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Taming the kangaroo: the collapse of due process within the Bar's disciplinary system

By *Marc Beaumont*

Things are not always what they seem. The Bar, above all professions, could be expected to operate scrupulously fair disciplinary procedures. But does it ?

In this article, I address the following questions:

1. Does the Bar's procedure of investigation of complaints represent best practice ?
2. Is the process of deciding whether or not to prefer charges, a transparently fair one ?
3. To what extent should the BSB be able to prefer generic charges of discreditability ?
4. Is there a proper system of disclosure after charge ?
5. Are disciplinary panel members being properly appointed ?
6. Is there a sufficiently complete separation between prosecutor and decision-maker ?
7. Are appeal panels properly appointed ?

1 Does the Bar's procedure of investigation of complaints represent best practice ?

Under the Complaints Rules, a Barrister subject to a complaint has to be given the opportunity to respond to it. Invariably, these responses are carefully drafted and represent many hours of anxious consideration. The Barrister's response is sent to a single member of the Professional Conduct Committee of the BSB ("PCC"). He or she is called a "sponsor". The sponsor may well be a Barrister, or in some cases, a lay member of the PCC with no legal qualifications whatsoever.

The sponsor produces a report. It contains a description of the complaint, the Barrister's response to it, some analysis and a recommendation. That sponsor report is then copied to each member of the division of the PCC that will consider whether the Barrister should be charged. That is a group of some 25 people. These people meet. But (apart from the sponsor member) they are never actually given, or read, the Barrister's formal response to the complaint.

The system in this way plays fast and loose. It relies heavily on the sponsor report accurately summarising the Barrister's response to the complaint. But it cannot be right that the tenor, style and feel of the Barrister's own response is withheld from the PCC members.

Moreover, I have seen a number of examples of sponsor reports that are misleading and incomplete or even trivialising, sarcastic and, in one case, thoroughly offensive. And the reports remain secret. They are not shown to the accused Barrister before the committee sees them, and invariably they are not disclosed at all.

Most Barristers and their advisers do not know that such reports even exist and naturally, but wrongly, assume that their full response is read by each of the 25 or so decision-makers. The BSB asserted in one case that it is regarded as an inconvenience for the decision-makers to read the Barrister's defence in his own words and, indeed, for the BSB to photocopy the document 25 times.

So there is no opportunity for any inaccurate or incomplete summary of the accused Barrister's response to be corrected before the full PCC makes a decision about whether to charge on the basis of such sponsor report. Contrast this with the full transparency of a Forensic Investigation report in SRA prosecutions. Here, the SRA's system is plainly more sophisticated than the Bar's

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One might at least expect the sponsor report to be disclosed in full before trial. But this does not happen. Such a report is not volunteered by the BSB unless the Defendant Barrister requests it, which presupposes that the Barrister knows about a report the existence of which is not mentioned in the Complaints Rules and is often kept secret.

If the sponsor report is requested by the defence, the BSB will generally redact out large swathes of the narrative. The BSB does not generally wish the analysis or recommendation sections of the sponsor report to be seen by the defence or even by the tribunal. The BSB will even withhold the sponsor report from a High Court Judge hearing an application for its disclosure. In 2 recent cases, Counsel for the BSB subtly misrepresented the contents of the sponsor report by asserting that the contents were innocuous or irrelevant, when later it was revealed that they were far from immaterial.

Plainly, there has to be some public interest justification for such secrecy, but there is none. This was a test propounded by a High Court Judge in one recent case and it is surely correct. Where the BSB cannot explain why in the instant case it is in the public interest for the redacted parts of the sponsor report to be withheld, then they will have to be disclosed. Interestingly, this is also the test for disclosure of forensic investigation reports in rule 6(7) of the *SRA (Disciplinary Procedure) Rules* 2010. Once again, the Solicitors have got it right and the Bar is embarrassingly wrong.

