



## **Bar Association for Commerce, Finance and Industry**

### **Response to the BSB Consultation paper on the Legal Services Act 2007 – Implications for the regulation of the Bar in England and Wales**

#### **Introduction**

The Bar Association for Commerce, Finance and Industry was founded in 1965 to promote the interests and professional status of barristers employed in commerce, finance and industry. BACFI is a Specialist Bar Association, affiliated to the Bar Council but operating independently to represent employed barristers practising outside chambers.

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.

#### **General comments**

BACFI has welcomed the Legal Services Act as providing employment opportunities for employed barristers to practise in several different types of organisation. Whilst accepting the need for regulation of (practising) barristers we feel that the regulation should be such as not to disadvantage barristers in comparison with other professionals working in the same organisation. We would not like to see a return to the “bad old days” when an employer would choose to employ a solicitor rather than a barrister because of the number of restrictions placed on the work which an employed barrister could carry out.

There is little reference in the Consultation Paper to employed barristers, the focus being largely on the self-employed bar. However given that it is increasingly common for barristers to move from employed to self-employed practise and vice-versa, the consideration of appropriate regulation has to bear this fact in mind. Also many self-employed barrister are not working from a conventional chambers but acting as consultants.

There is even less mention in the Paper of “non-practising” barristers (“npbs”) providing legal services. This issue has never been adequately resolved in spite of two working parties on the subject. The radical changes introduced by the Act in the way barristers may be allowed to provide services is a golden opportunity to address this issue. We do not make specific proposals as the questions do not cover the point, but we flag it as an unresolved issue which needs to be tackled.

There are references in the paper to the Solicitors Regulation Authority (“SRA”). Since many of the regulation issues related to ABSs and LDPs will also apply to the solicitors’ profession, we hope that the BSB is liaising with the SRA on matters of common interest.

We list below our responses to the questions posed.

### **The General Approach and the “cab-rank” rule**

As a general comment we feel that this is a golden opportunity for the bar to reassess whether its rules are fit for purpose in today’s modern business environment.

**Q. 1 Do you agree with the general approach set out in paragraphs 51-55 above?**

Yes

**Q. 2 How effective in practice, in your experience, is the “cab-rank” rule in securing for clients the Counsel of their choice? Do you consider that the adverse consequences mentioned above are likely to occur if the rule is abolished? If so, how could they be reduced or avoided?**

*The specific answers to the three questions posed here are:*

*(i) In commercial cases, the rule has no bearing on securing the Counsel of choice;*

*(ii) No;*

*(iii) N/A*

**Q. 3 Do you agree that it will not be possible to apply the “cab-rank” rule to barristers practising in ABS or LDP firms?**

*Yes agree.*

**Q. 4 Should the "cab-rank" rule, as set out in paragraph 602 of the Code of Conduct, be abolished as regards barristers who are members of a partnership of barristers?**

Yes.

**Q. 5 If the "cab-rank" rule is abolished as regards barristers practising in ABS firms and partnerships, should it also be abolished as regards sole practitioners?**

*Yes in civil matters for all self-employed barristers whether sole practitioners or operating out of chambers shared with others, provided self-employed civil practitioners identify no issues with this approach. It is important to maintain a level playing field for all barristers.*

**Issues relating to practice in the new business structure and partnership**

Paragraphs 66/67 hint at an issue which is not directly mentioned in the paper and that is the position of barristers who have been called to the Bar but because they have not complied with the Bar's training rules are not permitted to refer to themselves as barristers in connection with the provision of legal services (as defined by the Code), so called "non-practising" barristers. It is assumed that the use of the term barrister in the paper refers only to those barristers with the right to practise. With barristers appearing in different forms of business enterprise there may be a need to readdress this issue which has never been properly finalised by the BSB or the succession of working parties which have looked at the matter. The Board considers it premature to raise the question but we take the view that far from being premature is long overdue! There is a rather odd reference to npbs in para 88, implying that their conduct will be covered by the regulator even though they have no right to practise as barristers.

