



REGULATING BARRISTERS

The Structure of Self-employed Practice
Consultation paper

August 2009

BAR STANDARDS BOARD

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Consultation Paper

Introduction

1. In February 2008 the Bar Standards Board (“the Board”) published a first consultation paper on the implications of the Legal Services Act 2007 (“the Act”) for the regulation of the Bar in England and Wales. Most of the paper was concerned with issues relating to practice in the new business structures permitted by the Act and in partnerships and to the regulation of business entities and their members. However, Part V of the paper also raised questions regarding the structure of self-employed practice. The consultation paper observed that although the Act had no direct implications for the self-employed Bar the relaxations that it encouraged regarding the supply of legal services made it appropriate to consider whether current restrictions relating to the supply of such services by the self-employed Bar should also be relaxed.

2. The Board received over 50 responses to the first consultation paper. It is very grateful to all who submitted responses. The Board has taken full account of the responses in formulating the proposals in the present consultation paper.

The Board’s approach

3. The restrictions considered in this consultation paper were initially imposed because of a belief that they were necessary in order to protect the independence of barristers or to safeguard the administration of justice. The Board fully recognises the importance of those objectives. However, experience under the public access scheme suggests that current restrictions are unnecessarily severe. Moreover, the Act requires the Board to have regard to the full range of regulatory objectives that it sets out, including the promotion of competition in the provision of legal services. The Board must also consider whether, even if the existing restrictions achieve their objectives, they are an appropriate and proportionate way of doing so.

Purpose of this consultation

4. In the view of the Board the proposals set out in this consultation paper do not raise major issues of principle; the issues of principle that they do raise were fully exposed in the first consultation paper and the responses to it. The prime concern of the present paper is therefore to seek comments on the detailed amendments to the Bar’s Code of Conduct which are set out in Annex A.

Business arrangements

5. Paragraph 403.1 of the Bar’s Code of Conduct prohibits a self-employed barrister from practising from the office of or in any unincorporated association involving sharing the administration of his or her practice with any person other than a self-employed barrister and a limited number of other, mostly foreign, lawyers. This rule prevents barristers from entering into arrangements with other professionals, such as accountants or solicitors, whereby a group of people could provide, on a self-employed basis and not as partners, related services from the same office and refer to each other problems within their expertise.

6. As the first consultation paper pointed out, relaxation of this rule would have some advantages, but also some dangers. In particular, it would enable barristers and those

working with them, particularly in specialist fields, to provide a wider range of services to the public, and enable barristers to compete more effectively with other organisations providing similar advice. But any provision for mutual referral might mean a loss of independence — barristers might be reluctant to criticise colleagues or might refer work to colleagues even though they were not the most suitable people for the client; there might be scope for conflicts of rules or interests and for confusion among consumers over who was offering particular services; and the costs needed to provide a suitable regulatory regime might be prohibitive. The consultation paper outlined a number of forms that relaxation might take, from simple sharing of office facilities with one or more other persons with complete business separation to practice in association with professionals or other persons providing a wide range of services.

7. More than two-thirds of the responses that commented on the point accepted that the rules about the persons with whom barristers can share the administration of their practice should be relaxed. However, many said that this was subject to the proviso that there must be complete business separation. On the other hand, a significant number of responses argued that it would be wrong to allow barristers to join with others in a business undertaking otherwise than through an appropriate, and appropriately regulated, Legal Disciplinary Practice or Alternative Business Structure under the provisions of the Act. They suggested that consumers would be at risk of being confused about the status of such an undertaking and the relations between its members; and that it would not be easy to devise a satisfactory regulatory regime outside that established under the Act to govern an undertaking the members of which would be subject to different professional codes or to none.

8. Having carefully considered the arguments mentioned in the previous paragraph, the Board proposes to allow barristers to share office facilities with others, provided that:

- There is no business sharing arrangement, and nothing is done that might create the impression of such an arrangement.
- There is no general referral arrangement or understanding between the barrister and the other person or persons.
- Prior notification of the details of the arrangements for sharing facilities or premises, and of the other person or persons involved in them, has been given to the Board.

The Board notes that concerns have been expressed that allowing barristers to share office facilities could lead to referrals ‘by the back door’ and recognises the need to monitor closely what happens. Barristers participating in such arrangements will be required to keep a record of any work or clients referred to them by the others involved, and of any work or clients that they refer to those others. The Board will then be able to monitor these records and is minded to issue guidance.

