

Bar Association for Commerce, Finance and Industry



The response of the Bar Association for Commerce Finance & Industry (BACFI) to the Consultation Paper

The Future for Practice at the Bar

Whom should the Bar Regulate?

Introduction

The Bar Association for Commerce, Finance and Industry (“BACFI”), which was founded in 1965, represents members of the bar who work in-house or provide legal services outside chambers. Amongst its members are those who, although called to the bar, have been unable to obtain a practising certificate under the current regulations, the group formerly known as non-practising barristers.

BACFI is keen to play its part as a representative organisation in helping shape the development of the bar of England and Wales, by bringing forward the views of its members and pressing for appropriate change. BACFI actively supports the objective of an independent and high quality bar, accessible to all.

Preamble

The simple answer to the question “Whom should the Bar regulate?” is all barristers providing legal services, with different levels of regulation according to where and how the individual practises.

The paper does not address directly the regulation of barristers who do not have the right to practise under the current regime, i.e. “non-practising” barristers (“npbs”), although they are mentioned in para. 11 of Section 1. (The term “barrister” is used in some places in the paper and “practising barrister” in others. We are not clear whether the term “barrister” refers to all barristers but we take it to mean barristers with the right to practise.)

If and until deferral of call is introduced the numbers of npbs will continue to grow. BACFI has always maintained that all barristers providing legal services should be regulated whether or not they qualify for a practising certificate. We continue to maintain that there could be different types of practising certificate and that a barrister in employment need not always be trained to the level of higher court advocacy skills that are required for a self-employed barrister. If the barrister in question wished to acquire higher court rights either as an employed or self-employed barrister then he/she could be required to undertake such additional advocacy training if any, as may be necessary. We note that there is no intention to amend the qualification rules (para 27).

We consider it to be against the public interest that any barristers providing legal services should not be regulated. This includes those not permitted to use the title other than with a health warning. The present situation is a compromise that does not find favour with anyone.

We feel that the scope of the consultation could have been widened to encompass the issues surrounding non-practising barristers. When the new Code was introduced, the objective of the Bar Council was to bring as many of these barristers as possible into regulation. This has not happened to any great extent and as many of such barristers will seek to work in ABSs the issue of regulation will remain.

Question 1 - Are these the right aims?

Probably yes, but now that regulations permit solicitor advocates there should be recognition that there is an alternative route to advocacy provision. Also the definition of advocacy needs to be reviewed in the light of the work done by employed bar and “non-practising” barristers. The Dutton report of 2002 contains a much broader definition of advocacy that currently applied by the Bar Council and the BSB. The reference to specialist adviser is welcomed as an indication that barristers are not solely advocates as narrowly defined.

Question 2 - Are the arguments for and against option 1 correctly stated?

2a) We do not hold out that we represent the self-employed bar. However many employed barristers have been self-employed and may be so again. Flexibility within the profession is something BACFI has always advocated and indeed we believe that such flexibility can only strengthen the profession. To facilitate this further there is a demand for change from employed and non practising barristers who constitute a significant and increasing proportion of the Bar. We believe the need for change is also recognised by many self-employed barristers.

2b) We do not think it is right that barristers should be expected to re-qualify if they wish to work in an ABS, whether as employee, manager or owner, provided that the necessary regulatory controls are in place either from the BSB or another approved regulator.

Question 3 - Is there any reason why barristers employed in ABS firms should not be regulated by the BSB and be entitled to practise as barristers?

There is no valid reason.

Question 4 - Should option 2 be rejected?

Yes

Question 5 - Do you think the arguments in favour of the abolition of the ban on partnerships outweigh those against?

The arguments in favour do outweigh those against. The reasons against are over-stated. There will be no compulsion to create a partnership and competition will be improved. The other arguments in favour are strong.

Question 6/7 - this is principally a question for the self-employed bar although the removal of the ban together with the removal of other restrictions may help some consultants who are currently operating as self-employed or non-practising barristers and may wish to have a partnership for tax reasons, We know of at least two such barristers.

Question 8 - If the difficulties outlined can be overcome, is there any reason why barristers should not be permitted to enter into partnerships with solicitors?

No reason.

Question 9 - Would the proposals here be sufficient to deal with any public interest concerns arising out of such partnerships?

Yes.

Question 10 - If you are a barrister who does not plan to go into partnership with solicitors, is it right that you would not be prepared to contribute to a compensation fund?

Yes, if there was a scale of contributions as with the current Bar Indemnity Fund? The premiums for this fund are much lower than on the open insurance market. The alternative is to pay more for greater flexibility. It should not be feasible for some to opt out of contributions altogether.

Question 11 - If you are a barrister, would you find the ability to enter into partnership with solicitors attractive?

Some of our members may find this an attractive career option.

Question 12 - Have you any further comments on the issue of partnership?

The questions focus on partnership with solicitors but there are other professions to be considered, particularly accountants generally and other professions for instance in the building and property development areas. There seems no reason to restrict partnership opportunities to partnership with solicitors.

Question 13 - Should the BSB regulate barristers in ABSs?

The BSB should regulate all barristers working in ABSs including non practising barristers.

Question 14 - Is it right to assume that the BSB should not regulate activities which self-employed barristers cannot currently undertake?

Why is the question restricted to self-employed barristers? The answer to the question as posed is probably 'yes'. However this may need further consideration in the light of situations which may arise.

Question 15 - Is there likely to be a demand at the Bar to be part of the ABS described in this section?

Some employed barristers may well wish to be part of an ABS and to continue to be regulated by the BSB.

Question 16 /17/18

We have no definite views on these questions at this stage. They are largely hypothetical and need to be considered in the light of situations which may arise.

Question 19 - Are there any further questions that need to be asked or considerations that have been missed?

See our comments on non-practising barristers above. These have not been properly addressed in the paper.

BACFI
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