This is all a far cry from the recommendation of the BSB's own Complaints Commissioner, Mr Behrens, in his 2007 report, *A Strategic Review of Complaints and Disciplinary Processes,* that there be full disclosure of sponsor reports, just as it is a contradiction of the BSB's statutory duty of transparency as written into its Constitution.

It is manifestly time for a rule change providing for complete disclosure of the sponsor report to the Barrister, before the PCC meets, so that it can consider the decision to prosecute based on agreed documents.

2. Is the process of deciding whether or not to prefer charges, a transparently fair one ?

It is interesting to note that the deliberations of every Bar Council Committee are painstakingly minuted. By contrast, the practice of the PCC is not to minute its meetings at all. This is so out of kilter with the Bar Council's *own* practice (let alone *good* practice) as to call for some explanation. It is also a contradiction of Mr Behrens' recommendation as to minuting in his 2007 report.

There is no evidence that there has ever been any formal BSB Board resolution for the PCC to operate in secret session as a matter of course.

However, the basis of the PCC's decision in each case is presumably noted down by the case officer who then writes to the parties. How does he or she do this if not from his or her note of the PCC meeting ? If so, why are such notes not produced when asked for and why is it always asserted that no Minutes of the PCC meeting in question were ever taken ?

As Mr Behrens recommended in 2007, all PCC meetings, which invariably concern a critical decision in the professional life of a Barrister, should be minuted. The minutes should be disclosed as a matter of course.

3. To what extent is the BSB able to prefer generic charges of discreditability ?

The Code of Conduct provides:

"301. A barrister.... must not: (a) engage in conduct whether in pursuit of his profession or otherwise which is: (i) dishonest or otherwise discreditable to a barrister..."

The practice of the PCC has for several years been to apply a broad test of"discreditability" to the conduct of Barristers in all sorts of contexts. No doubt, this has been a handy umbrella under which the BSB has been able to condemn as professional misconduct a range of perceived infractions that might not otherwise have engaged any more specific provision of the Code of Conduct.

Does this word mean "bad," or does it mean something else ? The BSB has for some while acted as if it assumes that "discreditable" just means, bad.

Earlier this year in *BSB* v *Sivanandan* [2012] 30thJanuary, Mr John Hendy QC, chairing a disciplinary tribunal, rather courageously held:

"*The juxtaposition of dishonesty and discreditableness is, in our view, significant. We do not think that the word discreditable has to be construed, as the lawyers would say, ejusdem generis, but we do think that the gravity of the conduct takes colour from the fact that the first description of the untoward conduct is dishonest.....anything short of serious professional misconduct is not intended to be within the description of discreditable."*

It follows that the BSB must therefore now cease using "discreditability" as if it sweeps up any and every conceivable form of Code violation, however trivial.

There is also the issue of publicity about the *Sivanandan*decision, as it is an example of the need for an online registry of such decisions of tribunals and of the Visitors. I have lobbied the BSB in this regard, who are considering my suggestion.

Will the BSB consign the *Sivanandan*decision to unreported oblivion ? Only time will tell. Plainly, COIC and the Visitors should publish an online registry of all decisions, whether or not adverse to the BSB.

4. Is there a proper system of disclosure after charge ?

One would expect the BSB to discharge the prosecutor's continuing duty of disclosure, not least as most of its prosecutors are criminal lawyers.

In *Veen v BSB* [2011] 27th October, the BSB failed to disclose a file note that discredited an important witness, only doing so after the trial. Thirlwall J. stated:

"No reason was given by the BSB for the failure to disclose the file notes at the proper time. They plainly should have been disclosed before the hearing before the tribunal. The BSB must ensure that it complies with its disclosure obligations in all cases. They are responsible for the regulation of professionals who are entitled to expect, and indeed demand, that it conducts its own affairs with proper regard for the rules. That failure was unimpressive and unacceptable. It should not be repeated."

