

Amendments to the Bar Code of Conduct – Authorisation to Practise

For approval by the Legal Services Board

This application is made in accordance with the requirements set out in the Legal Services Board's Rules for Rule Change applications. The BSB wishes to provide the information below to support its application.

Any queries about this application should be made to:

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1. The proposed alteration

- 1.1 The Bar Standards Board (BSB) has committed itself to reviewing the Code of Conduct of the Bar of England and Wales (the Code). The BSB has split the review of the Code into discrete tranches, with the last consultation reviewing the entirety of the Code being published in January 2011.
- 1.2 This application relates to the new authorisation to practise arrangements which were approved by the Board on **13 July 2011**. These changes arise from the advent of the Legal Services Act 2007 (the 2007 Act) and in particular section 13(2) which requires individuals wishing to provide reserved legal activities to be authorised to do so by the relevant approved regulator.
- 1.3 The BSB formed a Project Board to consider the authorisation to practise arrangements, as well as having an expert working group examine and scrutinise the necessary rule changes. A consultation was also issued in March 2010, with final details being consulted on in the Code Review consultation in January 2011. The BSB has considered the consultation responses in detail and has developed rules and a detailed implementation plan.
- 1.4 The new approach to authorisation will be a more formal process for the annual renewal of practising certificates and the authorisation of barristers to undertake reserved legal activities. During the new process, barristers would be asked to:
 - Verify their current contact details
 - Verify their status and entitlement to exercise reserved legal activities

- Confirm whether they have completed the requisite amount of continuing professional development (CPD)
- Declare that they have obtained and paid for adequate indemnity insurance
- Sign a declaration of truth

2. Details of existing authorisation arrangements

- 2.1 The present practising requirements are detailed in Part II of the current Code. The requirements are largely the same as those proposed for the new authorisation to practise regime, however the BSB's internal arrangements for ensuring compliance with these requirements are not currently linked. For example, barristers can renew their practising certificates without being up to date with their CPD requirements or having paid for professional indemnity insurance cover.
- 2.2 The current Code does contain Practising Certificate Regulations (at annexe D), that allow the Bar Council to refuse to issue practising certificates for failure to comply with the requirements listed above, but this provision has not been enforced since the practising certificate regime was introduced in 2001.
- 2.3 Under the existing regime in order to obtain a practising certificate for the first time or after a break in practice, a barrister must complete a form to demonstrate that they are entitled to practise. Barristers who provide a complete set of information and pay the requisite fee are entitled to a practising certificate. If the information provided is incomplete (or the requisite fee not paid), the Bar Council will not issue a practising certificate.
- 2.4 The process for annual renewal of practising certificates is less formal. Each year, the Bar Council's Records Office sends a notice to all practising barristers reminding them that they need to pay an annual fee to renew their practising certificates. Barristers can renew their practising certificates by paying the requisite fee and there is no obligation to provide evidence of on-going compliance with the practising requirements proposed for the new regime.

Self-employed barristers

- 2.5 Under the existing regime, for self-employed barristers, the practising certificate fee is due on 1 January each year and the previous year's certificate expires on that date. Barristers who continue to practise after 1 January are technically in breach of the Code, but enforcement action is not usually taken immediately. Instead, in cases of late payment a surcharge is added and they are only referred to the Complaints team if the fee is still outstanding by the end of March. The barrister's status on the Bar Council's records continues to be listed as practising, but it is noted the practising certificate fee is outstanding. Similarly the online register (explained further at paragraph 5.1) continues to reflect the barrister is still practising even though they have not paid their fee.

Employed barristers

- 2.6 Under the existing regime for the employed Bar, the practising certificate fee is due by 6 April and the previous practising certificates are valid until that date. If payment is made after 4 May, late-payment surcharges are added to the fee. For historic reasons employed barristers who have not paid the fee by July have their status changed to non-practising and are not referred to the complaints team.

