



**RESPONSE OF THE SOUTH EASTERN CIRCUIT OF THE BAR
TO THE BAR STANDARDS BOARD REVIEW OF
CONTINUING PROFESSIONAL DEVELOPMENT**

An Historical Context:

1. The Bar Standards Board [BSB], as the 'independent' regulatory arm of the Bar Council [BC] is responsible for overseeing and regulating complaints, discipline, ethics and standards and education and training.
2. Under the Courts and Legal Services Act 1990, prior to the establishment of the BSB, these areas were the province of the Bar Council and/or the Inns of Court. Many at the Bar consider that the BSB simply does that which the BC did previously, but at a considerable increase in the cost to the Bar. The continuing flurry of 'consultations' and 'proposals' requiring responses absorbs ever increasing tracts of time of many members of the Bar.
3. There is a growing sense of resentment amongst practitioners that the body created to oversee our essential standards appears to be more interested in form than substance. There has been no public outcry at deficiencies in the provision of legal services by the Bar and no Government assertions of any deficiencies. No evidence or research has been forthcoming to suggest that there is any sort of crisis in confidence in the competence or professionalism of members of the Bar.
4. Those practising in the publicly funded Bar are facing a continuing diminution in their remuneration for the provision of advisory and advocacy work, coupled with increasing workloads imposed by broadening demands of 'case management' and written pleadings. There is already a marked reduction in pupillages being offered in these disciplines and significant numbers of senior practitioners are looking to move their practices away from publicly funded work. A 'brain drain' is already underway. Those who regulate our profession should consider any 'consultations' or 'proposals' in the light of this backdrop.

The Current Position:

5. Section 4 of the Legal Services Act 2007 requires the Legal Services Board through its designated regulators to ensure continued education and training of the members so regulated.
6. In June 2011 the BSB set up a Working Group under the Chairmanship of Derek Wood QC to review the Continuing Professional Development [CPD] regime as part of a commitment to review all stages of the education and training of the Bar.
7. The current requirement for CPD is 12 hours per annum, of which 4 hours must be on accredited courses. The BSB proposal is that the number of required hours should be doubled to 24.

8. At **para 19** of the Overview to the Review, the BSB states that the proposed amendments '*will meet the regulatory objectives set out in the Legal Services Act 2007 in terms of ensuring the protection and promotion of the public interests of the individual consumers of the services delivered*'. However there is no suggestion either therein, or in the Review itself, that the present provisions of CPD do not already meet those objectives or the public interest. We are unaware of any debate within the public arena, or any evidence based research to support the proposition that there is a requirement for any increase in the required CPD hours.
9. The Review is based on a fallacy: the sole basis for the proposed 100% increase in the numbers of CPD hours appears to be as a counterbalance to the proposal to expand the areas of activity that can be considered for the completion of the CPD hours. This has nothing to do with the objectives of the regime.
10. We acknowledge that there is good reason to reduce the administrative cost to the BSB (and thus to the Bar) of checking the returns of the individual members and thus simplifying the reporting system that the required hours have been completed. We support anything that may assist in this objective.

Criticisms of the current requirement?

11. The Working Group refers to these at **paras 83-86**. One of these is said to be that the 12 hour requirement is '*too small*' (drawing comparisons with other professions), and is merely formal. The Working Group comments that the comparison with other professions may not take into account the much wider range of activities that count for CPD.
12. At **Annex 6** the Working Group set out a list of the CPD requirements of other professions. It should be noted that the requirements of the Bar Council of Ireland and the Faculty of Advocates is 10 hours, whilst ICAEW and the GMC has no specific numbers of hours. Added to this list might be:
 - a. Health Professional Council (UK regulator for 15 health professional bodies) does not link CPD to fitness to practice and has no set number of hours;
 - b. Chartered Scientists have no set hours;
 - c. ICAEW, which is listed in Annex 6, requires members to complete such development activity '*as the person feels sufficient to remain competent*', and submit a signed declaration to that effect;
 - d. The General Pharmaceutical Council (regulator for Pharmacists and Pharmacy Technicians) requires members to complete 9 hours per year, 3 of which should be certified.
13. At **para 86**, one of the criticisms is that those practising out of London are at a particular disadvantage.