Despite this scathing criticism, the BSB still refuses to disclose sponsor reports, or does so, but redacts out the sponsor's analysis and/or his recommendation. And the BSB still refuses to disclose PCC Minutes. The BSB's idea of its duty to make disclosure seems off-beam.

It is submitted to be time for the *Disciplinary Tribunals Regulations* to spell out a clear and unqualified duty to disclose all unused material. Apart from anything else, this would rid the BSB itself of lengthy and costly interlocutory disputes

5. Are disciplinary panel members being properly appointed ?

In November of 2011, a formal enquiry was set up by COIC under the Chairmanship of the highly respected Desmond Browne QC, in order to investigate issues of the time expiry of lay and Barrister panel members.

The upshot is that several dozen Barrister and panel members sat in recent years when their original period of tenure had expired without renewal.

It has been stated in the legal press that as many as 500 or more trials resulting in conviction may have been presided over by panellists who were not entitled to sit at all.

The BSB argues that these panel members had *de facto* authority. They liken time-expired panel members to the common law concept of a *de facto* judge – that is, someone without *de jure* authority who, it is said, gains that authority from sitting in such capacity. One response is that the *de facto* judge principle does not apply to a domestic tribunal. There is indeed no case in which this doctrine has been applied to a disciplinary tribunal. As is now well known, a test case is to be argued out on 29th June 2012 before the Visitors.

But this is not all. Since the decision in *Re P a Barrister* in 2005, when the Visitors held that serving PCC members should not sit on appeal panels, there has been an express rule providing that disciplinary tribunals shall not contain Barristers who are Bar Council or BSB members or members of Bar Council or BSB committees. This is to ensure a proper separation between prosecution and decision-maker. It has been discovered that an as yet undisclosed number of panellists have been sitting in breach of this rule.

6. Is there a sufficiently complete separation between prosecutor and decision-maker ?

In 2006, COIC established something that most Barristers will never have heard about. It is called TAB – the tribunal appointments body. It has its own terms of reference, which appear never to have been published. Its make-up until early 2012 was a senior Judge, 2 Barristers and a lay member. It appears that their names were never published. The TAB's job was to appoint or re-appoint panel members and to review their tenure on an annual basis.

However, it has now been discovered that one of the 4 TAB members was simultaneously a serving member of the BSB's complaints committee. It appears that the prosecuting authority has in this manner over some 6 years since 2006 been responsible for appointing or annually reviewing the appointment of the disciplinary tribunal decision-makers.

It is remarkable that this happened in the immediate aftermath of *Re P.* It appears that at almost the same time as the *Disciplinary Tribunal Regulations* were being re-written as a result of *Re P* to exclude Bar Council and BSB members and committee members from tribunals, the BSB placed one of its Complaints Committee members, who would have been banned from being on a tribunal or appeal panel, on the over-arching appointments body.

It is also the case that the BSB is formally a member of COIC and Baroness Deech sits on COIC. It is surely wrong in principle that the deliberations of the tribunal's governing council involve the prosecuting authority at all. According to COIC's Constitution, Baroness Deech is not entitled to vote on COIC. The obvious good sense behind that fetter would appear equally to disqualify her from engaging in any debate before COIC. As one Barrister asks:

"Is it reasonable to expect Barristers to tolerate hearings, and trials, in front of tribunals appointed by the prosecutor, under the guise of an organisation of which the prosecutor turns out to be a member ?"

The notion of a proper separation between the prosecuting body and the decision-maker enshrined in the common law as well as under Article 6, is now a European norm, as the *Bordeaux Declaration*emphatically exemplifies.

In the case of the Bar, there are all sorts of unique reasons why there ought to be a careful separation between prosecution and judge:

(i) It is a small profession where the risk of undue influence is that much greater;

(ii) The need for such separation between prosecution and "judge" is underlined in the case of the legal professions by *R* (*Kaur) v ILEX* [2011] EWCA Civ 1168. In that case, it was held that officers (including the Vice President) of the ILEX Council, which was the prosecuting regulator, could not lawfully sit on disciplinary tribunals;

(iii) As is now known, the Bar Council, the prosecuting authority, pays the fees and expenses of the lay members of the panels and provides them with guidance materials;

(iv) The conviction rates at disciplinary tribunals are very high.

