

Appendix A

Legal Services Act 2007 Summaries of responses

This Appendix gives brief summaries of the responses to the Board's consultation document. Respondents represented here by letters instead of names have asked that their response should be treated as confidential and that they should not be identified.

4 Pump Court

This response begins by saying that the correct question is by whom barristers should be regulated. The administration of justice, enhancement of competition, and the interests of clients will all be promoted by the existence of a corps of specialist advocates who operate under the cab-rank rule, are not members of partnerships, and whose functions are confined to those currently undertaken by self-employed practitioners. There should therefore be two separate regulators of barristers: one to regulate those in independent practice, and one to regulate those barristers who wish to practise in new business structures.

The response suggests that the BSB's approach is to allow relaxations of the current Code of Conduct for fear that to do otherwise will be incompatible with the Legal Services Act 2007. True, such relaxations would not compel barristers to take advantage of them. But the probable outcome would be to erode the present identity of the Bar. The approach is wrong. The Legal Services Act 2007 sets up a regulatory regime that is like that in the Financial Services Act 1986: in particular, the 1986 Act envisaged a multiplicity of regulators from which persons wishing to provide financial services could choose to be regulated. It would be in accordance with this approach to have more than one regulator for barristers.

ABSs will require a high degree of intrusive regulation. If the BSB regulates them it is likely, as the example of the SRA suggests, to extend such intrusive demands to sets of chambers. For this reason and others, the BSB should not undertake the regulation of ABSs. It lacks the expertise to do so; costs of regulation would be driven up; and intrusive regulation would worsen relations with the profession.

The response goes on to argue that the cab-rank rule is valuable and (if the BSB remains the regulator for all barristers) should be retained for all barristers. Without it, barristers would come under pressure not to act against, for example, the major banks. Barrister ABSs should be subject to the cab-rank rule. Any group of barristers wishing to form an ABS could either seek regulation by the SRA or practise as an ABS subject to the cab-rank rule.

It would be against the public interest for chambers to convert to partnerships. Arguments to the effect that there are tax and other advantages for partnerships, so that barristers wishing to avail themselves of such advantages should be allowed to do so, are mistaken. Barristers who wish to practise in business structures other than independent practice can always requalify as solicitors and be regulated by the SRA. To have one regulator (the BSB) for professional regulation and another for business regulation will lead to conflict and confusion.

The response argues that there should be no substantial extension of the range of activities that barristers are permitted to undertake. They lack the expertise to do so; and the regulatory consequences, including the likely need for a compensation fund, would be

adverse. In particular, the ban on handling clients' money should remain. The only significant exception is that the restrictions on investigating and collecting evidence could be relaxed.

(Note: although the response argues that there should be two bodies to regulate barristers, the statistics in this paper are based on the answers that the response also gives on the assumption that there will continue to be only one regulator.)

A, barrister

The author has asked that his response should be treated as confidential. It consists mainly of short answers to the questions posed in the consultation document, but also contains the following wider comments.

- The cab-rank rule is not very effective. The author knows of no instance of counsel being forced to represent someone they did not wish to.
- It would be advantageous if "someone (perhaps the LSB)" would decide case by case which regulator would be most appropriate to regulate a particular business entity.
- A compensation fund is likely to be needed; its cost should fall on those who are involved in the relevant activities.
- New forms of business organisation will emerge quickly; and "first movers" will have a considerable advantage. The BSB should therefore give urgent consideration to seeking powers to regulate LDPs immediately.

Alexander Barristers Chambers

The general approach expressed in this response is that barristers should have parity with other lawyers, and that self-employed barristers should not be subject to unnecessary restrictions: the Bar will be left behind if it does not give barristers freedom of choice. No one profession should have greater restrictions than any other. The response suggests that a cab-rank rule "of some description" is needed in the public interest, but that "a watered-down cab-rank rule is inevitable in light of the changes that will come about as a result of the new Act".

Other points in the response include:

- New business models will require new forms of regulation. The BSB should look at expanding its role.
- Barristers should be able to provide a wider range of legal services so long as they have the infrastructure to be able to provide a quality service. They should not be precluded from handling clients' money. But this will require greater supervision, the cost of which should fall on the supervised.
- There should be a regulatory system based, where appropriate, on principles such as the system that applies to Chartered Surveyors.
- There is a need for more flexible regulation that can respond rapidly to changing circumstances. The BSB should stay "ahead of the game" and relax as many prohibitions as possible as soon as reasonably practicable.

Alloway, Tor

This response is confined to comments on the cab-rank rule. It accepts that the rule could not be applied to those practising in ABSs or LDPs, but says that it should not be abolished

for sole practitioners. However, its main point is that the provision that publicly funded services are deemed to be at a proper fee (already abrogated for family and criminal practice) should be abolished.

Association of Personal Injury Lawyers (APIL)

This response is concerned with personal injury work and acknowledges that different considerations may apply in other specialist areas. It expresses concern that the proposals in the consultation document will give rise to serious problems with access to justice and reduce the quality of legal services provided by barristers to injured people.

The response argues that self-employment encourages independence and quality of service as well as maintaining access to justice. Allowing barristers to practise in ABSs, LDPs and partnerships will remove their self-employed status; and APIL is not confident that independence and access to justice will be maintained at present levels within those business structures. New arrangements will also restrict consumer choice as a result of “conflicting out.” ABSs, LDPs and partnerships which undertake insurance work could well be prevented from undertaking claimant work: insurance companies could effectively monopolise the market by placing instructions with a few large firms or sets. This problem could be still more serious outside London. There is already an “inequality of arms” between claimants and defendants. The proposals will exacerbate this. Access to justice is more important than creating business opportunities for the Bar.

The response suggests that in the new business structures envisaged in the consultation document the commercial interests of the business will become more influential and may supersede the barrister’s duty to act in the best interests of the client: for instance, cases of lower value may be pushed down to junior levels. In the new business structures there is likely to be some form of risk assessment committee which will decide whether to accept instructions. Such committees will probably include non-lawyers, who will give priority to commercial considerations. More generally, the possibility of outside ownership of law firms will enable big companies to move into the market, and will tend to commercial and cost considerations taking precedence over quality of service. These developments will tend to favour more wealthy litigants. If the cab-rank rule is not enforced this will further erode access to suitably qualified and experience counsel.

The response suggests that similar arguments apply to the forms of looser association discussed in Part V of the consultation document. It argues that the suggestion that administrative arrangements to manage conflicts of interest and problems of confidentiality are unrealistic.

B, clerk

This response, from a person who appears to be a barristers’ clerk and has asked not to be identified, is confined to stating that the cab-rank rule is widely breached across the whole of the Bar. Alleged lack of time is frequently used as an excuse for not taking on unwelcome work. If the rule were abolished this would not limit access to justice. There are more barristers than there is work.

Bar Association for Commerce, Finance and Industry (BACFI)

The response generally welcomes the BSB's approach, but stresses the need to consider the position of employed barristers and of non-practising barristers providing legal services. Most of the response takes the form of answers to the questions posed in the consultation document (and summarised in the spreadsheet); but the following should be noted.

- The response suggests that the BSB should seek power to regulate all LDPs, and not only those undertaking the type of work undertaken by the self-employed Bar.
- If partnerships of barristers are permitted they should be allowed to undertake all types of work mentioned in paragraph 83 of the consultation document. It would be sufficient to rely on the provision in the Code of Conduct requiring barristers to undertake work only if they are competent to do it.
- Many barristers do not provide services to the general public but only to large companies, who do not need the same degree of protection. Any regulation should be "light touch."
- If partnerships of barristers are allowed there will probably be a need to strengthen governance.
- There will be a need for a compensation fund; but it may be that the arrangements suggested in paragraph 127(a) would be adequate. Only barristers engaged in the activities concerned should be required to contribute to any fund.

Bar Council of England and Wales

See Appendix B.