Particular Responses of Members of the South Eastern Circuit:

14. When this Committee was formed to consider the appropriate response to the consultation, we invited members of the Circuit to send us their views by email. We have received many responses from practitioners, none of which is in favour of any extension to the number of CPD hours.

15. There are many trenchant criticisms of the existing system and a demand that those tasked with the regulation of the Bar should return to common sense and a proper understanding of the amount of “out of hours work” that is already done by the Bar. Examples of the criticisms are set out below:
- a. In order to appear in court or to advise clients, we have to be in touch with current and proposed developments in law and practice. Consequently, we carry out research with great regularity, particularly now with the advantages of online databases. CPD cannot keep anyone up to date by attending courses or by the keeping of logs of private reading. The necessary hours may have been completed by the end of, for example, March but the law on a topic may change or a new statute be passed in April; in such circumstances, the keeping of a record for a couple of months hardly meets the professed aims of CPD;
 - b. Single parents can suffer from the hours already necessary and the difficulties are compounded if such persons live out of a metropolis;
 - c. Preparation for lectures and seminars, plus in many instances travelling some distance to attend activities, can more than treble the time taken to acquire the required number of hours;
 - d. Attending judicial courses often takes 4–15 hours of preparation, none of which is taken into account in the CPD allocated to the actual course;
 - e. The Working Group failed to take into account that members of many of the other professions considered are paid to attend CPD activities. Barristers are not paid, save those attending judicial seminars, albeit at a half rate;
 - f. At a time when pressure on the Publicly Funded Bar is becoming more acute, and fees are being cut by successive Governments, the additional cost of attending further CPD courses is punitive on the self-employed. Many CPD courses require those attending to spend a day doing so: any increase will require practitioners to find further time to accommodate attendance and pay disbursements in order to attend, while at the same time losing the opportunity for earning and/or paying for childcare;
 - g. There is a real sense that only those providing CPD courses stand to benefit from an increase in CPD requirement. The CPD regime has already spawned an industry of CPD providers, with no apparent improvement in the quality of legal provision in the country;
 - h. Presumably the intended effect of undertaking CPD courses is to increase knowledge of law and procedure and to enhance professional skills. Is it suggested that such increase and enhancement have become necessary amongst barristers generally? Is it suggested that the judges are complaining that barristers as a class are becoming more ignorant of the law than they used to be; or that advocacy skills or other professional skills are in decline? Are solicitors (or other professionals) who instruct barristers making such complaints? Do complaints about barristers from lay clients increasingly cite lack of knowledge and skill as grounds of dissatisfaction? (if they do, how often are these grounds made out on investigation?). In the absence of some demonstrable causes for dissatisfaction with the performance of barristers as a class, there is inevitably a suspicion that this proposal amounts to regulation for regulation’s sake;