9. Apart from this relaxation the Board does not intend to permit self-employed barristers to practise in association with non-lawyers in forms of business organisations other than those subject to regulation under the provisions of the Act.

10. Given the limited nature of the type of association that will be permissible under this approach, the Board sees no need for further regulatory provisions regarding its structure or composition, except that it should not, of course, in any way be likely to conflict or appear to conflict with the professional obligations of the barrister or barristers involved.

Special-purpose vehicles

11. The Board is aware that there is discussion among members of the Bar of the possibility of facilitating block contracting or other procurement with purchasers of legal services. The Board is ready to give constructive consideration to any proposals for such organisations that may be put forward. In any event it would not wish their creation to be impeded by technical constraints on the premises that they may use. It accordingly proposes to include a new paragraph 403.3 in the Code of Conduct in the terms indicated in Annex A. The precise terms may be subject to clarification or refinement as proposals for such organisations or vehicles are developed in future.

Q.1 Do you agree with the proposal in paragraph 8? In particular, do you agree with the text of paragraph 403.2 of the Code of Conduct suggested in Annex A?

Q.2 Do you agree with the proposal in paragraph 11?

Prohibited work

12. Paragraphs 107 to 120 of the first consultation paper discussed the possibility of relaxing the provisions of the Code of Conduct which prohibit self-employed barristers from undertaking a number of types of work. These are:

- (a) the management, administration or general conduct of a lay client's affairs;
- (b) conducting litigation or other *inter partes* work, including corresponding with another party or instructing an expert witness;
- (c) investigating or collecting evidence for use in any court;
- (d) taking proofs of evidence in criminal cases;
- (e) attending at police stations without a solicitor to provide advice to a suspect or interviewee; and
- (f) holding clients' money.

13. A small majority of those responses to the first consultation paper which discussed the issues favoured some relaxation in the existing prohibitions, especially as regards public access work. The Board has given separate consideration to the prohibitions as they affect public access work and a paper setting out its conclusions will be published shortly. What follows is primarily concerned with work other than public access work. However, the two matters are obviously related. If, for instance, it is right, as the BSB is proposing, to relax existing restrictions on the conduct of correspondence in the context of public access work, then maintaining them in other contexts will need to be clearly justified.

14. In the light of the responses to the first consultation paper and to its own further consideration the Board has decided that it will not take further the suggestion that self-employed barristers might be permitted to manage a lay client's affairs, or to conduct litigation, or to hold clients' money.¹ Other considerations apart, the Board has no reason to believe that there is any significant demand that self-employed barristers should be permitted to engage in such work; and if they were so permitted there would be far-reaching implications for their training and regulation. The arguments are especially strong as regards the handling of clients' money. The costs of establishing a compensation fund and an appropriate regime for monitoring and supervision would be large; and, as the first consultation paper pointed out, it would be widely regarded as unfair to impose them on members of the profession who did not handle clients' money. The Board does not believe

¹ A fixed fee, agreed and paid in advance, is not regarded as clients' money. However, money paid on account of fees yet to be agreed is so regarded.

that there is sufficient demand from the profession to be allowed to handle clients' money to make the costs of putting in place and operating a regulatory apparatus bearable by the small number of people on whom the costs would fall. If, however, there proves to be a significantly larger demand than has so far appeared and the costs involved appear to be affordable the Board will review the position.

15. However, the Board is minded to introduce some relaxation in the following areas.

- Collecting evidence and taking witness statements;
- Attending interviews at police stations; and
- Conducting correspondence.

Collecting evidence and taking witness statements

16. As the first consultation paper pointed out, the justification for the existing prohibition is that if a barrister collected evidence it might be thought that his or her duty to the court could be compromised if the evidence was questioned, or the barrister might be thought to have coached the witness. However, these arguments do not have force if the evidence is not disputed. The Board therefore proposes that self-employed barristers should in future be permitted to investigate and collect evidence and to take witness statements in both civil and criminal cases. However, a barrister will be precluded from acting as an advocate in the case if there is reason to think that s/he might be called as a witness or their conduct in collecting evidence otherwise impugned.² The Board is not minded to make a distinction between civil and criminal cases but this may be a matter for respondents to consider.