3. Nature and effect of the proposed alterations

- 3.1 The Practising Certificate Rules will replace the Practising Certificate Regulations found at annexe D of the current code. As the new rules are being brought in ahead of the new Code, the Practising Certificate Rules need to be imported into the existing Code in order to bring them into effect for the renewal process next year. Whilst these rules will replace annexe D of the current Code, some minor changes are needed to the rules to ensure compatibility with the current Code. Importing the rules in this way, has also necessitated making some consequential changes to other provisions in the main body of the Code. Alongside this we have also made some amendments to tidy up some old transitional arrangements.
- 3.2 The new regime will put in place a more consistent approach for the self-employed and employed Bar. For example, the BSB will be moving to a common renewal date of 1 April for both the self-employed and employed barristers.
- 3.2 The practising certificate rules are attached at **annex 1**, and amendments to the main Code and transitional arrangements are attached at **annex 2**.

The Practising Certificate Rules

- 3.3 The Practising Certificate Rules set out the eligibility conditions for obtaining a practising certificate, the application process, the authorisations granted by practising certificates and the arrangements for review of contested decisions. The rules will be supplemented by procedures and guidance which are in the process of being developed. A timetable setting out target dates for implementation of procedures and guidance is set out at **annex 3**.
- 3.4 In essence, the new rules and regime will require barristers when applying for a practising certificate to provide or confirm certain basic information about themselves and their practice, to confirm that they are covered by insurance, to state whether they have complied with the CPD rules and to pay the relevant fee. The renewal will be done online and will be quick and easy to complete. It will still be possible for Chambers and large employers to submit a block return.

- 3.5 The Practising Certificate Rules (specifically rule 20) will authorise every barrister who has a practising certificate to carry on reserved instrument and probate activities, the administration of oaths, as well as rights of audience which are automatically granted to all barristers who have been issued with a full practising certificate (further detail of the different types of practising certificate is provided below). Rights in relation to litigation are explained at rule 19 of the Practising Certificate Rules.
- 3.6 The BSB will seek to ensure that barristers have the appropriate skills and training in place to conduct the reserved legal activities they have been authorised to undertake by the BSB, by verifying that barristers are up to date with their CPD requirements and the CPD they do undertake is relevant to the area in which they practise. In fact the new regime should provide a more efficient way of checking barristers have complied with the relevant CPD requirements.
- 3.7 The practising certificate will run for a period of 13 months from 1 April every year, for both the employed and self-employed Bar. The BSB will have an additional month's 'grace' period at the end of the 12 month cycle to accommodate both the Records Office administrative process as well as to ensure all Barristers have the opportunity to arrange payment. Subject to approval by the Finance and Audit Committee, a surcharge will be payable by any barrister who has not paid the fee by the due date, 1 April. Any barrister who is believed to be practising and who has not renewed his or her practising certificate by 1 May each year will be referred to the Professional Conduct Committee in early May for consideration of what action to take. Action could include reporting the barrister to the police and/or taking disciplinary action. Any barrister who has failed to comply with the authorisation process and make payment will not be included in the online Register.
- 3.8 The Bar Council, as the Approved Regulator, will continue to set the fees and the Schedule of Practising Certificate Fees issued by the Bar Council will reflect this. The relevant provisions are in the current Code in the Practising Certificate Regulations, but have not been reproduced in the new rules.

Main changes introduced by the rules

- 3.9 The practising certificate rules will allow for the following 5 different types of practising certificates:
- A full practising certificate for barristers who have satisfactorily completed (or have been exempted from the requirement to complete): 12 months of pupillage; or on 30 July 2000, were entitled to exercise full rights of audience by reason of being a barrister; or who were called before 1 January 2002 and have been granted full rights of audience following an application under the transitional provisions in rule 1102;

- A provisional practising certificate for pupils who have satisfactorily completed (or have been exempted from the requirement to complete) the non-practising period of 6 months pupillage;
- A limited practising certificate for barristers called to the Bar before 1 January 2002 who have no or limited rights of audience;
- A registered European lawyer's practising certificate if you are a registered European lawyer; or
- A temporary practising certificate where an application for review has been made

3.10 **Annex 4** maps out the process that all the different categories of barristers will have to go through, when completing the online renewal process. This demonstrates how the rules would work in practise. Further explanation has been provided below as to how limited and temporary practising certificates would work.