**Q. 6 Should the Code of Conduct be revised so as to permit a barrister to supply legal services to the public while acting as manager of an ABS firm or LDP?**

*Yes. If the Legal Services Act is to achieve its purpose then there should be no restrictions on barristers acting as an employee, manager, partner or shareholder of an ABS*

**LDPs and partnerships of barristers**

Paragraphs 70-78 deal only with self-employed barristers operating in the conventional way from chambers. There are an increasing number of barristers who operate as self-employed consultants who may find it a much more effective business model to work in partnership with others or to work through a company.

**Q. 7 Should the Code of Conduct be amended to allow barristers to provide legal services to the public while acting as a manager of an LDP?**

Yes

**Q. 8 Should the Code of Conduct be revised so as to permit a barrister to provide legal services to the public while a member of a partnership? If so, in what kinds of partnership?**

*Yes; all types of partnerships envisaged under the Act*

**Q. 9 As regards barristers who are members of Legal Disciplinary Practices with at least one solicitor member should the restrictions in paragraph 307(f) and paragraph 401(b) be maintained? Or should some or all be removed?**

*As regards 307(f), although appropriate safeguards including training and a compensation fund may need to be established, the restriction on client money seems to be anchored in the past. As regards 401 the restrictions in 401(b) (i) and (ii) should be revisited. There seems no reason to maintain the restriction on the management of a client's affairs or the conduct of litigation provided that there are solicitors in the practice or appropriate training has been undertaken. We cannot comment on criminal cases but the collecting of evidence in civil cases should be permitted. In effect the barrister in an LDP should not be at a disadvantage compared to his/her solicitor colleagues.*

#### **Regulation of business entities and their members**

**Q. 10 Is the Board right in its view that, subject to the point mentioned in paragraph 89 above, it should be the prime regulator of the professional conduct in ABS firms of barristers in England and Wales? If not, who might alternatively or additionally exercise that role?**

*Yes*

**Q. 11 Do you foresee any serious problems arising if there is a divergence between the rules of different regulators? If so, what might they be?**

*In practice divergences can be resolved through inter regulatory agreements or memoranda of understanding. Employed barristers may already be subject to different regulatory regimes. Directors are governed by the Companies Act, those in the financial services sector by the FSA and there are several other examples.*

**Q. 12 Should the Board seek to become a licensed regulator of ABS firms? If so, should it confine that role to the regulation of firms wholly or mainly engaged in the provision of advocacy services, or advocacy services and legal advice, as the arguments above may suggest would be appropriate?**

*The BSB should restrict itself as suggested – it is not geared up for business regulation and the cost would be significant. However it could be involved in regulation by delegating its powers to other regulators.*

**Q.13 Do you consider that the Solicitors' Regulation Authority should be the business regulator for all LDPs with solicitor and barrister members? Or should the Board seek to power to regulate LDPs? If so should the powers be confined to regulation of LDPs undertaking the type of work currently undertaken by the self-employed Bar? Within what timescale should the power be available to be exercised by the Board?**

*The Board should seek the power to regulate LDPs in relation to all legal services not just LDPs which undertake the type of work currently undertaken by the self-employed bar. To adopt such an approach would be to fail to seize opportunities this Act offers which it seems the SRA is happy to embrace. Timescale should be as soon as practicable. Decision of which regulator should probably not be left to the LDP but pre-determined as suggested in option c)*

**Q. 14 Do you agree that partnerships of barristers to supply legal services should be permitted?**

Yes

**Q. 15 If partnerships of barristers to supply legal services are permitted, should the activities of such partnerships be restricted to providing the types of service provided by sole practitioners, that is, essentially advisory and advocacy services? If not, what additional types of service should be permitted?**

*No. We suggest that the types of service mentioned in para 83 should be permitted. The Code requires barristers to undertake work only if they are competent to do so. This provision should prevent partnerships taking on work they are not competent to carry out. Also the Act will allow barristers with experience as employed barristers to set up in partnership. The expertise and experience of such barristers is much wider than a barrister who has only worked as a self-employed barrister in chambers.*