Birss, Colin QC

This response is confined to a discussion of the cab-rank rule. It argues that the rule is both important and effective. It means that the barrister is not perceived as endorsing the client's case, and it allows him or her to be detached from it. It is a defence against pressure, especially from powerful commercial interests, not to take on certain clients or types of client.

The fact that solicitors are not subject to the cab-rank rule has had damaging effects. It should be retained for all barristers, in whatever type of business structure they may practise.

BSB Consumer Panel

The response welcomes the BSB's "commitment to embrace" the potential of ABSs. It suggests that the BSB should try to anticipate what will happen in the market for the provision of legal services. It should also consider the possibility of joint regulation of business entities with the SRA and look at areas where both individual professionals and entities are regulated.

The *objective* (emphasis in original) of the cab-rank rule is important rather than the particular wording and should be retained. However, the response notes that there is some doubt about how effective the rule is in practice, and suggests that there should be research into its working. It suggests that there is a danger that removing the cab-rank rule for new

business structures may result in the self-employed Bar becoming a dumping ground for cases that new firms do not want.

C, barrister

(The respondent has asked for the response to be treated as confidential).

A thread running through this response is that all barristers should be treated alike. In particular, although the response agrees with the BSB's general approach it says that it is essential that barristers working in ABSs or LDPs should be required to observe the same standards of independence (which must be preserved) as now exist. It also argues that as the cab-rank rule cannot be maintained for barristers practising in ABSs, LDPs or partnerships, it should be removed, in the interests of a "level playing field", from sole practitioners. Similarly, the restrictions in paragraph 307(f) of the Code of Conduct should be retained, while some of those in paragraph 401(b) might be relaxed, for all barristers.

Chancery Bar Association (ChBA)

The response says that the cab-rank rule plays a vital part in making the services of specialist barristers widely available. Because of the rule a client will always be able to retain a suitable specialist barrister. If it is discarded consumer choice will become severely limited. Paragraph 601 of the Code of Conduct gives barristers an answer to criticism if they take on an unpopular case. However, it should not be conflated with paragraph 602. This obliges a barrister to accept instructions, except for a limited number of reasons laid down in the Code. If he or she refuses instructions one of those reasons must be substantiated. The fact that solicitors do not have such a rule can lead to clients finding it hard to engage an appropriate firm. The cab-rank rule entrenches a culture under which picking and choosing clients is impermissible. Unlike firms of solicitors sets of chambers cannot have business policies determining whom they will or will not work for. If the rule were abolished barristers and sets of chambers would come under intense pressure from large clients to limit access to the market. As applied to self-employed barristers the cab-rank rule *guarantees* a wide choice, and ensures easy access to specialists. Abandoning it would seriously damage the efficiency of the market and would be detrimental to consumers.

The response argues that the chambers system encourages the concentration of particular skills, and the cab-rank rule makes them available to all comers. It also discourages the formation of sets of chambers that, for instance, specialise in working for claimants or defendants. It thus promotes centres of excellence, and produces candidates for the judiciary who have a wide range of skills and experience.

As regards barristers in ABS firms, to attempt to apply the cab-rank rule to them would be likely to bring them into conflict with the firm's business policy and so make them unattractive as managers of employees. But the rule could be adapted so as to avoid the risk of "conflicting out" or being a disincentive to the formation of ABS firms. There is therefore no reason why it could not be applied to ABS firms or to barrister managers in them. However, it would be wrong to subject barristers employed in such firms to the rule. The cab-rank rule should apply to partnerships of barristers if these are permitted (which the response opposes) because it is in the interests of consumers. It should also be retained for self-employed barristers.

The response then analyses the provisions of the Legal Services Act 2007. It argues that the sole innovation of the Act affecting the way in which legal services may be delivered to the

public is the possibility of forming ABS firms. But this should not be interpreted as giving the green light to making barristers interchangeable with solicitors: Parliament intended to retain the difference.

The response says that there is no need for barristers to manage ABS firms, a task for which solicitors are better suited. Moreover, there should be only one regulator of such firms and the SRA is better suited to this. Barristers wishing to participate in the management of an ABS firm can requalify as solicitors. This would provide regulatory consistency, since all managers of ABS firms would be solicitors. For the same reason, there would be greater clarity for consumers. It would simplify the task of the Board and keep its costs down. On this basis it would be undesirable for the Board to seek to become a business regulator of ABS firms. The Legal Services Act 2007 does not require this.

As regards the matters discussed in Part V of the consultation document, the response opposes relaxations in the rules relating to administration of practices, except that barristers might be allowed to share office facilities if there was complete business separation. It endorses the approach in the consultation document to the rules relating to “prohibited work.”

Citadel Chambers

This response largely takes the form of short answers to the questions posed in the consultation document. In its more extended answers it expresses doubt about the effectiveness of the cab-rank rule, and suggests that it is unlikely that significant adverse consequences would flow from its abolition, so long as paragraph 601 of the Code of Conduct is maintained.

On regulatory issues the response opposes heavy or intrusive regulation, but suggests that in the longer term it would be preferable for the regulatory bodies to be fused into a single entity.

The response endorses the BSB’s approach to the matters discussed in Part V of the consultation document. It opposes the creation of a compensation fund (suggesting that it would be better to ensure that new business structures are properly insured); but if a fund is created its cost should fall on those who want to provide legal services through new business entities.

The response concludes by saying that “The bar must be given every opportunity to compete with other legal professionals immediately.”

COMBAR

(COMBAR is the association representing barristers with a substantial practice in commercial law.)

The response emphasises the importance of the English legal system (and especially its commercial law aspects) for the economy. International clients who choose English law or jurisdiction regard it as important that they have access to a pool of wholly independent barristers – that is, independent from other barristers, solicitors or third parties. They also know that they will always be able to find a suitable representative who is not conflicted out, and that he or she will be required by the cab-rank rule to take on their case, and will not decline it on the grounds that another client would prefer him or her not to act. This

guaranteed independence and the cab-rank rule distinguish barristers from other forms of legal provider. The proposals of the Board would leave barristers with no distinguishing feature other than regulation by a different body. The public and clients welcome the existence of the Bar as a separate profession. The public interest lies in maintaining its essential distinct existence and code.

Crozier, Rawdon

This response takes the form of annotations to the consultation document. Its central proposition is that rules against conflicts of interest will prevent provincial chambers from taking advantage of ABSs; this will lead to larger chambers from major conurbations leeching out particular areas of work; and that the solution is to allow the existence of “Independent Practitioner Entities” (IPEs). IPEs could have a wide range of business structures; their primary function would be to provide advocacy, advice or consultancy services through individual members of the organisation to individual clients; and the duty of the member to the client would (subject to the provisions of the Code of Conduct) override any duty of the member to other members of the organisation or the organisation as a whole. The cab-rank rule, which the author regards as “an important principle”, would continue to apply to members of IPEs. The author also argues that the consultation document overstates the problems of conflict of interest in partnerships.

It is not entirely clear whether the author envisages that IPEs would be one among a range of possible organisations within which barristers could provide legal services otherwise than as employees, or whether they would be the only available option other than LDPs and partnerships of barristers, which the author explicitly states should be permitted: it appears to be the former.

On other issues, the author is strongly opposed to the possibilities discussed in Part V of the consultation document.

D, barrister

The respondent is an employed barrister. He has asked that his response should be treated as confidential.

The response stresses the potential benefits to clients from the services provided by employed barristers and the benefits to barristers from being able to move between chambers and law firms. It questions the argument that self-employed barristers are more “independent” than employed barristers.

The Bar’s strength is its specialism in advocacy. The BSB should continue to be the professional regulator of all barristers. Indeed, it should regulate all specialist full-time advocates. But it should not regulate “structures” except sets of chambers or (perhaps) partnerships consisting solely of practising barristers.

The answers in the response to the questions posed in the consultation document are recorded in Appendix C.

Employed Barristers' Committee (EBC)

Although this response is from the Employed Barristers' Committee it emphasises that the employed Bar supports the concept of "One Bar" and that it has considered the implications of the consultation for the whole of the practising Bar.