Limited Practising Certificates

3.11 A limited practising certificate will in all cases apply to a barrister in employment, providing legal services to their employer only. The Practising Certificate Rules however, allow barristers with limited practising certificates to continue to exercise any rights of audience which they were entitled to exercise under the transitional provisions of the current Code. Changes have been made to the rules in relation to a category of barristers called before 2000 who will have full rights of audience but under the rules would only have been entitled to a limited practising certificate. Amendments to rule 3.1 will allow this category of barristers to obtain a full practising certificate. Those with no or limited rights of audience will be entitled only to a limited practising certificate. The certificate itself will not be entitled "limited" so as to not prejudice employment opportunities, however the certificate and the barrister's register will list the rights which the holder may exercise.

Temporary practising certificates

3.12 Under rule 28, a barrister can apply for a temporary practising certificate when they have asked for a review as to why their application for a practising certificate or amendment to their certificate has been refused. The temporary certificate would cover the period until the review was determined. Guidance will set out the criteria for issuing temporary practising certificates, however the BSB considers such certificates would only be issued where it would be in the public interest to do so (for example in those cases where a barrister who suddenly has no practising certificate would leave a client unrepresented) and only in cases of renewal, rather than first time applications. As can be seen from annex 3 the BSB expects approval of this guidance to take place by the end of 2011.

Amendments to the main body of the Code

- 3.13 The majority of changes made to the Code are consequential; however one significant change is the insertion of a new paragraph 202A. This paragraph prohibits a barrister from carrying on any reserved legal activity unless he is authorised to do so by a practising certificate issued pursuant to the Practising Certificate Rules. This reflects the requirements in section 13(2) of the 2007 Act.
- 3.14 There is one other group of substantive changes. Paragraph 206 has been amended to incorporate a cut off date for barristers called before July 2000. The amendment will require barristers registered under rule 206 to notify the BSB if they wish to be allowed to hold themselves out as a barrister, even though they have not completed pupillage. Barristers who have so notified the BSB will need to provide an annual update so the BSB has the relevant contact details. Failure to provide an annual notification (for which the BSB will issue reminders) will result in the loss of this privilege. The proposed cut off date is 31 March 2012, to allow the BSB enough time to issue publicity about these changes. A similar cut off date is proposed for applications under the old transitional rules 1102 and 1104.
- 3.15 Rules 1105 and 1106 are transitional provisions which have become spent, and so the BSB would like to delete them. Other amendments to the Code are minor and consequential.

4. Why we wish to make the alterations

- 4.1 The BSB believes that the existing approach is no longer appropriate in light of the changes introduced by the 2007 Act. It is in the public interest that the BSB develop a robust regime for granting and renewing barristers' permission to practise. This will ensure that barristers meet the basic requirements before being permitted to practise.
- 4.2 The existing arrangements present a risk to users of legal services in that they have no means to check whether the barrister they instruct has complied with all the necessary practising requirements. It also creates an excessively burdensome process for members of the Bar. It is important that members of the public are able to look barristers up on the online register and feel confident that those barristers are currently permitted to practise by their regulator.
- 4.3 The proposed code amendments facilitate and promote the regulatory objectives enshrined in the 2007 Act. See section 5 below.

5. The regulatory objectives

In its strategic plan for 2007-2009 the BSB committed itself to reviewing the Code of Conduct. The aim of the review is to ensure that rules governing barristers are fit for purpose and meet the BSB's overriding strategic objectives.

Protecting and promoting the public interest

5.1 Safeguarding the public interest has been one of the primary concerns of the BSB as it seeks to facilitate the objectives of the 2007 Act. Promoting the public interest is one of the key drivers behind the new authorisation to practise regime. The BSB previously concluded in August 2007, that there was a clear need to provide the public with information about who is and is not permitted to practise as a barrister and to this end an online register has been developed. The register already provides basic information about barristers who are permitted to practise including:

- full name
- status (i.e. self-employed or employed)
- date of Call to the Bar
- practising address
- whether the barrister is a pupil supervisor
- whether the barrister undertakes Public Access work, and
- publishable disciplinary findings

5.2 Once the regime has been implemented the register will provide further clarity for the public and other users of barrister's services as it will also contain more detail on individual barrister's practising entitlements.

