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When sorrows come.....

Marc Beaumont considers how the Bar's Complaints process might be made more tolerable

"When sorrows come - they come not single spies - but in battalions." Hamlet's Uncle Claudius may have been a psychopathic killer, but he spoke the language of a wise and just monarch. When accusation is heaped on accusation, the world can be a lonely and frightening place. And it is no less so for Barristers.

Few Barristers will confess that they found the Complaints process to be stressful, even traumatic, but rest assured that they did. Of course, standards have to be maintained. But so much is this rather disagreeable experience part and parcel of modern professional life, that aspiring Bar students should be given a health warning.

No-one would argue against a disciplinary process that robustly regulated Barristers who deceive the Court, who cannot draft pleadings or legal argument, or cannot properly cross-examine witnesses. However, whilst the Bar's disciplinary regime processes several hundred complaints every year, only a fraction involve allegations of serious dishonesty or gross incompetence. That is because the majority of Barristers are dedicated, honest and competent - they could scarcely survive for very long in such an unforgiving profession where much of the work is performed publicly, for other professionals and before Judges, if this were not so.

The screening process

But we are all vulnerable to the making of Complaints. And so it is essential that the Bar has a screening process for vexatious complaints. Since the mid-1990s, the Bar has had in place a Complaints Commissioner who exercises this screening function. Michael Scott was a hard act to follow in this respect. His unique mix of humour, proportion and wisdom was perhaps born from having seen men die in the battle for Mount Tumbledown. The

Due Process

Despite the availability of funded defence representation, it is still difficult for the Bar to complain about lack of due process. There is a natural reluctance to threaten the BSB with judicial review if something goes awry. One area of growing controversy is the report of the Sponsor Barrister. Once a complaint is passed by the Commissioner to the Complaints Committee, a single barrister is deputed by that Committee to prepare a report called the Sponsor's report. It is this report and this alone that is read by the Complaints Committee members, some of whom are lay members, and not the original complaint or, apparently, the complained-against Barrister's own response. This means that the Sponsor will summarise what the Barrister had to say in the latter's response.

This would be innocuous were it not for the fact that the Barrister has no opportunity to correct any error in the Sponsor's report or to comment on any inadvertent one-sidedness. The decision-makers make a critical decision about the Complaint on the basis of a single, anonymous Barrister's report, which no-one is able to comment upon before the event, or even to read after the event. This is despite the recommendation of a previous Complaints Commissioner, Mr Robert Behrens, that such reports should be disclosable to the Barrister complained against, which proposal, curiously, the BSB, did adopt, but still does not practise. It is to be hoped that the BSB will resolve this problem without controversy, especially given the fact that Barristers are in law prima facie entitled to the disclosure of such material under the Data Protection Act 1998.

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More generally, the issue is one of

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fulminations of a disgruntled ex-client were viewed against that sobering background. But the broad discretions conferred on the Bar's screener by the Complaints Rules are such that were a hypothetical Commissioner so disposed, (perhaps under political pressure), he or she could stamp an entirely personal approach on the job and allow every complaint, irrespective of its triviality, to proceed to full investigation. And the pressure for some cases to be taken forward could also come from within the BSB: the Complaints Committee is under the rules able to "advise" the Commissioner at every stage and can, in effect, "call in" cases from inception and guide the Commissioner and his or her staff accordingly. Whether this is right or wrong is for others to judge, but if there is over-frequent reliance by a hypothetical Commissioner on Barrister advice from the Complaints Committee, the idea of an independent screener is surely diluted.

Which polluter should pay ?

There seems to be a tendency for allegations by clients to be more extreme than ever before. Couple this tendency with the ease with which a Complaint can be made (on-line) and the absence of any compulsory, pre-complaint protocol or issue fee, and a disgruntled ex-client can launch a pre-emptive attack on a Barrister, without notice, without financial obligation, without fear of an adverse costs order, and due to the defence of qualified privilege, without any personal repercussions at all. It is time to consider if this unqualified freedom is justified. The BSB is an exceedingly well-funded, well-staffed, bureaucratic machine with powers deriving from statute. It is the police force of the Bar. It does not regulate bureaucracies of equivalent financial and administrative power (because in a profession made up of sole practitioners, there aren't any), but individual men and women. When the BSB turns its attention upon an individual barrister, the power imbalance is truly massive. Perhaps this partly accounts for the feelings of helplessness, anguish and even depression, when a white envelope containing a Complaint is removed from a Barrister's pigeon hole.

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The reaction of the Barrister to such an experience is the reaction of an individual to the crushing blow of notice of the start of an investigation by a powerful public body against an individual with no resources other than his or her own personal energy, intelligence, self-esteem and mental strength. In such austere modern

transparency. The confidence of the Bar in the BSB would be enhanced by greater transparency in this respect and generally. It is therefore suggested that the BSB should make a short film of itself at work at: (a) the Commissioner stage, (b) the Complaints Committee stage and (c) the trial stage, so that Barristers have a much clearer idea of what is being done, when it is being done and how it is done. Such a film ought to be freely available on the BSB's website.

A Barristers' Defence body ?