The response repeatedly states that the BSB should seek to become a regulator of entities as well as of individuals and that this regulatory power should be framed in wide terms: in particular, it should not be confined to the regulation of entities supplying those services that are provided by the self-employed Bar. It also emphasises that any changes in current arrangements should permit, not mandate, new business structures. The system of self-employed barristers practising in chambers has worked well; but it should not be the only available model. In essence, it argues that barristers should be allowed to provide legal services in any lawful business structure and without restriction to any particular type of activity.

As regards the cab-rank rule, the response argues that this could be applied to barristers providing legal services as managers of ABSs or LDPs, although it accepts that as a result such barristers would probably be more likely to be "conflicted out" of some cases. In general, the rule should be maintained for all (other than employed) barristers.

In general, the response supports the relaxations discussed in Part V of the consultation document. However, it questions the BSB's stance on "prohibited work" since, as it points out, employed barristers can already conduct litigation. It suggests that it may be better to consider the issues in terms of what work "case advocates" should be allowed to undertake. The response broadly endorses the BSB's approach to the issues raised by the possibility of handling clients' money. As regards possible compensation arrangements it suggests that these could be left to the commercial insurance market.

Falcon Chambers

This response is discursive and does not address any of the specific questions posed in the consultation document; but its general tone is fairly negative. It expresses concern that the BSB may not be seen by government as capable of regulating under the new regime, and that this may lead to pressure for one regulatory body, presumably the SRA. In the same vein, the response suggests that the ultimate logic of the new regime is a fused legal profession. This would be a bad thing; and the BSB should protect the independent Bar from such a development. The response says that it is disappointing that the BSB appears to envisage a fairly restricted regulatory role for itself.

The cab-rank rule should apply to all barristers: to apply it only to the self-employed Bar would be unfair because it would be likely to have the effect that ABSs and others would take only the attractive cases, leaving the unattractive ones to sole practitioners. On the other hand, it would be hard to apply the rule as it stands to ABSs; and any modified rule would probably be ineffective and hard to enforce. The rule is important and it would be undesirable to water it down.

The response expresses concern about the effect of ABSs on the independent Bar. The emergence of such structures is likely to lead to increased costs and reduced choice. Even if the structures are generally unattractive, their adoption by just a few big chambers could have a disproportionate effect. There is also a danger in permitting practice in partnerships because of the risk of "conflicting out" and consequent reduction in choice. The response recognises the argument that the related commercial considerations are likely to limit the

attractiveness of partnerships, but says that commercial and other circumstances may change in future.

If barristers handle clients' money, or are involved in organisations that do so, they will need appropriate training, and a compensation fund will have to be set up. The costs of this should fall on those whose business model requires it.

The response concludes by saying that "any prohibition of what the [Legal Services Act 2007] allows would be against the spirit of what Parliament is trying to do." But new systems will need careful consideration. The BSB should conduct another consultation when they have digested the responses to this one, and allow further comments before final decisions are made.

Garden Court Chambers

This is another discursive response that does not address the specific questions posed in the consultation document. It opens with a general attack on what it sees as a commitment on the part of the Government and others to focus on "market forces" in the area of publicly funded work. It suggests that the Legal Services Act 2007 is part of this commitment, and that the introduction of ABSs and LDPs is an attempt to undermine the existence of the independent Bar. The BSB should not slavishly implement legislation irrespective of the consequences for the administration of justice: it should not regulate the Bar on behalf of the Executive but in the public interest. If the economic pressures created by the Legal Services Act 2007 are allowed full effect, there is a danger that the Bar will not survive. The BSB should do what it can to prevent this happening.

The cab-rank rule is important for access to justice. It should not be abolished for the self-employed Bar. The response accepts the difficulty of applying the rule to ABSs and LDPs, and concludes that the BSB has no option but to accept the provisions proposed in the consultation document.

The response argues that if barristers can form partnerships (including LDPs) the rationale for the Bar disappears: advocates working within a partnership will have to consider the commercial needs of the business, and this will undermine their independence. The BSB's jurisdiction over barristers practising otherwise than as independent practitioners will be hard to justify. Either there should be fusion of the professions (with a single regulatory body) or the BSB's jurisdiction should be confined to the independent Bar.

Gray's Inn

The response is explicitly confined to matters in which the Inn believes it has a legitimate interest. It endorses the BSB's general approach, except that it suggests that the interests of justice should be central. Its main concern is the potential cost to the profession if the BSB should become a business regulator, although it recognises that this may be unavoidable. It argues that no part of this cost or of any consequent disciplinary proceedings should fall on the Inn.

Griffiths, Richard

The main point in this short response is that "no restriction ought to remain or be put in place without rational justification." Barristers should be free to practise in whatever structure they

judge will best serve their interests. Abolition of the cab-rank rule is inevitable. It is anyway open to question whether it has any basis in practice.

Henderson, Roger QC

This response analyses many of the issues raised in the consultation document as matters of law rather than as a mixture of law, policy and practicability.

The main points in the response are

- to raise the issue that before beginning the consultation the BSB should have taken and published legal advice on whether the Bar could lawfully retain the cab-rank rule; and
- to suggest that the profession should be split between independent practitioners required to work under the present Code of Conduct and practitioners in new business structures who would work under some less demanding set of rules: the two parts could be regulated by different bodies or structures.

Hills, David

The respondent is the Under Treasurer of Lincoln's Inn, but makes his comments in a personal capacity.

The response suggests that there will always be a requirement for high quality advocacy. The problem is ensuring that those working in the publicly funded arena obtain the necessary experience. There is a need both for a system which safeguards the independent Bar, subject to such requirements as the cab-rank rule, and for a more flexible system which allows barristers to work in different business conditions and to pursue alternative career routes. This points to a need for duality of regulation.

Some barristers will wish to take advantage of the new regulatory regime; but the independent Bar must be protected from such a move leading to a fused profession. Different regulators may be appropriate for different types of business structure. But barristers should always retain some residual allegiance to the BSB.

The response says that the cab-rank rule is effective, but would be difficult to justify in ABSs and LDPs. Barristers should be allowed to practise in ABSs and in LDPs consisting only of barristers. But except for residual CPD responsibilities they should not be regulated by the Board. Business regulation by the Board should be confined to organisations consisting only of barristers. Any additional regulatory costs should fall on those organisations. The Board should retain disciplinary rights over all barristers.

Authorised activities by barristers in either an ABS or LDP should be regulated by the appropriate body other than the Board. That regulatory body should be responsible for compensation arrangements. Barristers in independent practice and barrister-only partnerships should fall within existing insurance provisions.

Institute of Chartered Accountants of England and Wales (ICAEW)

This response says that the ICAEW supports the concept of a strong and independent Bar. But embracing a wider range of business structures need not undermine the concept. The accountancy profession has done this: there is no evidence that it has led to any reduction

in ethics or standards. Restrictions should be retained only where there is a clear public interest justification for doing so.

The response suggests that conduct is more effectively controlled by using principles rather than specific rules. A principles based approach could be of great help, for instance in considering the future of the cab-rank rule.

Barristers should be able to look to the BSB as their regulator for a full range of services. So the BSB should not rule out forms of practice or areas of activity: it should be as flexible as possible. For example, associations of barristers should not be limited to partnerships: corporate bodies and other forms of association should be possible. Nor should the BSB allow regulatory gaps to emerge that would tend to be filled by other regulators. Otherwise the Bar may lose its unique position.

The response broadly agrees with the approach in the consultation document, except that it believes that elements of the cab-rank rule should be retained. A principle that maintained the obligation to act in all but defined circumstances could assist in retaining what is good of the rule while allowing flexibility suitable for a wide range of business structures. It would then be possible to apply elements of the cab-rank rule to barristers in all forms of business organisation.

The response draws a distinction between holding clients' money and receiving fees in advance, which should not be restricted. More generally, any rules prohibiting particular activities should consider the risks involved and the safeguards required to strike a balance between the freedom of the barrister to offer services and protecting consumers and the public interest. The BSB should use the experience and expertise of other regulators as far as possible, and should study the development of regulation in other professions.

