



Legal Service Board Discussion paper on developing a regulatory regime for alternative business structures

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 legal profession, accessible to all. As our members work in many different types of corporate structures alongside other professionals we feel we are well placed to comment on some of the issues faced in developing alternative business structures. Although most of our members are employed by organisations whose business is not delivery of legal services, new business structures will open up alternative employment opportunities which may be of interest to members. It is important that there are no unnecessary barriers to barristers wishing to take up these opportunities.

Much of the Discussion paper deals with the licensing regime on which we have few comments. We have focused on the effect on individual barristers and on the market for legal services as a whole.

Questions 1-3

We feel that the accelerated timetable proposed is too tight and that these important changes to the legal market need to be properly debated. Clementi suggested a staged approach with which we agree.

Section 4 The benefits of opening the market

We are very much in favour of increasing competition in the market for legal services and removing restrictions which may constitute a barrier to such competition. The current unedifying and very public argument between the Bar Council and the Crown Prosecution Service does not reflect well on the self-employed Bar and its willingness to face up to competitive forces.

We believe that in the commercial world the removal of restrictions as to the environment in which barristers can work and to whom they can provide services will be of benefit to consumers (in the widest sense). For example, currently a barrister working for a firm of accountants cannot (in the capacity of a barrister) advise clients of the firm nor appear in court on behalf of the client even though the barrister may have full rights of audience.

Alternative structures may provide new job opportunities for barristers and we will be watching closely how the BSB intends to regulate barristers working in these new structures. While we recognise the need for firm-based regulation, this should not diminish the need to regulate individual lawyers and should not add unnecessary layers of regulation and bureaucracy. In addition, we would not want to see regulatory restrictions on individual barristers limiting opportunities for barristers who wish to work in an ABS. As barristers will be working in firms alongside solicitors they should not be put at a disadvantage compared with their solicitor colleagues. We consider that barristers working in LDPs or ABS should be regulated by the BSB and not the SRA.

The case study described in paragraph 4.8 whilst appearing to be an attractive solution does raise some concerns in relation to conflicts of interest where the most of the clients are likely to be competitors. This is a concern that has been raised more generally by the Bar.

There may also be greater opportunities in ABS for barristers who have not been able to obtain a practising certificate because of the lack of pupillage opportunities. This is a particular problem for those employed barristers called after 1 January 2002 who cannot obtain a practising certificate of any sort without a pupillage. There are many employers who will only employ those with a practising certificate. As mentioned in paragraph 4.18, there may be more opportunities for competent barristers without a practising certificate in the new business structures, whether as lawyers, para-legals, managers or administrators. We should make clear that we are not advocating any reduction in the quality of service and that we believe the public interest is paramount in ensuring that only adequately trained professionals should be able to deliver legal services.

From the point of view of the in-house lawyer as a client, the ability to instruct a one-stop shop is most attractive in terms of cost and efficiency. Elaborate mechanisms have had to be set up in the past to allow accountants and IP professionals to work alongside solicitors and the removal of restrictions will greatly enhance client choice.

Paragraph 4.20 refers to training. We have long advocated more flexible training structures for lawyers making it possible for competent candidates to practise in their chosen field. Now that solicitors can acquire higher rights of audience there is less

difference between the two professions. It would therefore make sense to have a common basic training so that students do not have to decide at such an early stage whether they want to qualify as a solicitor or a barrister. This would enable those who cannot obtain a pupillage to be able to consider the solicitors' profession and those who want to specialise in advocacy being able more easily to choose between the two professions. This is a radical proposal which has been rejected in the past but there is no reason why it cannot be considered afresh in the new scheme of things.

Q5- 9 We have covered most of the questions in the paragraphs above

Q10

We do not agree that the recession should influence the timing of introduction or the level of regulation of new entities. The LSB should plan for a regime which will survive good and bad times.

Section 5 Managing the risks of opening the market

5.7. We do not share the concerns of the self-employed bar. Barristers will be free to choose whether to enter into partnership or work in one of the new business structures. The cab-rank rule has little relevance in civil work. There is an issue with publicly funded work and a way has to be found to ensure that everyone has access to proper representation. However this cannot be at the expense of free competition. BACFI has a strong interest in maintaining ethical principles and high professional standards at the employed bar. Ethics is one of the key topics of training for newly qualified barristers and BACFI has developed special ethics training modules tailored for employed barristers which are being introduced in the "New practitioner" programmes run by the Inns of Court. In 2010 we are running a special seminar on ethics for all our members. We recognise only too well the various scenarios mentioned in paragraph 5.11 and it will be important for all lawyers working in these new structures to receive guidance and training to deal with such conflicts. Many of these are issues which are managed on a daily basis by our members.

Paragraph 5.15 refers to firms of patent and trademark attorneys. Many of our members have found it of great value to have a one-stop shop for such services where many of the issues are linked. Saving of time and cost is a great advantage and there are no obvious risks except perhaps a consolidation of the market creating barriers to entry for firms wishing to offer only one of the services. However we consider that the efficiencies outweigh any competition issues as there seems to be no evidence of pricing abuse.

Questions 11-13 Risks and conflicts of interest

With different stakeholders there will be a need to ensure that professional independence and ethical principles are maintained. It is important therefore that these principles are enshrined in both firm based regulatory rules and individual regulation. The proposed Core Duties in the Bar's draft Code of Conduct attempt to set out these principles for individual barristers.

It seems that the Australian model referred to may be a good starting point for firms.

Section 6 Risk based regulation of entities

In developing a risk-based approach to regulation, regulators may wish to draw on the experience of corporate counsel whose principal role is identifying and managing legal risk within corporate structures.

We also support an approach based on outcomes rather than detailed prescriptive rules.

Q 14-20 We have no comments on this section other than indicated above.

Section 7 Specific regulatory issues

Q 21

It is not clear how access to justice will necessarily be improved under the new regime. Although there may be more choice, there is no guarantee that legal services will become any more affordable to the poor in society. We feel that more thought should be given as to how access to justice is to be delivered and demonstrated.

Non-reserved legal activities – Q 25

The problem outlined in paragraph 7.42 (non-reserved legal services being provided by non-regulated individuals) currently exists at the Bar in the shape of “non-practising” barristers. These are barristers who have been called to the bar but because they have not completed the full professional training (generally pupillage plus three years supervised practice) are not entitled to a practising certificate. There are many thousands of such barristers providing legal services of one sort or another. Although they are not entitled to refer to themselves as barristers in the provision of legal services (as defined in the Code of Conduct) nevertheless many clients /employers are aware of the fact that they have been called to the Bar and there is confusion about their status. BACFI has long maintained that all such barristers providing legal services should be regulated in some way and the BSB is currently considering options for regulation. As such barristers seek employment in new structures, we feel it is even more important than at present to ensure that they are subject to regulation. Although this is not a subject for this consultation we feel that many of these barristers are highly competent and would merit a full practising certificate were it not for the rigid rules of the Bar which insist that all barristers should have full right of audience even if they have no intention to appear in Court.

Section 8 Special bodies Q 26-28

No specific comments.

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We should be very happy to elaborate on any of the points raised above.

BACFI
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