



BAR ASSOCIATION FOR COMMERCE FINANCE AND INDUSTRY

Response to the second BSB Consultation Paper on the Legal Services Act-- Legal Disciplinary Practices and Partnerships of Barristers

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 and “non-practising” barristers practising in a business environment.

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. As mentioned in our response to the first consultation paper we welcome the opening up of the market for legal services both in terms of enhancing access to legal advice and in terms of greater flexibility in the provision of legal services. We also endorse the need to maintain the highest standards of professional conduct.

The paper focuses on LDPs and barrister-only partnerships. However we would like to add at this stage our view that, in line with the objectives of the Legal Services Act, the regulatory regime should be as flexible as possible allowing barristers to work in the structure that best suits their business. There are many barristers who provide services only to business and not to the general public and they should not be shoe-horned into a structure that does not fit their work. The over-riding control is the Code of Conduct and the proposed amendments to the Code would not for example allow a single barrister to provide services to “the public” through a company either as an employed or self-employed barrister. It may be that further amendments once the full ABS regime is introduced will permit this, but such types of structure could be permitted now and adequately regulated by the Code of Conduct.

Part 1 Legal Disciplinary Practices

Q1 The Board's approach.

We agree that barristers should be permitted to supply legal services to the public as either employees or managers of LDPs. As we have already mentioned in our response to the first paper, employed barristers practise in many different fields and therefore have experience of working alongside solicitors and other professionals. There is therefore a body of experience which can be drawn upon in examining the issues which arise from allowing barristers to work in LDPs.

Many of the arguments against allowing barristers to become managers of LDPs ignore the fact that employed barristers have faced the issues described in paras 27-30 and there is no evidence that their independence or professional standards have been adversely affected. . There seems to be an assumption in para 30 that the in-house barrister may wish to act rather than referring to a self- employed barrister. As well as para 606.1 of the Code the in-house barrister will be conscious of the need to comply with the requirement that he must not undertake work outside his competence.

The issue of conflicts (paras 31-35) is one which solicitors' firms are well used to handling and firms have very strict rules on conflicts which LDPs regulated by the SRA will presumably also have to adopt.

Q2 Restrictions or safeguards on barristers' action as managers of LDPs.

We do not consider that it is necessary to impose any restrictions on such barristers. They will be acting as employees, directors or partners in the firm and as such it is the firm which will contract with the client and which will be regulated. As mentioned above the provisions in the code as it stands are sufficient to protect the client. We addressed the issue of handling client's money in our response to the first consultation paper. The SRA as regulator will ensure that managers of LDPs receive appropriate training and in any event it is unlikely that barristers employed in or managing LDPs would be actively involved in the financial operations of the firm.

Q3 Barristers as shareholders in LDPs

We agree that barristers should be permitted to own shares in an LDP. Normal rules on conflicts and disclosures should apply.

Q4 Practise in more than one capacity

This should be a matter for the firm. See our reply to Q 11 although we can see that it may pose regulatory issues in that work for the firm would be principally regulated by the SRA and "private" work by the BSB. May need further consideration although at first reading the objections appear overstated.

Q5 Strengthening para 601 of the Code of Conduct

Barristers will be employed in or partners in the LDP and as mentioned the SRA rules will apply to the firm. It will surely be the firm which will decide which cases to take on. To impose additional rules on the barrister may bring him into conflict with his employer/partners. As para 52 points out s. 52 of the Act provides that the rules of a business regulator will prevail over the rules of a professional regulator. We note that discussions are being held with the SRA and it may therefore be premature to consider amendments to the Code until those discussions have been finalised.

Q6 Amendments to the Code as set out in Appendix B

There are other groups looking at amendments to the Code and it is important that there is co-ordination of these groups. We would prefer to defer detailed comments on the proposed amendments until we can see the full picture and until the discussions with the SRA have been concluded.

Part 2: Barrister- only partnerships

Q7(a) Should barristers be permitted to practise in barrister-only partnerships.

Yes. There is no reason to make a distinction between LDPs and barrister only organisations although we accept that because of regulatory issues the only vehicle possible for the moment is a partnership under the Partnership Act 1890.

Q7(b) If so should these be restricted to advocacy and advice services?

We do not agree that such partnerships should be restricted to providing advocacy and advice services. As set out in our reply to the first consultation paper, we believe that at the very least such partnerships should be allowed to conduct litigation, carry out management of a lay client's affairs, investigate and collect evidence. Whereas the suggested solution of employing a solicitor may be a practical way of resolving the problem, we feel that it should not be necessary to do this. For example, many employed barristers are able to conduct litigation either in their own name if authorised to do so or in their company's name and we see no reason why this could not be extended to barristers working in partnerships. It is difficult to see what extra regulatory burden would be imposed and it would greatly enhance access to justice for clients of the partnership in that they could offer a "one-stop shop". As mentioned earlier the protection lies in the over-riding provision of the code that the barrister should not take on work outside his competence. It may be that barristers would need to undertake additional training before being allowed to carry out work with which they had not previously been familiar. If such partnerships are generally permitted to provide services direct to the public then presumably the barristers will need public access training in any event.

Q8 We have not canvassed our members on these questions so we can only make assumptions.

Q 8(a) Are you likely to consider joining a partnership of barristers

We consider that our members are more likely to be attracted to joining an LDP than a barrister only partnership. However such a partnership may be attractive to those of our members who work as consultants and would like to join with other barristers doing the same work provided there are no unreasonable restrictions on the services that can be offered.

Q8(b) Are you more or less likely to do so if barristers are permitted to become managers of LDPs?

See 8(a)

Q8(c) Would you be more or less likely to practise in LLPs or limited companies if this were to become possible?

We would think that these would be more attractive than a partnership.

Q9 Cab-rank rule

As stated in our response to the first consultation paper, we believe that the cab rank rule should be abolished in relation to barrister- only partnerships.

Q10 Safeguards for consumers

For partnerships dealing direct with the public, the firm's literature and conditions of engagement should make clear that the client is dealing with the firm rather than an individual. Since most consumers are more familiar with solicitors firms this should not be too difficult to explain.

We consider that regulating such partnerships will not be so different from the present regulation of chambers. We would not support a higher practising fee for those practising in partnerships unless it can be shown that there are "additional risks involved" and that there are necessary additional costs of regulation.

Q11 Should barristers be permitted to practise both as members of a partnership and as sole practitioners and if so under what safeguards?

We have no strong views as our members are unlikely to be affected. However we can see that in relation to block contracting it might be attractive to have dual status. It will be more an issue for the partnership as to whether it wished to allow a degree of self-employed practice and steps would need to be taken to ensure that it was absolutely clear in what capacity the barrister was acting from a regulatory and insurance point of view. The medical profession may be able to provide some useful pointers as they have the same issue.

Q12 List of regulatory issues

The list seems comprehensive.

Q13 Should the Bar Council take steps to enable the Board to regulate entities such as LLPs and limited companies?

We consider that the Bar Council should be active in taking steps to canvass the Bar in relation to demand for such organisations. By not taking such steps the Council is effectively preventing barrister from setting up such organisations unless they join forces with solicitors and become SRA regulated. We feel that the Bar should be more active in seeking to regulate alternative business structures of barristers.

Q14 Are there any further provisions though to be necessary or desirable?

No further comments at this stage.

BACFI

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