But such issues of due process are too important to be left to single articles written by individual commentators like me. I have always been impressed by the work of the League Managers Association. If a Premier League manager has a problem of a disciplinary nature, the LMA will spring to his defence with a public statement. Why can't the Bar have such a body ? Since the separation of representational and regulatory functions, it ought to be easier for the Bar Council to create a Barristers' Defence Committee to consider issues of policy and practice, (such as the issue above concerning Sponsor Reports). If it does not do so, I would advocate a return to my 1996 model of a Barristers' Defence Association, which would represent all Circuits and SBAs and work with the BSB and BMIF to make the Complaints process more tolerable where this is necessary and to espouse individual cases where one person seems overwhelmed by a Complaint. A BDA, like the LMA, would also be able to counter unfair press, media and internet attention, which is becoming a very serious problem. The first three stated purposes of the LMA are:

1. To represent the interests of the professional football managers to The Football Association, Premier League, Football League and all the game's other governing bodies and stakeholders
2. To promote and publish the views of the professional managers on key issues within the game
3. To protect the rights and privileges of its members

It should not be beyond the Bar to create a Committee or body with a similar mission statement, thus:

1. To represent the interests of self-employed Barristers to the BSB, the LSB and the OLC,
2. To promote and publish the views of Barristers on key issues of regulation and professional practice
- 3 To protect the rights and privileges of its members

Taking "no further action"

At the 2009 Bar Conference, the BSB held a workshop at which it became apparent that there is a serious problem with so-called "NFAs". These are decisions by the BSB Complaints Committee to take "no further action" against individual Barristers. A

conditions, it is submitted that it is time to treat complaint-making not as cost-free pseudo-litigation for malicious people, but to require all Complainants: (a) to serve pre-complaint protocol letters which give the Barrister time to respond and to explore resolution by ADR, without, at that stage, being formally investigated and (b) to pay a modest issue fee. If the notion that "the polluter pays" has merit in the eyes of regulators, the malicious complainant who puts so many people to work only for the Complaint to be dismissed after 6 months, is a polluter. If the Barrister is later convicted, he would have to repay the issue fee. If the prospect of a conviction of the Barrister is fanciful, the malicious complainant would think twice about complaining. And since the Bar is now required to fund the new LSB super-regulator and the OLC, the substantial cost of this process, which is bound to increase year on year, might well be lessened by some issue fee revenue.

Impact assessment

What of the complaints that do, unavoidably, require extensive investigation before they can be dismissed? Here Barristers may wait for 6, 9 or more months for the investigation to be completed. There are many hundreds of such investigations each year. What damage is being done to the Bar's economic output and professional productivity whilst investigations conducted with the gravitas of investigations into large organisations or the policing of organised crime, weigh so heavily on the wilting shoulders of mere individuals? How do self-employed individuals manage to function professionally when, if they stop working, they stop earning? What is the psychological damage being done to hundreds of Barristers each year? This is no idle thought. It has been considered in the medical profession by the Society of Clinical Psychiatrists.

I propose that the Bar Council should commission a psychological impact assessment on the effect of Complaints investigations and hearings over a given period (say 2 years). The purpose of this exercise would be to determine whether certain Barrister behaviour patterns or reactions could be alleviated or mitigated by new measures. For example, if Barristers were to report in a feedback questionnaire, that they found that a period of 6 months to deal with a trivial complaint was too long and too stressful, how might the BSB improve its performance? If Barristers were to report that the screener is allowing trivial matters to proceed, how might that problem be ameliorated? If they were to report that they simply could not work properly, or at all, due to the appalling worry of it all, how might the Bar Council or Chambers do more to support those who are in such a

technical or trivial breach of the Code, without consequence for a client, might, for example, warrant a NFA.

The current rules (Rule 60(c) of the Complaints Rules), provide that in the event of a body such as the Judicial Appointments Commission or Queen's Counsel Appointments, enquiring about a Barrister's record, the BSB will say, where a NFA has been made, only that, "a complaint has been received which has not been dismissed". [it is understood that this is the tense actually used]. This odd practice was regarded by the Bar Conference workshop Chair, Lady Justice Janet Smith and other delegates as being unfair. The JAC or QCA might well be left with the erroneous impression in cases where the Complaints Committee has taken no further action, that such a decision involved some disciplinary or other stigmatising finding, (or even, due to the odd use of tense, that the matter is continuing, when it is not). As one senior junior in the Temple puts it, "the act of providing such information is arguably 'further action,' when the BSB will have resolved to take none."

Given that no Barrister is entitled to make representations where the Complaints Committee has in mind to take no further action, this is another example of unfair process. It is not difficult to envisage how a Barristers Defence Association (or some similar new Committee of the Bar Council), could assist the Bar to achieve an immediate rule change to remove any suspicion that careers on the bench, or in Silk, are being jeopardised by incomplete reports by the BSB about the actual outcome of disciplinary investigations.

Marc Beaumont is an elected member of the Bar Council and specialises in advising and defending Barristers, Solicitors and other professionals against disciplinary and regulatory investigations

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position ? If Barristers were to say that the BSB seems to be allowing its process to be used by money-seekers, as a form of cost-free satellite litigation, how could that problem be addressed ? The BSB itself would win more support from the Bar in recognising that its users are not merely members of the public, but Barristers and that its procedures should not be unnecessarily oppressive. It must be possible to make the process more tolerable.

In this respect, much has improved about the process over the 25 years of my career. But these improvements have largely come from outside the regulatory arm and not from within it. In 1996, I advocated the creation of a "Barristers Defence Association". But the idea became slightly diluted in committee and the proposal yielded the Barristers Complaints Advisory Service (BCAS). This comprises a panel of advisers willing to assist with the defence of complaints. However, the scheme is not enough on its own: the amount of work involved in defending Barristers against often complex matters is such that expecting Barristers to give up time away from their own practices, is not fair to them or to the client-barristers who are entitled to expect as much priority as any other client. This is why I went on to advocate insurance-backed defence and, eventually, the Bar leadership accepted this idea. The upshot is that BMIF now, to its credit, offers such cover as a free add-on to the standard indemnity cover. This is a tremendously important reform for the Bar, but it is notable that it is a reaction to and not a product of the BSB, or of its predecessors, the PCCC and PCC. The BSB could surely, where necessary, itself consider the welfare of the Barristers it regulates, without undermining its *raison d'être*.

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