Institute of Barristers' Clerks

(Note: A central theme of this response is that those barristers who are not subject to the cab-rank rule or who practise in new business structures should not be allowed to practise under the title of "barrister" but should be required to adopt some new title. Responses to individual questions in the consultation document should be read with that in mind.)

The response argues that the cab-rank rule should be retained for all barristers in whatever type of business structure. To relax or abolish the rule would be inimical to the public interest, to access to justice, and to client choice. If it is abolished for ABSs and LDPs the result will be to concentrate less attractive work on the independent Bar.

Barristers should not be allowed to practise in partnerships. To do so would restrict choice, reduce access to justice, and reduce competition.

To have different types of barrister using the same title would create confusion in the mind of the public. So barristers in ABSs or LDPs should be required to use a different professional title and be subject, like employed barristers, to a separate section of the Code of Conduct. Subject to that, barristers should be allowed to supply legal services to the public in all types of business structure.

The BSB should remain the professional regulator of barristers. Regulators must command the confidence not only of the public but also of the regulated. The SRA would not be suitable, as it has no experience of dealing with complaints about the professional conduct of barristers.

As regards the questions posed in Part V of the consultation document, the response argues that there should be no relaxation of the current rules concerning business associations. It agrees with the BSB's approach on "prohibited work", and is very strongly opposed to allowing barristers to handle clients' money.

Judges' Council of England and Wales

This is a very general response which is avowedly confined to the possible impact of any changes on the administration of justice. Its main concerns are that changes should not unduly restrict the choices available to lay clients and solicitors in instructing counsel; that concerns about possible conflicts of interest in new business structures should be addressed; and that any new regulatory and disciplinary structure should be clear and straightforward in its operation.

Lambert, John

The author of this response says that the Legal Services Act 2007 offers many opportunities for the Bar, and that he intends to practise through an ABS as soon as possible. He states that the cab-rank rule is irrelevant to his practice. It is not clear whether he believes that the rule should be retained at all for sole practitioners: he says that "if it has any value at all, I think the rule should be applied on a sector by sector basis regardless of the area of law."

The answers to the questions posed in the consultation document are very short, but it is possible to discern a thread running through several of them: that barristers should not be restricted in the services that they are allowed to provide, so long as they have appropriate expertise. A wide range of business structures should accordingly be permitted; but there should be "much greater regulation of all business models by the Code including traditional chambers." There will be a need for a compensation fund "but it is only fair that those who want to do that work should contribute to it or arrange appropriate insurance cover."

Law Society of England and Wales

The response welcomes the BSB's "permissive and open-minded" approach. Although it expresses diffidence about offering opinions on matters relating peculiarly to barristers, it agrees that it would not be practicable to apply the cab-rank rule to barristers in ABSs or LDPs. It also says that it can see no reason of principle to maintain the current prohibition on practising in partnerships.

The response agrees in general with the BSB's approach to regulation, but says that there is no reason why LDPs with both solicitor and barrister members could not be regulated by both the SRA and the BSB. It does not agree that the BSB should be the primary regulator for LDPs specialising in advocacy services: they should have a choice of regulator.

The response expresses some scepticism about the proposals for multidisciplinary associations, which it says "carry some potential risks to transparency and consumer protection."

The response points out that under schedule 11 to the Legal Services Act 2007 if the BSB becomes an ABS regulator it will be required to maintain appropriate compensation fund

arrangements. It also raises a technical question whether during the transitional period partnerships of barristers would have the right to provide reserved legal services.

Legal Complaints Service

The response welcomes the proposals in the consultation document to amend the regulatory structure of the Bar to allow barristers to be part of the new landscape for legal services. It says that in developing the proposals it will be important to bear in mind the impact on consumers and the need to ensure that consumers know where to go to seek redress. It also says that regulated bodies should be encouraged to develop a strong focus on client care. Finally, it asks what consumers need to know about the changes proposed in the consultation.

Legal Services Commission

This response begins by saying that it is important to promote competition, while maintaining the core values of independence and consumer access to providers. It suggests that there is a risk that multidisciplinary organisations (whether ABSs or LDPs) could cherry-pick cases and leave the unprofitable or unpalatable ones without representation. There is a need to strike a balance between enabling the widest possible range of service provision and ensuring that extension does not reduce or remove consumer choice. “Conflicting out” could be a real threat to choice. And new entities may stifle future provision either by dominating the marketplace or by driving up costs.

Careful thought should be given to retention of key aspects of the cab-rank rule. The response agrees that the rule would be difficult or impossible to apply to barristers in ABSs or LDPs. As regards self-employed barristers, the response says that the cab-rank rule well reflects the Bar’s ethos of acting in the best interests of clients. However, it suggests that there is not much evidence that it works well as a rule and in a climate where there is an increasing number of opt-outs. The rule should be thoroughly reviewed and rewritten.

The response is ambivalent about the possibility of barristers practising in partnerships. It suggests that an assurance is required that these would be established in the best interests of clients and solely to put barristers on an equal footing with litigators/solicitor advocates. It suggests that if they were set up to provide greater leverage in bidding for commercial contracts there is a danger that they would not operate in the public interest by restricting access, and possibly presenting a longer-term threat to services (particularly publicly-funded services). But the response also says that if the aim in forming partnerships were to increase leverage in contract bidding this could potentially enhance access to services and might be a preferred option to the Chambers system.

The response challenges the assumption that the BSB should remain the sole professional regulator of barristers. The BSB is a regulator only as the delegate of the Bar Council, which is a representative body. Moreover, the Legal Services Act 2007 envisages that barristers should have a choice of regulator: the SRA might be as suitable as the BSB. However, all regulators should work collaboratively to ensure that their rules are consistent. Similarly, LDPs should have freedom to choose their business regulator. If the BSB is one of the regulators it should confine itself to regulating the type of work undertaken by the self-employed Bar.

Partnerships of barristers, if allowed, should not be restricted to advocacy and advisory services (although the response then says that it is hard to see why barristers should wish to branch out into wider areas).

On the structure of self-employed practice, the response endorses the BSB's approach to Question 19 and 20, though it suggests that ideally more information is required on the actual benefits to clients and whether and how it would be possible to overcome concerns about client confidentiality and conflicts of interest. The response also endorses the BSB's approach to Question 22, and says that the cost of additional regulation should be borne by those in the profession who directly benefit from it.

The response agrees with the BSB's approach to Questions 23 to 25; but says that additional robust safeguards should be in place to protect the consumer.

On Questions 26 to 28 the response agrees with the BSB's approach, but again suggests that additional safeguards are required in order to ensure that barristers in ABSs are covered by regulations on handling clients' funds. If barristers are permitted to handle clients' funds a compensation fund will be required. If they are regulated by the SRA they could pay into the existing compensation fund. Alternatively and preferably, there could be a separate function managed by a "fund handler."

As regards the issue raised in Question 31, the BSB should work with other regulators to ensure that any barrister wishing to operate in an LDP can do so and choose to have that entity regulated by the BSB. Waiting until the regulatory regime for ABSs is in place may well put barristers at a disadvantage compared with litigators.

Leveson, Lord Justice

This short response is confined to an assertion that the cab-rank rule is essential to the proper administration of justice and should be preserved.

Makey, Christopher D

The main thrust of this response is that the consequence of the Legal Services Act 2007 and the suggestions in the consultation document will be the disappearance of the independent Bar and the emergence of a fused legal profession. For instance, although it does not answer any of the questions about the structure of self-employed practice it says "The Board appears to assume that what is required is an end to any differentiation between firms of Solicitors and self-employed Barristers. Had I wished to become a Solicitor I would have done so...[the suggestions in the consultation document] will not strengthen the Bar but will turn those Barristers into Solicitors."

The response accepts that the cab-rank rule could not be applied to barristers who were managers of ABSs or LDPs, and probably not to barristers practising in partnerships. However, such managers will be treated as "de facto solicitors". By extension, the BSB is likely to cease within a short period of time to regulate such barristers, because they will be carrying out functions proper to solicitors.

