



Response of the Bar Association for Commerce Finance and Industry ("BACFI") to the Bar Standards Board Consultation on Regulating Entities

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 principally in the commercial private sector.

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 is broadly supportive of the proposal that the BSB should become a regulator of entities providing certain legal services. We feel it is important that barristers working for new forms of legal practice should have the choice of firms which are regulated by the BSB. We refer to our Response to the earlier Consultation Paper on the Legal Services Act.

Our main concern in establishing the BSB as a regulator of entities is that the setting up costs will be passed on to all practitioners unless some way is found of allocating all the costs to the entities themselves. The Practising Certificate Fee is now at a level which many employed barristers find difficult to justify to their employers and any significant increases may be resisted.

We would also like to see these new forms of practice as creating more opportunities for the growing number of "non-practising" barristers who have been unable to obtain practising rights due to the shortage of pupillages. We support the need for rigorous training of barristers but believe that the current pupillage regime is too inflexible. We have made our views on this clear in our evidence to the Wood Review and it is hoped that the forthcoming Review of legal education generally will open up new possibilities for able young barristers to obtain the necessary training.

Answers to the questions posed

We have not attempted to answer all the questions but only ones where we can contribute a useful view.

Q1 Do you agree that it is in the public interest for the BSB to become a specialist regulator of advocacy focused entities?

Yes.

We think that the BSB should be able to regulate entities where barristers consist of more than a certain percentage of the professionals in the firm. We agree that there should be a limit on non-professional managers and owners – probably around 15-20%.

Chapter 1 Permitted Services

We think it would be a mistake to limit the services which can be carried out by regulated entities. The Bar needs to remain competitive and may need to find new sources of work as publicly funded work declines. We do not agree that services should be limited to those ancillary to advocacy and litigation although we agree that training should be required of those with no experience of the service concerned. Employed barristers in the private sector are required to be able to conduct a wide range of services and there seems no public interest reason why self-employed barristers should not be able to do the same if suitably trained. We think that the public should have direct access to such services subject to certain controls. We do not agree that the restrictions on managing clients' affairs should remain.

Although we agree that the BSB should not seek to regulate MDPs, there should be no restrictions on barristers who work for such organisations providing legal services to the public.

An increasing number of barristers work through service companies, providing their services to businesses as, or alongside in-house counsel. This is particularly the case for those who work in interim management. For these people, it is effectively impossible to obtain an assignment, or even be considered by the interim management providers (i.e. the agencies who introduce work), unless they have set up and work through a limited company, with appropriate PI cover.

It is arguable as to whether the service companies themselves, or the barristers who work through them, are providing the legal service, but it would certainly be unfair if such people were to be regulated twice, once as individuals and again as entities. We would recommend that the risk of such double counting should be addressed before individuals working through service companies be characterised as regulated entities. We believe that the barristers in question would prefer to be regulated as individual professionals by the BSB.

Chapter 2 Payment Options and Client Money

As mentioned in our earlier Response we feel that the risks in allowing entities to hold client funds are over-stated. The BSB can require entities which it regulates to have proper procedures for protecting client funds. It would be the firm and not the individual barrister that would set up the procedures and payments would be made to the firm.

Chapter 3 Accepting Instructions

Strict rules on avoiding conflicts of interest need to be applied. The solicitors' profession has developed good procedures and the BSB regulated entities could adopt similar systems. We consider that it would be difficult to apply the Cab Rank

Rule to all advocates working within regulated entities. Currently the Rule does not apply to employed barristers and they will be working alongside self-employed barristers and possibly solicitor advocates in many entities. We consider it would be too restrictive to apply the Rule to all such advocates and possibly a deterrent to an entity deciding to be BSB regulated.

Chapters 4, 5 & 6

No specific comments

Chapter 7 Costs

As stated above we would be concerned if the costs of entity regulation caused a significant increase in the Practising Certificate fee. This would clearly have an effect on lower paid barristers. We agree that entity fees must be competitive with other regulators and would hope that they would be a lot less as setting up from scratch will avoid the bureaucracy that grows with time. It is dangerous to start from the premise that barristers would be prepared to pay more to be regulated by the BSB.

Chapter 8 Potential Characteristics of a BSB Regulated Entity

We think that the BSB should be as flexible as possible in the entities it regulates. We do not agree that the majority of managers need to be high court advocates and we think that there should be no limit on the number of non-advocate employees as long as the organisation has the necessary range of experience. We have no strong feelings about the number of non-lawyers which should be permitted. As stated above we feel that between 15 and 20% is about right.

Conclusion

Employed barristers work in many different types of organisation and are well used to working with different regulatory regimes. Flexibility and lack of bureaucracy is the key to good regulation.

BACFI

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