It is the current judicial view that the fair minded and informed observer may not really have much complaint about a system in which the lay "judges" are paid fees and expenses by the prosecution. But this view might well be less sanguine if it were informed with knowledge that as well as being paid by the BSB's parent body, the Bar Council, those lay members are in part *selected by* the BSB, and that these bodies are in fact constitutionally part of COIC and are permitted to assist in the direction and management of its business.

It is suggested that if the Bar's disciplinary tribunals are to have any credibility and are to avoid being dubbed kangaroo courts, then the influence of the BSB and the Bar Council must be removed from TAB in particular and from COIC in general.

So on the 4 grounds of time expiry, Bar Council Committee membership, the endemic defect in the TAB, and the unlawful role of the BSB on COIC itself, it is fair to say that the Bar's system is not in good shape – and that is probably an understatement.

7. Are appeal panels properly appointed ?

Appeals are heard by a Judge, a Barrister and a lay person. Under a Memorandum of Understanding of 2010 between COIC and the BSB, (hitherto a secret document), COIC appoints the Barrister and lay Visitor members from *its* pool. So there will have been numerous past Visitor panels containing time-expired and/or conflicted and/or BSB-appointed, Barrister and lay members.

There is a yet further problem. It appears that the Judges as the Visitors to the Inns of Court have acted *ultra vire*s in purporting to appoint wingmen to Visitors panels at all. The Judges have never had the power to create non-Judge Visitors. This argument will shortly fall for judicial determination. If it be correct, one has to ponder the validity of scores of past failed appeals.

Conclusion

The Bar's disciplinary system is in need of another overhaul and very possibly, an overhaul conducted by an outside body such as the LSB. The sponsor system is defective because it empowers one person to influence the thinking of an entire committee with a document that is not routinely disclosed and is not checked for accuracy before it is relied on in what might be the most significant decision in the life of the subject Barrister. Furthermore, the sponsor report purports to replace the often carefully drafted response of the accused Barrister because the committee members are not given that response to read before they decide to prosecute the Barrister. The committee meetings are un-minuted and thus are held in secret session. The BSB is not making proper disclosure and strict rules as to this need to be codified. A policy of blanket disclosure of all unused material would be welcome.

Whilst a decision taken bravely by Mr Hendy QC is an important check on the BSB placing all manner of allegations under the heading of "discreditability," this decision may well receive little if any publicity. There is no guarantee that the BSB will not carry on as if this decision does not bind them. A registry of all decisions of tribunals and appeal panels needs to be published. And it should be retrospective.

The catastrophic problems of time expiry, conflicts of interest, the unlawfully constituted TAB body, as well as the irregular role of the BSB on COIC, suggest maladministration on a considerable scale. The weighty and expensive bureaucracy of a regulator (the Bar Council), a prosecuting body (BSB), tribunals administered in rotation by the Inns of Court and a super-regulator (LSB), have not prevented a serious failure of process. The success of the LeO scheme and the Bar's inability to self-regulate according to elementary notions of due process, transparency and basic administrative efficiency, coupled with the manifest waste of resources involved in there being 2 regulators, (the BSB and the LSB), all suggest

that the Bar's right to self-regulate might well now fall to be replaced with a statutory tribunal scheme to be staffed and administered from outside of the profession.

Marc Beaumont advises and defends Barristers and Solicitors in disciplinary cases. He was counsel in Kaur v ILEX and represents the Barrister in the forthcoming test case on the time-expiry of disciplinary panel members. Marc invented BCAS and funded Barrister defence. This article is based on a lecture given to the Public Access Bar Association at Middle Temple on 20th June 2012.

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