5.3 The current arrangements provide no link between authorisation and practising certificates. The new regime represents a shift towards a more explicit and robust regime that grants barristers authorisation to practise and provides for clear, effective and streamlined administration for barristers and the BSB. The BSB hopes that the regime will increase the confidence of those who use barrister's services as well as making it easier and more straightforward for barristers to comply with the requirements.

Supporting the constitutional principles of the rule of law

5.4 The proposed Code amendments do not have any adverse impact on this regulatory objective. Both the new Practising Certificate Rules and the main Code amendments seek to maintain the high standards of professional conduct traditionally associated with the Bar which seek to protect and support the constitutional principles of the rule of law.

Improving access to justice

- 5.5 When developing any new rules concerned with the provision of legal services, the BSB has at the centre of its focus the need to ensure those services are as accessible as possible – improving access to justice.
- 5.6 The proposed amendments provide a clearer framework for authorising the provision of legal services by barristers (reserved and unreserved). They will help to ensure that barristers, and those who use their services, know where they stand in terms of what activities they are authorised to carry out.
- 5.7 The link to the BSB’s publicly available online register of practising barristers will provide an easily accessible resource for those seeking legal services. For example, the use of the term ‘unregistered barrister’ refers directly to exclusion from the Register, helping to clarify barristers’ professional standing and the services they can offer. Similarly, the review of the rules and guidance around unregistered barristers is intended to make it easier for people to access the services they provide, whilst being clear about what regulatory protections are in place.

Protecting and promoting the interests of consumers

- 5.8 The BSB considers that the amendments and new regime will provide greater transparency which will be beneficial to consumers and procurers. The BSB has taken a decision that failure to renew a practising certificate should constitute misconduct. Having a current practising certificate is a fundamental safeguard for the public and consumer interest. Temporary practising certificates are being specifically introduced, in the interests of consumers, so clients will not be left unrepresented if there are problems with a barrister’s renewal.

Promoting competition in the provision of services

- 5.9 The BSB considers that the implementation of the above amendments will not have any adverse effects on promoting competition in the provision of services.

Encouraging an independent, strong, diverse and effective legal profession

- 5.10 Linking authorisation to the renewal process will encourage an independent, strong and effective legal profession. The process will ensure that barristers have complied with all the necessary practising requirements before being authorised to practise by the BSB.
- 5.11 The effectiveness of the barrister’s profession as a whole is dependent on having in place an efficient mechanism for determining professional status and authorisation to practise – i.e. who is, and who is not, a practising barrister. Authorising the provision of reserved legal activities in a logical, consistent and fair way is central to this objective.

- 5.12 Two equality impact assessments have been completed to assess any impacts on diversity as well as other protected characteristics under the Equality Act. The first EIA examines the potential impact of the Practising Certificate Rules generally and is attached at **annex 5**. The second EIA focuses specifically on the equality impacts of moving to an online system for renewals and this is attached at **annex 6**.

Increasing public understanding of the citizen's legal rights and duties

- 5.13 Section 13(2) of the 2007 Act places a specific requirement on individuals wishing to provide reserved legal activities to be authorised to do so by the relevant approved regulator. Importing this requirement into the Code of Conduct, as well as listing barrister's rights on the online register should assist users in understanding what their barrister can and cannot do.

Promoting and maintaining adherence to the professional principles

- 5.14 The proposed new rules and Code amendments intend to enhance rather than erode the high standards of professional conduct associated with the Bar. The new regime will act as a safeguard to ensure only those barristers who have complied with all the necessary practising requirements in the Code, are authorised by the BSB to provide legal services.