- i. The proposal will add to the burden of bureaucracy and cost which the Bar as a whole and barristers as individuals have to contend with, as well as Treasurers and members of the Management Committees of Chambers. A few examples of the present regulatory burden are as follows: practitioners at the Publicly Funded Bar are now compelled to gather and prepare increasing numbers of documents for Graduated Fee Payments and for submissions to contract managers in respect of VHCC cases; all practitioners have a growing demand for paperwork as case management becomes increasingly paper driven; Barmark accredited Chambers undertake regular consultation about and formulation of policies, followed by policy audits/reviews and reformulations, the whole set of arrangements being subject to annual audit; regulations require policies to govern complaints by clients, work distribution amongst tenants and pupils, money laundering checks, the acceptance of work on a direct access basis and the reporting of CPD compliance. In all Chambers the compliance burden on practicing members has grown and continues to grow at an unacceptable rate;
- j. One Member wrote thus: *'Standards are maintained by a strong sense of professional identity and esprit de corps. I personally do not think that the original imposition of a CPD requirement was justified. Long before it was imposed [my] experience of attending lectures, conferences and training events put on by the Bar Council, the Inns and the professional associations (ALBA for example) was that practitioners voluntarily attended in large numbers and participated enthusiastically. Perhaps that was because as persons who had chosen a career in the law they were interested in the topics under discussion and believed they would benefit from attending'*;
- k. The Bar will only survive (and will only deserve to survive) if it can continue to attract individuals who are interested in the law and in the practice of law and who will continue to advance their legal educations accordingly. If, as is proposed, it is really necessary to impose a system which requires practitioners to report details of their private legal reading to the authorities (presumably to ensure they are reading enough) then we can only conclude that the profession is not attracting entrants of the required calibre. We do not believe this is the case: our experience is that the quality of entrants to the profession is very high. A profession which has always put a high value on self-reliance and independence is *not* well served by the increasing trend towards minute regulatory supervision. Simply increasing CPD requirements will therefore have no effect on quality. It may also have an undesirable side effect, namely to cause otherwise entirely honest and responsible individuals to undertake 'creative accounting' in order to provide the necessary documentation to demonstrate compliance with a further increase in regulation;
- l. One member stated that the solution is to increase the effectiveness of the system of supervision and discipline of the Bar. He was a member of the BSB (and formerly the PCC) prosecution panel for about seven years: in that time he saw virtually no cases in which demonstrably inadequate, dishonest or disreputable barristers were the subject of the proceedings. Instead, there was a never ending tide of prosecutions for failure to comply with CPD regulations brought against individuals, most of whom were non-compliant due to a combination of personal problems and not because they had ever provided an inadequate service to their clients. Such easy targeting is not what is required of a proper supervising body and adds to the mistrust of practitioners that there is an emphasis on form over substance;

- m. Whenever a new or increased regulatory burden is proposed it is necessary to ask “*to what problem is this proposal said to be a solution?*” Neither the Working Group nor the BSB has given any detailed reasons why it is necessary or desirable to double the CPD requirement.
16. The majority of proceedings before the BSB in respect of CPD breaches appear to be against sole practitioners. There appears to be a case for the provision of better circulation of accredited events. There may also be a case for them to be subjected to closer regulation than those within a Chambers framework.

The Working Group’s reasons for proposing an increase in CPD hours:

17. Part of the answer is found at **Chapter XI paras 118-119**: “*We do not think that 12 hours are now enough*’. There is no material presented to found this view. Moreover the Group then states ‘*and we suspect that the public will not think that 12 hours are enough*’. This type of reasoning is unhelpful to those tasked with responding to it.
18. It appears to us that, in reality, the sole ground put forward by the Working Group for an increase in the number of hours would appear to be that if the areas of activity are to be increased then correspondingly so should the number of hours.
19. We would agree that the areas of activity should be increased to include those set out at **Table 6** and that those at **Table 7** should be excluded. However those areas in Table 6 can be the subjects of self-certification, but such extension of activities does not justify an increase in the number of hours to be completed; rather it extends the content of what may be completed in the 8 hours of unaccredited activity.
20. Reasons for opposing the increase in CPD hours are as follows:
- a. Taking into account the above and in particular the Working Group’s Review, we have looked for the specific evidence whether empirical, statistical or otherwise that founds any suggestion that the current CPD requirement fails to meet the objectives, whether set by statute or the aims of continuing education? We have found none;
 - b. The Working Group has failed to present any evidence to support either its own thoughts or its suspicions about what the public might think. We conclude that its recommendations have no substance and cannot be relied on as a sensible, reasonable or proportionate basis for its conclusions;
 - c. No evidence from the public is presented. We suggest that if the public were made aware of a number of matters then any concerns would be allayed with ease. Amongst such matters are the following:
 - i. The hours now required for both new entrants and established practitioners;
 - ii. The usual amount of reading and research that is carried out by members, both to keep up to date generally and to prepare particular cases;
 - iii. The CPD hours of the faculty of Law, the Irish Bar and the other professions that have no specific number of hours;
 - iv. Many do more hours voluntarily in various areas; indeed those who attend judicial seminars already do significantly more;

