five years – known as the *Regulatory Return*. Instead, we shall undertake targeted surveys where this is the most efficient way of gathering necessary information or intelligence.
22. Where we do take enforcement action in response to persistent non-compliance – which may, of course, become public knowledge under our published policy and process – we shall consider carefully whether such action is better taken against all the barristers in a chambers, who share responsibility for its governance, or against barristers in leadership positions who may have a greater share of the responsibility consistent with the governance arrangements in the chambers concerned.

Governance: what is a chambers and how should a chambers be governed?

23. As foreshadowed in our October 2023 consultation document, we think that the definition of a chambers is in need of modernisation to reflect current working practices, particularly the growing reliance on virtual association and governance. There was general agreement with such a change among those responding to the consultation. We accordingly propose to define a chambers as:

any group of barristers who come together under an agreed constitution, company or service agreement to facilitate their practice including informal agreements that place similar expectations on a group's members.

24. We shall consult further on this definition shortly. We shall also consult on the case for establishing a register of chambers to foster accountability and as an aid to consumer choice.
25. Those responding to our consultation also generally agreed with our view that we should not seek to prescribe governance arrangements for chambers or to specify precise leadership roles. We confirm that decision, but shall consult on a requirement that all chambers meeting the definition should have in place published governance arrangements which give assurance of compliance with our practice management regulations and the management of risks to compliance. Such a requirement might provide assurance of robust governance and risk management.

Equality Impact Assessment

26. A separate Equality Impact Assessment is attached at annex B. It sets out our analysis that these regulatory arrangements will support equality and inclusion for barristers' clients and for barristers, pupils, clerks, and practice management staff.

Bar Standards Board
September 2024