6. The better regulation principles

Transparency

- 6.1 A consultation paper was issued on the new authorisation to practise regime, before the proposals were fully developed. The Practising Certificate Rules were also consulted on as part of the main Code Review consultation, allowing stakeholders the opportunity to put forward their views on the new arrangements on two separate occasions.
- 6.2 A communications plan is being developed to ensure there is publicity around the new regime and requirements, as well as notifying the profession of the cut-off dates for the old transitional provisions. The BSB will be communicating with the profession before, during and after the launch of the new regime.

Accountability

- 6.3 As the regulator for the Bar, the BSB is accountable for any changes that are made and is also accountable in ensuring barristers are properly authorised to provide reserved legal services. The BSB envisages that the new rules will assist in determining whether individual barristers have complied with all the necessary practising requirements.

Proportionality

6.4 The BSB carefully considered all of the options for achieving policy objectives before developing the attached rules and Code amendments. The BSB also considered the practical implications the new regime will have on the profession. The BSB wishes to ensure that the procedures it puts in place keep to a minimum the administrative burden on individual practitioners or chambers. Whilst the BSB believes it is in the public interest that individual barristers should take responsibility for their own annual renewal of authorisation to practise, the necessary delegation of administrative tasks and allowing block returns and payment by Chambers will still be permissible, however the individual barrister will still have overall responsibility for the return. The BSB considers the new regime is a proportionate reflection of the requirements set out in the 2007 Act.

Consistency

6.5 The BSB considers that the proposals will align our processes more consistently with that of other approved regulators in respect of authorisation. The new regime compared to the current position will also be more consistent with the requirements set out in the 2007 Act.

Targeting

6.6 The new rules and regime will be systematically reviewed to ensure they are working effectively and also as a means to identify any issues that may arise.

7. Desired outcome

7.1 The desired outcome is for the BSB to have in place a more strengthened approach to the practising certificate renewal process which is more directly linked to compliance with the criteria that must be met in order to practise as a barrister.

7.2 The BSB is always seeking ways in which to improve and provide for better regulatory practice. It is hoped that the proposals will enhance the current arrangements and provide for greater clarity for both the Bar and for users of their services on what is meant by 'practising as a barrister.'

8. Other regulators

8.1 All of the other approved regulators were invited to provide comments on the 2 consultation papers. The responses that we received from other regulators have been carefully considered and taken into account in the final version of the rules.

9. Date of implementation

- 9.1 The BSB would like to have the rules in place for the next round of renewals on 1 April 2012. A commencement resolution is attached at **annex 7**.

10. Consultation processes undertaken

- 10.1 The BSB issued a consultation paper on the development of authorisation to practise arrangements in 2010. The Practising Certificate Rules were consulted on as part of the Code Review consultation which was issued in January 2011 and closed in April 2011.
- 10.2 A report on the Code Review is in the process of being prepared and will be published later this year. Very few comments were received in relation to the authorisation to practise regime, so there have not been any amendments to the rules as a result of this process. There was still some contention surrounding the linking of CPD to the authorisation process.
- 10.3 The rules give the BSB discretion not to renew a barrister's practising certificate if he has not complied with the relevant CPD requirements. There was a mixed reaction to this proposal and concern about how it would work in practice. Further work will be done on this as part of the CPD review which was recently published. The Board has agreed in the meantime, that the BSB will not use its discretion to refuse to renew a practising certificate on these grounds. Instead it will require barristers to state in their applications for renewal whether or not they have complied with the CPD requirements and to explain the reasons for any failure. This will help to underline the importance of CPD compliance. Any disclosed failure will be followed up in the current way i.e. through the own motion complaints process, but in the meantime the barrister's practising certificate will be renewed.
- 10.4 The consultation paper and response for the authorisation to practise regime are published on our website. The Code Review consultation is also published on the website and the report will follow later this year.

[First consultation paper](#)

[Development of authorisation to practise arrangements: Covering letter](#)

[Development of authorisation to practise arrangements: Consultation paper](#)

[Final Report](#)

[Second consultation paper](#)

[Code of Conduct for the Bar](#)

11. Other explanatory material

11.2 The Board considered recommendations of the Practising Rules Working Group on authorisation to practise, following the first consultation in November 2010.

Minutes of that Board meeting can be found at [Minutes 18/11/10](#).