- d. The number of hours for solicitors is no justification for an increase in those of the Bar – we are not (yet) a unified profession and complaints against Solicitors are many more numerous than those against the Bar.
21. We acknowledge that the current climate has engendered a shift to the professions having a requirement of CPD, now enforced by statute. This has substantially overlooked the fact that the Bar has seldom been criticised for not keeping up to date and the public does not lack confidence in the profession: quite the contrary - for more decades than most of us have been practising, the Bar has been recognised as one of the best examples of the legal profession in the world. The absence of any contradictory evidence and the conclusion that a failure to comply with CPD requirements does not equate with unfitness to practise contradicts the Working Groups basis for its recommendation that the CPD hours should be doubled to 24.
22. At **para 8** of the Conclusions, the Working Group states that there is good evidence at the Bar that CPD is effective in promoting the purposes that CPD is intended to promote. In other words, compliance with the CPD 12 hours achieves the objects. In these circumstances we fail to understand the need to propose an increase of any size, let alone one of 100%.

The additional areas of activity:

23. **Table 6 para 112** contains the proposed additional qualifying areas of CPD activity. We agree that there is good reason to expand the qualifying areas, however there is no reason why these should not form part of the unaccredited hours under the present regime.
24. Interestingly, the last item in Table 6 is ‘Private Study’; namely ‘*reading by way of private study, law reports, statutes, legal journals or similar materials otherwise than for the purpose of publication or providing legal services to a particular client, viewing or listening to relevant broadcasts having a professional legal content*’. This is an area that the members of the profession have to do, whether on a daily or weekly basis in order to keep up to date with the law. The Working Group recognised this at **para 96**. So, whilst acknowledging that in order to remain up to date we have to undertake very significant hours of legal research, there is a proposal that the number of formal CPD hours should be doubled. We fail to understand this.
25. The Working Group set out the aims and purpose of CPD at **para 71**. In general we do not disagree. However we do not accept that attending CPD events creates a ‘*collegiate ethos*’. The true ethos of the Bar is created and continued through Chambers and in Court Robing rooms, where the sharing of views on cases and laws contributes to the advancement of knowledge and an understanding of our respective positions within the current and historical legal heirarchy.

Should CPD compliance be a requirement for the granting of a Practising Certificate?

26. The Working Group accepts (at **para 151**) that failure to comply with the CPD requirements, whether in whole or in part, does not mean that one is unfit to practise. Consequently, compliance should not be a condition for a Practising Certificate. Any proposal to combine CPD compliance with the granting of a Practising Certificate has no proper foundation.

Monitoring and enforcement:

27. It is agreed that the current regime for monitoring is burdensome and costly. We note that in other professions the preferred method is for the member to keep the required records and submit a declaration of compliance (but not as a pre-condition of obtaining a Practising Certificate), coupled with random monitoring.
28. The cost to the Bar of the BSB and BC is such that any method of reducing costs is to be encouraged.
29. We support the idea of a declaration of compliance with the 12 hour CPD requirement coupled with a percentage of random checks to be carried out by the BSB.
 - a. As no one would know if they were to be part of the random sample, it should encourage the keeping of proper records. In respect of accredited activities, a comparison of the member's log with the activity providers signed logs would verify that part in any event;
 - b. Whilst there would be some burden on members in log keeping, we do not consider that this would be overly burdensome. We are opposed to a system that requires the setting out of annual aims, achievements and effect;
 - c. We do not accept the recommendation at **R16, page 90**, or as set out in the **Draft Handbook** at **para 1.3 page 120-121**: the burden of assessing, planning, implementation and review, in the form of a reflective plan is unnecessary and cumbersome;
 - d. The recommendation at **para 149, page 73**, is not acceptable:
 - i. The responsibility for the regulation and enforcement of the CPD requirement is that of the BSB, not of any individual practitioner;
 - ii. If there is a need for a member's record to be considered after the Compliance Section, then it should be delegated to a practising Member of the BSB and not to Heads of Chambers, QCs, Benchers, Leaders of the Circuit etc. These people have enough to do by virtue of their individual positions without such added burden.