If barristers are allowed to practise in partnerships it will not be realistic to confine them to providing the type of service provided by sole practitioners. And a completely new set of rules will be required to regulate them.

The response emphasises the need for costings of any proposed regulatory measures.

McIlroy, David

(Although the author of this response describes himself as the “ABS Officer” in a set of chambers, the response appears to be a personal one.)

Most of the substance of the response is contained in its answers to the questions posed in the consultation document (summarised in Appendix C); but it also makes the following main points.

- Most barristers will prefer to enter into Limited Liability Partnerships rather than partnerships at common law. This will raise the question whether barristers should be allowed to limit their liability.
- The approach to handling clients’ money outlined in paragraphs 118 to 120 of the consultation document is correct. Those barristers who did not handle clients’ money would not wish to contribute to the cost of an insurance fund to compensate clients defrauded by barristers who did handle clients’ money.
- barristers should be forbidden to supply legal services in partnership with non-lawyers until the regulatory regime for ABS firms is in place.

Middle Temple Hall Committee

The introductory paragraphs of the response emphasise the diversity of views among the members of the Committee, and that it is only a preliminary response that may will be modified when more detailed proposals are put out for consultation. The predominant tone of the response is support for the arguments and suggestions in the consultation document (which is not to say that there are no divergences).

More particularly, the response says that the proposals in the consultation document have been broadly welcomed by the civil practitioners on the Committee and by those undertaking public access work. It advances two principles:

- that barristers should have as much parity as possible with other professionals; and
- that self-employed barristers should be given the same opportunities as those working in partnerships or in new business structures.

Regarding the cab-rank rule the response suggests that there is no pressing need to retain paragraph 602 of the Code of Conduct, *provided* that paragraph 601 is retained (the need to retain paragraph 601 is mentioned several times).

The response makes it clear that many of the criminal practitioners on the Committee take a rather different view, especially as regards the cab-rank rule. However, the response expresses some barely concealed scepticism regarding the arguments in support of that position.

Particular points that seem worth especial mention are as follows.

- There is a long examination of the BSB’s general approach, which is strongly endorsed.
- It is suggested that barristers working in ABSs or LDPs should be permitted to hold clients’ money, subject to regulation by a body set up to regulate the function; but that self-employed barristers should not be so permitted.
- There must be a rigorous regulatory regime to prevent a barrister’s commercial interest in an organisation overriding his or her duties to the court.

- There is a long and discursive discussion of professional regulation which by and large endorses the BSB's approach but voices doubts about the desirability of having more than one body regulating those engaged in advocacy. Particular concern is expressed about the possibility that different rules would apply to different professionals engaged in providing advocacy services to the public.
- The BSB should seek power to regulate LDPs as soon as possible. These should be confined to LDPs undertaking the type of work currently undertaken by the self-employed Bar. Similarly the BSB should seek power as soon as possible to regulate LDPs consisting of barristers and non-lawyers even before the regulatory regime for ABSs is in force.

Monckton Chambers

The response argues against what it conceives to be the BSB's general approach, which it suggests is that because some barristers would wish to take advantage of the provisions of the new regulatory regime a favourable view should be taken of this without giving more than cursory consideration to the consequences for the public interest. The response says that this approach will over time have detrimental consequences. There is no evidence that the present system has adverse effects, or that changing it would achieve the BSB's stated objectives. The response attacks the argument that because Parliament has legislated to permit the provision of legal services through new firms it would be wrong for the Bar's rules to prohibit barristers from being involved in such firms.

If partnerships of barristers are permitted they will become the preferred model, as has happened with solicitors; and sole practitioners will be marginalised. This would be against the public interest: it would drive up costs and reduce competition and consumer choice.

The cab-rank rule is essential in the interest of both lay clients and barristers. The response accepts that it could not be applied to ABSs or LDPs. Since it argues that partnerships of barristers should not be allowed it says that the issue of the cab-rank rule should not arise in that context. However, if barristers were permitted to practise in ABSs, LDPs or partnerships and the rule were not applied to them it should not be applied to sole practitioners.

The BSB's regulatory functions should apply to barristers and to nobody else. The response answers all the questions posed in the consultation document. However, since it is fundamentally opposed to the general approach underlying the document most answers are on the lines of "This should not arise."

Needham, Julia

The main point in this short response is that the BSB should not become a business regulator, predominantly because of the cost implications. The response also expresses general opposition to the potential changes described in the consultation document, and suggests that it would be possible for the Bar to adapt to the Legal Services Act 2007 without changing its fundamental character.

Office of Fair Trading (OFT)

As regards the cab-rank rule, the response expresses some doubt whether the rule is effective in practice; suggests that it should be for individual ABSs, LDPs, or partnerships to

decide whether to adopt the rule; but suggests that the rule could continue to operate for advocates in independent practice.

The response is much more decisive on new business structures. It says that “The OFT has identified the prohibition on barristers forming partnerships with other barristers or with other professionals as amongst the most restrictive of competition.” Also that “It has always been the view of the OFT that allowing partnerships between barristers and others has the potential to increase the availability of barristers by attracting practitioners to new areas of practice.” The response gives the clear message that “Since the Legal Services Act 2007 permits the formation of ABSs which allow barristers to practise in these entities then the BSB should revise the Code of Conduct to reflect the wishes of Parliament.” In a similar vein, the answer to Question 9 includes this: “The OFT would be concerned that the BSB’s rules as they currently stand may restrict the ability of members of different legal professions from joining together in LDPs or the ability of LDPs to compete with each other and with lawyers organised in other types of business structures.” Partnerships should accordingly be allowed, and their activities should not be restricted.

As regards the matters discussed in Part V of the consultation document the response generally welcomes the BSB’s approach: it agrees that the rules regarding the sharing of administration should be relaxed, as should those bearing on “prohibited work.” However, the response does not agree that the current prohibition of barristers holding clients’ money should remain. Associated compensation arrangements should minimise the risk of any gap in cover. Charges should be neutral as between different business models.

Office of Immigration Services Commissioner (OISC)

This response endorses the BSB’s general approach, although it advises against reliance on market forces to sustain the positive features of the Bar. The BSB should not make it difficult by its rules for barristers to participate in new business structures. Nor should it discriminate against those who do not wish to participate.

The response suggests that the cab-rank rule has little effect in practice. The rule is unsuited to the marketplace created by the Legal Services Act 2007. It should therefore be abolished for all, including sole practitioners in order not to discriminate against them.

The BSB should be the business regulator for ABS firms whose business is analogous to the current remit of the Bar. New regulations will be required to regulate such firms.

As regards the possibilities discussed in Part V of the consultation document, the response sees “little point in allowing a parallel regime that incorporates some features of ABSs but is distinct from ABSs.” This would either require a parallel regulatory regime (which would take undue time and resources to develop) or there would be an unacceptable regulatory gap. It would also be confusing for clients. Those barristers who wish to work with other professionals should do so in an ABS firm.

However, the response supports the BSB’s approach to “prohibited work”.

The response suggests that it is not practical at present to allow barristers to handle clients’ money, though that may come about in time. In any event it would be in the public interest to establish a compensation fund to provide a safety net when individuals have no or inadequate cover. The costs of this will have to fall on the regulated. The response says that while it may seem fairer for the costs to be borne solely by those whose work carries the risk

of losing client money “the reality may be that there are not enough barristers in that category alone to bear the cost of an adequate compensation fund.”

Finally, the response says that the BSB will have to make arrangements to allow barristers to participate in LDPs. Whether it should set up BSB-regulated transitional LDPs will depend on whether it has the resources to regulate them adequately. If not, it should not permit their introduction.

Petts, James E

The author of this response disagrees with the BSB’s general approach. In his view, the virtues of the independent Bar are the virtues of a split profession. It is fundamental to being a barrister that barristers do not, for instance, conduct litigation. Regulators must ensure that those whom they regulate practise only within the confines of their profession. It is wrong that litigators are now allowed to practise as advocates: if advocates are in future allowed to litigate, all distinction between the professions will effectively vanish as, in consequence, will the virtues of the independent Bar.