Attending interviews at police stations

17. There is a particular problem connected with allowing barristers to attend on interviews at police stations. A lawyer who attends such an interview is very likely to have to advise the client whether or not to answer police questions or to volunteer a statement. In turn, the client's decision is very likely to be a significant matter in any subsequent court hearing. If it is, the barrister who advised the client would inevitably find him or herself in serious professional difficulties if s/he was acting as advocate in the case.

18. Moreover, advising clients during a police interview is something that is not covered by any of the material in the Bar Vocational Course. Solicitors who attend on clients at a police station are required to undergo appropriate training, and are subject to supervision until they have gained sufficient experience. It would clearly be necessary to impose similar requirements on barristers.

19. The Board therefore proposes to allow self-employed barristers to attend at police station interviews, provided that:

- in no circumstances may a barrister who has attended such an interview be involved in the subsequent advocacy of the case; and
- any barrister who attends a police station interview must have undergone appropriate training, and be subject to appropriate supervision until he or she has gained sufficient experience.

² Barristers would also be permitted, as now, to take witness statements if no other lawyer is available to take a statement needed during the hearing of a case.

Conduct of correspondence

20. The present restrictions on the conduct of correspondence by self-employed barristers can lead to inefficiency and unnecessary additional cost to the client. The Board considers that they should not be retained unless they are a reasonable and proportionate way of achieving an identified regulatory objective.

21. In its response to the consultation on public access work, the National Consumer Council said that it regarded restrictions which lead to double-manning as not being in the interests of consumers. There is widespread complaint that the current rule compels a consumer who wants a letter to be sent on his behalf by a lawyer to instruct a barrister to draft a complex letter, but then also to use a solicitor merely to reproduce the barrister's work on professional notepaper. The barrister can draft the letter, but he cannot send it.

22. The Board is also aware that some forms of correspondence are already being carried out by barristers without difficulties arising (for example e-mails and letters from barristers to opponents and the Court regarding court hearings and skeleton arguments).

23. The Board proposed to retain the prohibition on self-employed barristers conducting litigation. However, the Court of Appeal has held³ that conducting correspondence related to litigation does not in itself amount to the conduct of litigation. Any prohibition on barristers conducting correspondence would therefore need to be justified on other grounds.

24. There are many reasons why barristers instructed by solicitors might not choose (or might not be instructed) to conduct correspondence, for example:

- the likelihood of confusion (and possible duplication) if barristers were to send some letters and solicitors others in connection with the same matter;
- correspondence that involved formal service of documents (e.g. Claim Forms, Statements of Case etc.) would come with the attendant risk of negligence proceedings should service of the relevant document by barristers be defective;
- the need for proper records to be kept of the correspondence sent and received by barristers and the need to ensure that the lay and professional clients were fully aware of the contents of the correspondence ; and
- the risk of the barrister subsequently being required to give evidence of matters which arise from the conduct of correspondence and the attendant risk of professional embarrassment requiring the barrister to withdraw from the case.

25. The Board considers, however, that none of these (whether individually or cumulatively) appears to be sufficient to justify a *prohibition* on barristers conducting correspondence. Any relaxation on the present prohibition would require guidance and advice to be published and individual barristers would still have to decide, in consultation with their professional and lay clients, the circumstances in which it would be appropriate for him/her to conduct some or all of the correspondence on behalf of a lay client.

26. The Board is proposing in the new Public Access rules that 'A barrister who accepts public access instructions may undertake correspondence where it is ancillary to permitted work, and in accordance with the guidance published by the Bar Council.' The Board would find it difficult to justify restrictions on barristers conducting correspondence when they were

³ In *Andre Agassi v Robinson (HMIT) & (1) Bar Council (2) Law Society (Interveners)* [2005] EWCA Civ 1507.

instructed by solicitors being more onerous than those imposed on barristers acting for lay clients under the Public Access Rules.

27. In the light of the above, the Board is minded to permit self-employed barristers to conduct correspondence subject to the following safeguards:

- barristers will not be obliged to accept instructions to conduct correspondence;
- barristers will be required to consider whether conducting correspondence is in the best interests of the lay client;
- barristers will be required, before conducting correspondence, to ensure that they have adequate systems, experience and resources for managing the conduct of correspondence to ensure that the lay client's interests are not prejudiced; and
- barristers must ensure that they have adequate insurance cover in the event that the lay client suffers any loss arising from the conduct of the correspondence for which the barrister is responsible.