Responses to the remaining "Conclusions and Recommendations":

30. As to the "Conclusions and Recommendations" [R], other than those mentioned above, we respond as follows:
 - i. We agree R1, save for the recommendation in the increase in the number of hours, which is not supported by any evidence of need or criticism;
 - ii. We agree R2-5;
 - iii. We agree that there should be no compulsory topics, R6;
 - iv. Whilst barristers should be so trusted, we do not agree with any increase in the number of hours; there is no material in the Review that justifies R7;

- v. We agree Recommendations R8-10;
- vi. As to R11 (waivers): the current system should be retained. The Recommendation is unfair to those who are ill, pregnant or otherwise unable to carry on practice for some time whether, voluntarily or not;
- vii. We agree R12;
- viii. We agree R 13 and 15: we prefer the use of verification by a member's documentary proof of having undertaken 12 hours CPD, of which 4 should be activities verified by the external provider of the CPD activity;
- ix. We make no comment on R14, this is a matter for the BC and BSB;
- x. We completely disagree with members having to produce an expanded and reflective form of record as set out in R16 and the Draft Handbook; as one example of why such is otiose, a member may go to a lecture on the Bribery Act but in fact not have one case that year on it: how is he/she to demonstrate implementation, review-appraisal and revision?
- xi. R17 is part of Table 6, which we agree;
- xii. We agree R18, save that the signed declaration should not be part of the requirement for a Practising Certificate;
- xiii. We agree R19, except that a senior member of the profession outside the BSB should be involved in the procedures;
- xiv. In the circumstances above, we do not accept R20, which again ties compliance to the issue of a Practising Certificate, especially as the Working Group accept that non-compliance does not equate to unfitness to practise;
- xv. As to R21, the current rules should remain;
- xvi. We agree R22-23;
- xvii. We see no benefit to be gained by any extension to the ethics programme or the need for the attendance of solicitors and non-lawyers – we therefore disagree with R24;
- xviii. R25: since we see no basis for any extension of the number of CPD hours, this recommendation is not accepted;
- xix. We agree R26;
- xx. We agree with R27: CPD should not be part of the QAA;
- xxi. We agree R28.

Answers to the particular consultation questions:

31. In the light of the above, our answers to the Consultation questions are as follows:

Q1 Agreed.

Q2 We agree the range of approved activities should be increased.

We do not agree that the CPD hours should be or need to be increased at all;

The current method of record keeping of verified (accredited) activities is fit for purpose; as to non-verified activities, a simple log of the date, time spent and the precise nature of the subject matter of the activity is sufficient; we do not agree with the proposal of some form of 'reflective' record;

We agree with enforcement, as we have set out above, namely a certificate of compliance, not related to the application for a Practising Certificate, coupled with random sampling of a percentage of the Bar and Chambers Monitoring – all to be within the province of the BSB.

Q3 Save for the reference to a collegiate ethos, we agree.

Q4 Agreed.

Q5 Agreed.

Q6 Agreed. We also consider that there is a good case for permitting carry forward/carry back provisions for those who complete significant numbers of hours in a given CPD period but 'fall short' in the immediately preceding or subsequent period.

Q7 Not agreed; the current system should be retained.

Q8 Agreed.

Q9 Partially agreed; a signed declaration of CPD compliance together with the keeping of a Portfolio and the undertaking of random checks is an appropriate method of ensuring CPD compliance. However, this should not be part of the application for a Practising Certificate; there is no suggestion in the Review by the Working Group that non-compliance equates with being unfit to practise – quite the contrary.

Q10 Agreed.

Q11 Agreed.

Q12 See the above Response. In consequence, we submit that much of the Draft Handbook is unnecessary.

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