The cab-rank rule should be retained: it is of fundamental importance to the Bar. A barrister in independent practice should not be able to pass to another person responsibility for such an important aspect of his or her practice as deciding which instructions to accept. ABSs or LDPs wishing to engage as a manager a barrister in independent practice will have to do so on the understanding that he or she is subject to the rule. If they are unwilling to do this, they will be free to employ a solicitor advocate. If it is thought that there is a risk of malicious clients seeking to “conflict out” the organisation in which the barrister is engaged, the matter should be dealt with by introducing a clause in the cab-rank rule which would allow instructions to be refused if there were reasonable grounds for believing that a client was behaving in such a way.

The BSB ought to license organisations (other than chambers, which should not need licences) to engage barristers in independent practice and mandate that barristers may practise only in organisations that have such a licence. But the BSB should not seek to regulate any aspects of the organisations other than the way in which they engage barristers and provide barristers’ services. In order to obtain a licence an organisation would have to satisfy strict requirements regarding the maintenance of the independence of all barristers working within it; such barristers would, just as much as self-employed barristers, have to act independently in the interests of the lay client and be subject to the cab-rank rule.

Personal Injuries Bar Association (PIBA)

The response begins by pointing out that the Legal Services Act 2007 is facilitative: it does not require new business structures to be set up. What needs to be considered is whether a new structure will comply with the regulatory objectives in the Act. The response says that it is unlikely that ABSs or LDPs (or partnerships more generally) will best serve the public interest. Barristers should therefore not be allowed, except as employees, to provide legal services through them.

The Bar provides high-quality services as a result of its specialisation. The referral model of advocacy offered by the self-employed Bar is likely to remain the best method of providing such services. Nor is there any evidence of demand from consumers for an alternative: the BSB should commission a survey of client opinion in this matter.

The response is particularly concerned at the risk of polarisation between organisations dealing with claimant work and those dealing with defendant work. This is avoided by the chambers structure. The growth of ABSs would greatly increase the risk; and even barristers who wished to operate as sole practitioners would come under pressure to operate in partnerships or LDPs.

The response says that the cab-rank rule is of fundamental importance. An ABS would be unwilling to represent clients who might damage their image. But such clients need to be represented in the interests of justice.

The response espouses the arguments rehearsed in the consultation document against allowing barristers to practise in partnerships. It also argues that an elaborate and expensive system would be required to avoid conflicts of interest. The expense of this would drive up costs.

On matters of more detail, the response argues against relaxing the restrictions in paragraphs 307(f) and 401(b) of the Code of Conduct, even in the context of LDPs (were barristers allowed to practise in these). It is prepared to consider some of the relaxations discussed in Part V of the consultation document, but is strongly against allowing barristers to handle clients' money or allowing relaxing the rules relating to "prohibited work" except in certain respects for barristers engaged in public access work.

Professional Negligence Bar Association (PNBA)

This response begins with a fairly extensive survey of the provisions and philosophy of the Legal Services Act 2007. On the basis of this survey it reaches the conclusion that barristers should be permitted to supply legal services as employees of ABSs and LDPs, but not as partners or managers. As regards those ABSs that were licensed to provide reserved legal services additional to exercising rights of audience, they would inevitably be involved in handling clients' funds. Although other partners or manager would no doubt be responsible for this any barrister manager or partner would be vicariously liable for any shortcomings on their part and so would need training in the handling of clients' funds. The only sensible and economical way of achieving this is for such barristers to requalify as solicitors and be regulated by the SRA. As regards those ABSs that were licensed only in respect of exercising rights of audience that argument would not apply, since they would not handle clients' funds. However, if substantial numbers of currently self-employed barristers wished to provide legal services in this way it would reduce consumer choice and so would be undesirable: if only a few did, it would be more sensible to require them to requalify as solicitors.

The response argues that these conclusions are fully consistent with the aims of the Legal Services Act 2007, since ABSs would not be prevented from coming into existence, and barristers wishing to provide legal services through them would be free to do so, either as employees or by qualifying as solicitors.

The response also argues that since it would be difficult or impossible to apply the cab-rank rule to barristers practising as partners or managers in ABSs and LDPs, and it regards the rule as of fundamental importance, this is a further reason against allowing such practice, and indeed against allowing barristers to practise in partnerships.

At first reading, the response appears to be less hostile to the ideas canvassed in Part V of the consultation document, but it is clear that it is generally opposed to the ideas. However, the response accepts that there is a case for some limited relaxations of existing rules to

permit barristers to conduct negotiations with third parties and to allow more scope for investigating and taking proofs of evidence.

Professional Practice Committee

This response begins by arguing that unless something in or arising from the Legal Services Act 2007 can be shown to make a revised approach necessary the BSB should not depart from the conclusions of the Kentridge Report. In fact, there is no need for changes in the rules of conduct for self-employed barristers, and little need for change in the rules applicable to other barristers. The response says that the BSB is mistaken in its view of the Legal Services Act 2007: it would not be frustrating the purposes of the Act if it refrained from making the changes contemplated in the consultation document.

The independent Bar provides specialist skills of advocacy and advice. These are valuable. But barristers do not have the training or experience to provide the full range of legal services.

The response goes on to argue that the BSB should regulate barristers as individuals, and should not seek to regulate business entities. This should be left to the LSB, SRA or other appropriate licensing authority. Barristers should be permitted to practise within ABSs or LDPs, but only as employed barristers.

The proposals in the consultation document would make it hard to justify continuing the distinctions between barristers and solicitors. Abolition of the present restrictions on the activities that barristers are allowed to undertake would undermine the virtues of the independent Bar. The BSB should have given more weight to the fact, which is recognised at least by implication in the Legal Services Act 2007, that barristers do not “supply legal services”, but carry on one reserved legal activity – exercising rights of audience. Attempting to go wider could create various problems relating to the activities of organisations involving barristers. These should be solved by retaining the existing prohibition on barristers practising in partnerships. This will not mean that barristers cannot be involved in ABSs or LDPs, so that the BSB could not be said to be working contrary to the will of Parliament as expressed in the Legal Services Act 2007. Barristers should be permitted to practise as employees of ABSs or LDPs, and to be shareholders, and so “involved”, in such bodies.

The cab-rank rule is effective across the board. It is important in maintaining the independent Bar. Retaining it would indeed have the effect of deterring the formation of partnerships. But it is not realistic, and it would be objectionable in principle, to rely on the cab-rank rule to prevent this. In any event, the rule should be retained for the self-employed Bar.

In fine, barristers should be able to supply legal services as managers of ABSs or LDPs, provided that they are not partners in these bodies, but employees (including directors). If barristers wish to be partners with solicitors they can requalify as solicitors and practise as such.

Barristers should not be allowed to handle clients’ money. Such an activity requires training that barristers do not have. Moreover the BSB is not equipped to regulate the activity. There would also be a consequent need for a compensation fund, which would be costly to set up. The BSB should remain as the professional regulator of barristers but should not seek to become a licensing authority in relation to ABSs. It would be expensive for the BSB to acquire the systems and expertise required to regulate companies. The BSB has no power to regulate LDPs and should not seek such powers.

As regards the proposals discussed in Part V of the consultation document the response opposes any relaxation of the rules relating to sharing of administrative arrangements. It says that there is no need for this; that it would undermine the justification for keeping the independent Bar as a separate profession; and that it would raise serious regulatory problems. The response also opposes relaxation of the rules relating to “prohibited work.” It stresses the importance of defining the profession of barristers as independent advocates.

Since barristers should not be allowed to handle clients’ money there will be no need for a compensation fund. But if the a fund were set up the cost should fall upon those practising barristers whose clients were to be covered by the fund.

Purnell, Chris

This response from an employed barrister says that the ability to act independently is not a function of whether the barrister is self-employed. The author doubts whether the “independent” Bar has anything to fear from the establishment of new business structures.