**Q. 16 Would it be sufficient to rely on the rules of professional conduct to regulate such partnerships, subject only to possible additional rules to strengthen the requirements related to governance of the partnership? If not, what alternative or additional rules would be needed?**

**Q. 17 What measures, if any, do you consider would be appropriate to strengthen the requirements related to the governance of such partnerships?**

*Would probably need to strengthen governance. Needs to be considered further.*

**Q. 18 Is there a need for rules relating to the employment of staff by partnerships of barristers?**

*Question is not entirely clear. Assume it means professional staff – barristers and solicitors or maybe other professionals such as trade mark/patent agents. However such firms would probably want to be LDPs or ABS. If it means barristers only then there would need to some rules.*

*Requires further consideration but adequate supervision essential and subject to the same overriding principles of the Act.*

**The structure of self-employed practice**

We think it is somewhat misleading to suggest that the Act has no direct implications for the self-employed bar!

**Q. 19 Should the rules about the persons with whom barristers can share the administration of their practice be relaxed?**

*Probably yes. There may be a number of barristers who may wish to operate in informal association with other professionals without setting up a formal ABS. Consultants who are technically self-employed barristers might wish to join forces with colleagues either barristers or other professionals. Such a relaxation would also facilitate the provision of legal advice in law centres or legal advice clinics.*

**Q.20 Should associations short of ABSs or partnerships be considered as described in paragraph 104 above?**

Yes

**Q. 21 Is there any demand from barristers or consumers for such associations?**

*No firm evidence but we know of several barristers who work as consultants who would welcome this relaxation.*

**Q. 22 Are the considerations set out in paragraph 105 the ones that the Board should consider? Are there others?**

*It should be recognised that many of the barristers working as consultants do not provide services to the general public but only to large companies. Such “consumers” do not need the same protection as members of the public. We feel that any regulation should be a “light touch”*

**Q .23 Is the Board’s approach set out in paragraph 109 -120 in respect of “prohibited work” correct?**

*109 – agree except in relation to client money – see below.*

*114 – agree; those who have been employed barristers may be well able to carry out this work.*

*116 – agree*

*117- no comment*

*120 – There is an obsession at the self-employed Bar with this issue and it has been used as a reason for prohibiting barristers doing work which they are competent to do. There may be circumstances particularly in public access work where it is necessary for the barrister to receive client funds. We do not agree that an expensive regulatory regime needs to be established but there should be a means of providing a regime for those who need to handle funds.*

**Q. 24 Are there further considerations that the Board should consider?**

**Q. 25 Are there other safeguards (e.g. monitoring) that need to be imposed if the rules are relaxed?**

*Probably – depends what is decided*

**Q. 26 Is the approach to handling clients’ money outlined in paragraphs 118 to 120 correct?**

*We do not agree with this approach.*

**Q. 27 If it is, are further amendments needed to the Code to give it effect?**

#### **Compensation arrangements**

**Q.28 Is there likely to be a need under the new regulatory regime to set up a fund to compensate clients who have sustained financial loss as a result of the misconduct or incompetence of a barrister? In what circumstances might such compensation be appropriate?**

**Q. 29 If such a fund were set up, how should it be financed?**

*Yes. Client protection is most important. This needs further debate with the other regulators who are likely to be involved in regulation of LDPs and ABSs. There should not be duplication and it may be that the arrangements suggested in 127(a) would be adequate. There may also be a need for rules on settling conflicts on which regulator controls the offence alleged to have been committed. Only barristers engaged in the activities concerned should be required to contribute to any compensation fund.*

**General and transitional**

**Q. 30 Do you consider that there is a likelihood that types of business organisation involving barristers will emerge that are not considered in this paper? If so, what might they be? And what regulatory issues would they raise?**

*Not possible to say at this stage.*

**Q. 31 Should the Board seek power to regulate LDPs consisting of barristers and non-lawyers? Or should barristers continue to be forbidden to supply legal services in such partnerships until the regulatory regime for ABS firms is in force? If the Board should seek such power, by when should that power be available to the Board?**

*Yes the Board should seek to regulate such LDPs and move to the new regime immediately subject to regulatory staff being able to properly regulate these entities.*

BACFI  
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