



Legal Services Board Consultation on Regulatory Independence

Response from BACFI

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.

BACFI strongly supports the concept of regulatory independence. Since the Bar Standards Board ("BSB") was established we have been impressed by their approach to regulation and have welcomed the contribution of lay members who bring with them experience from other sectors and professions. We feel it is important that as far as possible the BSB should continue their work free from control by the representative arm, the Bar Council. We do of course recognise that the Bar Council is the approved regulator. This is an exciting time for the legal profession as a whole and we feel that the Bar must embrace the spirit of the Legal Services Act. We recognise the need for safeguards but they must not be such as to defeat the objectives of the Act.

We deal with some of the individual questions as follows:

Q1. How might an independent regulatory arm best be ring-fenced from a representative-controlled approved regulator?

In order to give confidence to consumers and to members of the Bar that the BSB is able to operate independently we feel it is important that the current organisation chart published in the Bar Council Handbook (which goes to all practising barristers) should be amended from the present format which shows the whole of the BSB, apart from the Board itself, reporting to the Chief Executive of the Bar Council on a faint dotted line which on first examination appears to be a solid line. While we believe that the BSB does have a fair amount of autonomy, perception is important and there is no separate organisation chart for the BSB showing the Director having

a solid reporting line to the BSB Board. The lack of a clear indication that the BSB is operationally independent could give the impression that independence is a sham. Although we do not believe this to be the case, the published documents need to make this clear. You refer to this in paragraph 3.22 (second bullet).

Q2 Proposals for regulatory board appointees

We agree with the proposals.

Q3 Should chairs of regulatory boards be non-lawyers

We think this should be advisable rather than mandatory. In the case of the BSB both the first (non-lawyer) and second (lawyer but not practising) chair have been equally independent.

Q4 Management of resources including shared services

We agree that there should be sharing of “back office” type services with appropriate service agreements. The operational independence of the regulatory arm should not be compromised by such arrangements.

Q5 Balance between formal rules and guidance

We agree with the approach.

Q6 Oversight role of the representative-controlled approved regulators

We agree with the suggestions.

Q7/8 Dual self-certification

We agree that this would be the ideal process subject to over-riding supervision by the Legal Services Board. We hold no firm views as to how it would work in practice.

Q9/10 Permitted purposes for application of practising fees

Q9 – Yes

Q 10 – No

Q11-16 Process for applications for approval of fees and issues arising

Practising fees for barristers have increased significantly over the past few years. Whilst we support the need for effective regulation, as practitioners we expect the budget to be transparent and the regulatory function to be efficient and avoid bureaucracy. The fee should not be so high as to discourage barristers from obtaining a practising certificate when they are entitled to one. Whilst a barrister cannot practise as such without a certificate, there are many barrister in employment who are doing legal work but choose not to pay for a practising certificate (the Consultation Paper refers to this possibility in paragraph 27 of Annex C (Impact Assessment)). Their employers know that they are barristers and they would have been employed on the basis of their qualification, yet they are not subject to regulation, CPD and most of the Bar Code of Conduct. The BSB is currently reviewing the practising rules and it may be that this situation will change, but it is

nevertheless a relevant factor in setting the fee, especially as the Bar Council is planning to increase the fees for employed barristers to the same level as for self-employed.

The level of the fee may also impact on the employers of barristers some of whom may decide they are not prepared to pay the fee, leaving the barrister to pay it himself or herself or decide to practise outside the regulatory framework.

Q17 Draft Rules

We have no comments.

Q18 Comments on draft impact assessment

We have mentioned above the level of the practising fee in relation to employed barristers who are entitled to a practising certificate but choose not to obtain one. There is however a much larger group who are providing legal services but who are not entitled to a practising certificate mainly because they have not been able to comply with the Bar's training requirements. BACFI has always held the view that all barristers providing legal services should be regulated. Although such barristers are prohibited from "holding out" as barristers this is a very grey area and they are entitled to refer to their educational qualifications. Whereas the risk is low in the case of barristers in employment, there is a concern when such barristers are providing services to the public, particularly vulnerable groups. Many of the complaints which have arisen have been in the area of immigration.

Again we understand that the BSB is looking at this issue in connection with its review of the practising rules. We believe it is vital that the BSB should consult the employed bar in respect of the applicable practising rules.

Q19 Any other issues

We understand that the costs of the Legal Services Board and the Office for Legal Complaints are to be met by the profession. Whilst we fully understand and accept the need for regulation under the Legal Services Act, we hope that the impact on practitioners will be proportionate.

BACFI is committed to supporting a strong and effective legal profession and is very willing to assist the Legal Services Board with any further information which it may require.

BACFI

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