Reevell, Simon

The respondent is a barrister specialising in military law. His response is confined to commenting (in that context) on the proposal in paragraph 117 of the consultation document to remove the ban on counsel attending police stations. It welcomes this but argues that the suggestion that counsel would then be barred from representing the person attended is counterproductive and unnecessary: other provisions of the Code of Conduct are sufficient to prevent abuse.

Solicitors Regulation Authority (SRA)

Although this response says that it is limited to questions that it is appropriate for the SRA to answer given its role as an approved regulator, it is in fact pretty comprehensive.

The response begins by welcoming the consultation document. It points out that the Legal Services Act 2007 provides for a choice of regulator, but says that the SRA does not see itself as being in competition with other regulators. It continues by suggesting that there is an important distinction between the BSB’s and the SRA’s approach to regulation. The BSB is indeed the only body that could take disciplinary action against a barrister resulting in the loss of the right to practise. However, a barrister manager in an SRA-regulated firm would be bound by the SRA’s rules. In the same way, a solicitor in a BSB-regulated firm would be bound by the BSB’s rules. Hence the SRA will disapply most of the specific rules in its Code of Conduct from solicitors working in firms regulated by other legal regulators: they will bound to follow the rules of that regulator. Nevertheless, the core duties of solicitors will continue to apply in this situation. Clients will seek advice or services from a firm, not individuals within it. It will not be helpful to them if there is any doubt or confusion as to the rules applying to the individual who happens to be dealing with them. So the rules of the business regulator should apply to all individuals within the firm. However, there should not be a situation in which the business regulator allows a type of conduct that is forbidden by a professional regulator: the SRA’s approach to disapplying the details of it code to solicitors working in firms regulated by other approved regulators ensures that this cannot happen.

Subject to that point the response supports the general approach of the BSB. It suggests that there will be considerable benefit from barristers being able to practise in ABSs or LDPs without having to requalify, and that since Parliament has legislated to allow LDPs there

would need to be exceptionally strong arguments for the BSB not to remove the restriction on barristers being able to provide legal services while acting as a manager of an LDP.

As regards the cab-rank rule, the response says that the SRA is not aware that the lack of such a rule in the solicitors' profession has led to a lack of access to justice. It agrees that the cab-rank rule could not be applied to barristers practising in ABSs or LDPs. Indeed, it *should not* (emphasis added), for the reasons stated above, be possible to apply the rule to barristers practising in a firm regulated by an approved regulator that does not apply such a rule to the firms it regulates.

If the BSB is to regulate LDPs including barristers and others its powers and regulatory role will have to be adapted so as to regulate business entities as well as their members. The arguments for limiting the interim regulatory regime to entities providing only advocacy and advisory services are compelling; but it may be possible to go further with time.

The response suggests that an alternative and additional form of organisation to partnerships of barristers would be some form of incorporated enterprise.

The response broadly supports the BSB's approach to the matters discussed in Part V of the consultation document. But it stresses the need to ensure that any new arrangements do not breach client confidentiality or confuse clients. It suggests that if the BSB goes too far in the direction of approving particular arrangements it will be regarded as having accepted a degree of regulatory responsibility for those arrangements than it will be able in practice to discharge. It also suggests that if restrictions on what barristers are allowed to do remain they will have to be drawn to the attention of the client, and that barristers should be subject to an overriding requirement to consider whether in any particular case the restrictions may adversely affect the interests of the client.

As regards "prohibited work" the response points out that solicitors undertake a considerable amount of advocacy. Their duties to the court are pre-eminent, and there have been no problems such as those discussed in the consultation document. The response suggests that the fears voiced in the document may be exaggerated.

Regarding compensation arrangements, should these be needed, the response says that it is unlikely that the SRA has power to extend its compensation fund to cover barristers or organisations consisting solely of barristers.

South-Eastern Circuit

The response is predominantly hostile to the changes discussed in the consultation document. It argues that the starting point should be that the Legal Services Act 2007 is permissive, not mandatory, as regards extension of the type of business organisation in which barristers may provide legal services. The BSB is wrong if it assumes that it should allow to happen that which the Act enables to happen: it must consider what the public interest and the statutory objectives require. The prime public interest is the maintenance of a strong independent body of lawyers specialising in advocacy and related work. This can be done only by holding on to the core functions of barristers, and by preserving the cab-rank rule. A significant growth of other business organisations involving barristers would undermine this. The logic of the consultation document is that there should be a fused profession under a single regulator. The maintenance of separate professions and separate regulatory regimes is justified only if there is a difference of functions.

The response says that although the BSB is right to support the virtues of the independent Bar it is wrong to assume that the market will preserve them. The BSB should make no changes unless it is satisfied that they will not undermine the virtues of the independent Bar.

The cab-rank rule is generally effective. It has the important effect of ensuring not only that litigants can obtain an appropriate advocate but also that advocates before the higher Courts usually have experience of “both sides.” It is also an important ethical principle for the Bar. The LSB, when it is set up, should consider applying it to all who provide advocacy services, including those in the new business structures. The response suggests that decisions here (and on several other matters) should be deferred until they can be considered by the LSB. In the same vein, it suggests that barristers who wish to practise in new business structures should be required to requalify in a different profession; to practise under a different regulatory regime; and to practise under a title other than “barrister”: these matters should also be considered by the LSB.

As regards the suggestions discussed in Part V of the consultation document, the response argues that barristers generally should not be allowed to become involved in the conduct of litigation, management of a lay client’s affairs, and the handling of clients’ money. Otherwise they will increasingly be required to engage in such activities, and in consequence their level of specialisation, and public perception of it, will be diluted. There would also be an increase in the complexity and cost of regulation.

The BSB should not seek to become a business regulator of ABSs or LDPs. If, contrary to what is argued in the response, barristers are permitted to practise in them the BSB should be the regulator of their professional conduct but no more. It would probably be unlawful, and certainly contrary to the spirit of the Legal Services Act 2007, to amend the Code of Conduct so as to allow barristers to practise with solicitors and non-lawyers.

St Philip’s Chambers

The response says that the Legal Services Act 2007 will define the future for regulation of the Bar: it would not be appropriate for the BSB to prevent by regulation what Parliament has permitted by legislation. However, there should be a limit to the types of business structure through which barristers are permitted to offer legal services. They should be confined to ABSs, LDPs, partnerships of barristers, and sole practitioners. ABSs and LDPs with a majority of barristers as managers or owners should be regulated by the BSB even if they offer services going wider than those supplied by the self-employed Bar. However, the BSB does not at present have the necessary skills for this task. The cost of acquiring them should not fall on the Bar as a whole. The BSB should therefore look to enter into “shared service agreements” with the SRA.

The cab-rank rule has much to commend it. It is an important feature of the independent Bar. Abolishing it would have ill effects, and would not promote the aim of a more diverse Bar. On the more detailed questions relating to the cab-rank rule there is a division of opinion within the chambers. Those in criminal practice agree that the rule could not be applied to those practising in ABSs or LDPs, and that it should be abolished as regards barristers in partnerships. Others take the opposite view. There is also a divergence of opinion regarding practice in partnerships: those in commercial and other civil practice think that this should be permitted, while those practising in criminal law are equivocal. However, if partnerships are permitted there should be no limit on their activities.

As regards the matters discussed in Part V of the consultation document, the response is largely opposed to allowing new types of business structures other than ABSs, LDPs,

partnerships or sole practice. However, it broadly endorses the approach to “prohibited work”. Again, it argues that the BSB is not equipped to undertake the necessary regulation and should seek a “shared service agreement” with the SRA. Similarly, if barristers are allowed to handle client money a compensation scheme must be in place. A stand-alone scheme for the Bar would not be practical, and the possibility of subscribing to the SRA’s compensation fund should be explored.

TECBAR

(TECBAR is the association of barristers who specialise in the work that falls within the jurisdiction of the Technology and Construction Court.)

