



Legal Services Board Draft Business Plan 2009-2010

Comments from the Bar Association for Commerce Finance and Industry (“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 and “non-practising” barristers practising in a business environment. Our members advise some of the largest companies in the country and as such play an important role in the delivery of legal services to a critical market.

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. We routinely engage with the Bar Council, Bar Standards Board (“BSB”), Office of Fair Trading and other organisations reviewing the market for legal services. We have representatives on the Bar Council and its committees and also one member on the Qualifications Committee of the Bar Standards Board.

We welcome the Legal Services Act and 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 both legal advice and professional conduct.

We welcome the opportunity to put forward our views to the Legal Services Board (“LSB”) on behalf of our members who serve business “consumers”.

We comment on certain sections of the Business Plan with additional comments based on our own experience of the legal services market.

Section 2 Vision

We are particularly pleased to note that the regulatory remit will extend to education and training which is a topic high on our own agenda and on which we make further comment below.

Section 4 LSB role in the future of regulation

The issues highlighted in paragraphs 29 and 30 are particularly important for the Bar which tends to be heavily biased towards the self-employed bar. Our members work in a variety of business structures and are often constrained in how they can provide legal services because of the restrictive rules of the Bar and because of the requirement that to be eligible for a practising certificate a barrister must have full rights of audience in all courts. This is not a requirement of those businesses which use the services of our members and who would like to employ practising barristers as well as solicitors in order to have access to a wider talent pool. We refer further to this issue in our comments on education and training for the Bar below.

Section 5A Consumer and public interest

We believe that there is an imperfect understanding among business consumers of the Bar and particularly the employed bar. In our efforts to persuade companies to become Pupillage Training Organisations (“PTOs”) we have found a negative impression of the BSB and its procedures.

Section 5B Widening access to the legal market

We believe that the Bar does not currently intend to become a business regulator and that the SRA will be the regulator for LDPs and other ABSs other than barrister-only partnerships. It is important that barristers working in these new structures are not disadvantaged compared with their solicitor colleagues. It appears that the SRA intends that solicitors in these organisations will be principally regulated by the business regulator rules alongside a code of core duties for solicitors. The Bar appears to be proposing a different approach and it is important both for the lawyers concerned and the public that there is no confusion about what rules apply.

Section 5D Developing excellence in legal services regulation

Paragraph 86 is important in its reference to widening access to the profession. The LSB will be aware that there is a marked disparity between the number of those graduating from the Bar Vocational course (“BVC”) and the number of training places available (currently 2000 graduates for 550 places). There are many able BVC graduates who are not able to gain a practising certificate and are consigned to a lower tier of roles in the legal market. Added to these people are those from previous years still struggling to find a pupillage.

Of even more concern are those so called “non-practising “ barristers who cannot meet the Bar’s standards of education and may be delivering some sort of legal service in a completely unregulated way. Many of these could provide valuable and cost effective legal service to a high standard and in a perfectly legitimate way were the Bar able to relax the strict criteria for barrister training and take account of previous legal experience. This is an issue that was exacerbated by the changes to the Code of Conduct in 2000

and which has never been satisfactorily resolved by the Bar Council and the BSB.

A review by the BSB of pupillage is currently underway and it is hoped that some of these issues will be addressed. Lord Neuberger has already made strong recommendations in this area, specifically that more employed and other pupillages be made available; that the BSB should be flexible in their approach to waivers for part-time pupillages; pupils should be allowed to work during pupillage; additional funded pupillages sponsored by employers and governments agencies to be made available; active measures to be taken to encourage employers to become PTOs.

Paragraph 87 also refers to the need for consistent decision making by regulators. Many of the Bar's rules operate by a waiver system which creates uncertainty and calls into question the reliability and consistency of decision making. Many employed and non-practising barristers who have contacted the BSB have commented that the staff are not helpful in explaining the rules and the options open to the enquirer.

Paragraph 93 refers to the role of the Legal Services Consultative Panel. The present process for approving rule changes takes too long. An example is the new Training Regulations which will come into force in September 2009 some two and a half years after they were first sent to the Panel.

Section 5E Securing independent regulation

The BSB is relatively new and it would be premature to come to any conclusions at this stage as to how successful the Bar has been in separating its regulatory from its representative functions. However we would comment that from what we can observe the employed bar is under-represented on the BSB as compared with its representation on the Bar Council, This may be because there has been a lack of applicants for the positions on the committees and the Board of the BSB but if this is the case then one has to ask why this is.

There is a proposal currently being discussed to increase the practising fee for employed barristers to the same level as that for self-employed barristers. While we do not object in principle we consider that equal fees should come with equal representation on the regulatory body, proportionate to the number of employed practising barristers.

Section 5F Promoting access to a diverse legal profession

This section goes to the heart of BACFI's concern about access to the legal profession. Unlike the solicitors' profession, barristers are called to the bar (admitted) before completing the final stage of professional training. This results in a large body of barristers with the qualification of "barrister" but without the right to practise as such. This causes great resentment to those who are not able to obtain the right to practise and confusion among the public. The Bar has strict rules on "holding out" but whereas a barrister without a practising certificate may write books, deliver lectures, act as a

mediator or arbitrator using the title, he cannot deliver other legal services. There have been many proposals to eliminate this confusion arising from the dual use of the title “barrister” but the Bar Council and the BSB have not been willing to consider any change.

Section 5G Developing research and education strategies

There is an imperfect understanding at the BSB and a to a lesser extent at the Bar Council of how the employed bar (outside CPS and the GLS) operates. We feel that some research and fact-finding could usefully be undertaken in this area. Offers from ourselves and others to make presentations and arrange visits to legal departments have not been taken up.

Sections 6, 7 and 8 Levy, Organisation and Resources

We feel that it is vital that the LSB is seen to add value and to promote the independence of the profession. The levy on the profession to fund the LSB, which will be reflected in practising fees, makes it important that practitioners understand the role and contribution of the LSB to the profession as a whole.

Conclusion

We would like to re-iterate that we uphold the need to maintain the highest professional standards and quality of advice in the delivery of legal services. However we feel that more could be done to widen access to practise in the profession for competent people. We consider that this will result in improved access to legal advice for consumers in the widest sense. Paragraph 119 expresses this perfectly. None of the comments or proposals in this paper should be taken as compromising the Bar’s reputation for the highest quality of service and professional standards.

We recognise that some of the points we raise are very specific and that we represent a small but important part of the overall market for legal services. However we hope that we have given the Board a flavour of some of the issues “on the ground”. We would be happy to give the Board further details or indeed to address any other points that may arise.

BACFI

March 2009

www.bacfi.org