The response begins by stating that TECBAR does not welcome the provisions of the Legal Services Act 2007 that permit the provision of barristers’ services through ABSs or LDPs. These risk jeopardising professional standards and reducing consumer choice. However, it is now too late for fundamental opposition. On that basis, the response broadly agrees with the BSB’s approach. For similar reasons, although TECBAR believes that it is in principle undesirable to allow barristers to practise in partnerships, pragmatically they will have to be allowed.

The response accepts that abolishing the cab-rank rule as regards ABSs, LDPs, and partnerships is the necessary consequence of the introduction of new business models, but argues that it should be retained for sole practitioners.

As regards the possible changes in business arrangements discussed in Part V of the consultation document, the response says that in principle the changes are undesirable but “as a matter of pragmatism” they will have largely to be accepted. However, the response opposes the possible changes in provisions related to “prohibited work”, and in particular the possibility that barristers might handle clients’ money. As a matter of principle, barristers should not do this. If, however, they are allowed to do so they should obtain insurance cover from the market at their own cost.

Three Raymond Buildings

This response argues that in preparing the consultation document the BSB has not given sufficient recognition to *all* the statutory objectives in the Legal Services Act 2007. Promoting competition is only one of the six objectives. This implies that that increased competition may not always be compatible with other objectives.

The response also argues that whenever the BSB proposes to depart from the status quo the onus is on the BSB to demonstrate the case by evidence. The BSB should not base itself on conjecture but engage in empirical research. The permissive approach of the consultation document places undue faith in market forces. These cannot be relied on to produce a satisfactory regulatory outcome, as the experience of the financial services industry shows. And in some areas, such as criminal work market forces hardly operate at all.

The response agrees that BSB rules could not prohibit barristers from being involved in ABS firms, since the Legal Services Act 2007 permits such structures. However, this does not entail that simply because any prohibition could be evaded by involving a non-barrister barristers should be permitted to enter into partnerships.

The cab-rank rule should not be abolished: indeed, it has never been more important to maintain it. The Legal Services Act 2007 was passed in cognisance of its existence, and

there is no evidence that Parliament intended to abolish it. More generally, if the BSB believes that the rule is ineffective it should produce strong evidence in support of that belief. If it is ineffective in criminal work that is solely the result of Government policy on funding. The cab-rank rule should apply to all barristers in whatever type of business structure they practise. It would be perfectly possible to apply the rule to barristers in ABSs or LDPs. Doing so would reduce the attractions of establishing such structures, but that would simply be a consideration for those contemplating doing so to take into account. If the BSB wishes to abolish the rule it must engage in a properly structured programme of empirical research to assess both the likelihood and the nature of any effects of abolition. It is important to maintain a “level playing field” for all barristers. But this should be done in a way that best serves the statutory objectives as a whole. Moreover, the BSB should give the public clear information about the various players on the field and the different commercial, financial, and professional considerations that apply to each of them.

The response suggests that the traditional arguments against allowing practice in partnerships are sound. They are especially strong in criminal practice. This is not to say that partnerships should never be permitted in any circumstances; but the BSB should exercise a high level of caution in considering its regulatory stance in the matter. Any decisions must secure the statutory objectives.

Western Circuit

The response emphasises that views of members of the Circuit were divided on a number of issues, and that it is a synthesis. It begins by stating that the prime public interest at stake is that the English legal system relies heavily on oral advocacy, and that this means that it is essential to have specialist advocates who are capable of high-quality oral advocacy. Anything that would reduce the quality or the availability of a core of specialist advocates would be against the public interest. It would be best for both the public and the Bar if all currently self-employed barristers continued to work independently from chambers as now. Fusion of the legal profession would be most undesirable. However, the question is whether *compulsory* self-employment is essential. The majority view is that it is not.

- Barristers are now permitted to practise as employed barristers. In reality they work for entities that are not required to specialise in advocacy, so that the public is not misled. So there would be no difficulty in barristers working in any capacity (employed or otherwise) within entities that are not barrister-controlled. However, the provisions of the Code of Conduct limiting barristers to exercising rights of audience should govern all barristers practising from barrister-controlled entities. Such entities would be required to specialise in advocacy. The core of specialist advocates would then not be diminished.
- Other provisions of the Code of Conduct are sufficient to preserve and promote the Bar as specialist advocates and to assure quality. In particular, the restriction to advocacy is vital: if all lawyers can perform all reserved legal activities, there is then effectively one profession.
- The Legal Services Act 2007 is permissive in its approach. Self-employed practice is likely to remain as the norm; but this does not entail that other types of business structure should be prohibited.
- The Bar needs at least some new business models, for example to respond effectively to demands for block contracting. At present the Bar cannot compete with other suppliers, especially in areas of publicly funded work (the response gives several detailed examples).

The response says that it recognises that a significant element of opinion at the Bar is particularly opposed to practice in partnerships. It advances arguments for thinking that this opposition is mistaken.

- Parliament has already decided that the public interest is for all business models to be available to lawyers, subject to appropriate regulation. To ban partnerships would run counter to this.
- It is very unlikely that there will be large numbers of large partnerships. Rather than attempt to preclude such a remote possibility it would be better to embrace the philosophy of the Legal Services Act 2007. And continuing to ban partnerships would risk an undesirable confrontation with the OFT.
- There is no good reason to prevent the few who might choose to practise in partnerships from doing so.
- Most importantly, the future is uncertain. It is essential that the Bar should have available all possible business models, as the Legal Services Act 2007 envisages.

The conclusion is that paragraph 205 of the Code of Conduct should be revoked.

The response says that a minority (about one-third) of the Circuit favours maintaining the status quo on self-employment. The status of self-employment gives the best assurance to the public of quality, and that the client's case will be championed. The status quo works well, and there is no immediate need for change. If change is required in future, the Code of Conduct can be amended. It would be particularly wrong to allow partnerships, since these are against the public interest.

On the cab-rank rule, a majority favours retaining it as widely as possible, and certainly for self-employed barristers. However, the response recognises that extending the rule to cover barristers working in firms or other business entities would pose difficulties.

The response says that the Board should regulate business entities, but only if they are controlled by barristers and so are in effect required to specialise in advocacy (although the activities of some of these entities may go wider, for instance to include conduction litigation). Such entities should not be allowed to hold clients' money, but could be allowed to hold fee income.

As regards the questions discussed in Part V of the consultation document, the response agrees that the rules regarding the administration of practices should be relaxed, but opposes the approach suggested to "prohibited work", on the grounds that barristers should be restricted to specialist advocacy.

Young Barristers' Committee (YBC)

The response begins by saying that although some new models for the provision of services by barristers *could* be permitted it does not advocate that they *should* be permitted (emphasis in original). Though the Legal Services Act 2007 provides for the existence of ABSs and LDPs there should be no presumption that the Bar's professional rules should be altered to allow barristers to practise within them.

The key strengths and skills of the Bar should be protected in the interests of justice and service to clients. Diversification of the tasks that barristers are allowed to undertake risks diluting the value of the profession.

The response argues that the cab-rank rule is essential to the working of the Bar and must not be compromised or eroded. If it cannot be applied in ABSs or LDPs that is a good reason for not allowing barristers to practise in such structures. Such structures would also reduce clients' choice of advocate (because of increased "conflicting out"). It would be confusing, divisive, and against the public interest to apply the cab-rank rule to some barristers and not to others, and it would undermine the importance and effectiveness of the rule.

Barristers should be allowed to work in the new structures, but they should be treated as employed barristers. This would be an effective compromise, as it would allow barristers to use their professional qualifications in new structures without damaging the ethical code of self-employed practice. The business entities should be regulated by others – the BSB should not seek to become a licensed regulator of ABS firms – but the BSB should remain the regulator of barristers' professional conduct.

The prohibition on partnerships for barristers in self-employed practice should be maintained: barristers who are partners in ABS firms (if this is allowed by the appropriate regulator) should be treated as employed practitioners.

The response leaves the questions in Part V of the consultation document largely unanswered, but says that barristers should continue to be forbidden to hold clients' money. There would then be no need to set up a compensation fund.