28. Although the proposals speak of "letters", the Board intends that correspondence should include all types of written communication, such as e-mails and faxes.

29. Although the proposal in paragraph 27 is mainly relevant to civil work, the arguments that justify it also apply to criminal work. The Board accordingly proposes that, *mutatis mutandis*, barristers should be allowed to conduct the same types of correspondence in criminal work.

30. Although the Board believes that the changes proposed in paragraphs 16 to 28 above are fully justified, it will be important for barristers to ensure that, so far as possible, their actions do not create any threat to either their actual or their perceived independence, or any risk of subsequent professional embarrassment. For example, they should not appear personally to endorse statements by clients or witnesses, since that might appear to conflict with arguments or evidence which they subsequently laid before the Court. The Board intends to issue guidance on these matters, and would welcome views on what it should contain.

31. Revised paragraphs of the Code of Conduct reflecting these proposals are set out in Annex A.

Q.3 Do you agree with the proposals in paragraph 16?

Q.4 Do you agree with the proposals in paragraphs 17 to 19?

Q.5 Do you agree with the proposals in paragraphs 20 to 30?

Q.6 Do you agree with the text of paragraphs 401(b) (ii) and (iii) of the Code of Conduct suggested in Annex A?

Q.7 Do you agree with the text of paragraph 401A.1 of the Code of Conduct suggested in Annex A?

Q.8 Do you agree that guidance is needed as suggested in paragraph 30? If so, what do you suggest should be its content?

Q.9 The proposals in paragraph 16, and those in paragraphs 20 to 30, apply to both civil and criminal work. Do you consider that different provisions would be appropriate in those types of work? If so, what should the differences be?

Equality and diversity impact

32. The Bar Standards Board is committed to promoting equality and diversity throughout the Bar and within our own organisation. We endeavour to ensure that our processes and procedures are fair, objective, transparent and free from unlawful discrimination. We are also keen to identify ways in which access to and progression within the Bar can be widened such that everyone who has the ability to succeed is able to do so regardless of race, gender, disability, religion or belief, sexual orientation, age or socioeconomic background.

33. In addition to the questions we have asked you to respond to, we would welcome contributions on any areas of the consultation paper which you consider might have implications for equality. For example, are any of the proposals likely to have a greater positive or negative effect on some groups compared to others? We would particularly welcome feedback on whether there are likely to be any negative consequences for any group arising from the proposed changes and how these could be mitigated, or if there are opportunities to promote greater equality and diversity in the areas mentioned above.

Responses

34. Responses to this consultation paper should be e-mailed or posted, by 25 September 2009, to Clare Vicary at:

**Bar Standards Board
289-293 High Holborn
London
WC1V 7HZ**

cvicary@barstandardsboard.org.uk

35. A list of those to whom this consultation is to be sent is at Appendix B. Responses are, however, welcomed from all who wish to contribute to the debate. The Board may wish to cite individual responses in its report of the consultation. If you do not wish your response to be identified in the report, or published on the website, you should make this clear in your reply.

APPENDIX A

PROPOSED AMENDMENTS TO THE CODE OF CONDUCT

Part IV – Self-Employed Barristers

Instructions

401 A self-employed barrister whether or not he is acting for a fee:

- (a) may supply legal services only if appointed by the Court or if instructed:
 - (i) by a professional client; or
 - (ii) by a licensed access client, in which case he must comply with the Licensed Access Rules (reproduced in Annex F1); or
 - (iii) subject to paragraph 204(c), by or on behalf of any other lay client, in which case he must comply with the Public Access Rules (reproduced in Annex F2); or
- (b) must not in the course of his practice, except as permitted by the Public Access Rules:
 - (i) undertake the management administration or general conduct of a lay client's affairs;
 - (ii) conduct litigation (for example, issuing any claim or process or inter-partes work (for example the conduct of correspondence with an opposite party, instructing any expert witness or other person on behalf of his lay client or accepting personal liability for the payment of any such person); and must not conduct interpartes work, save as permitted by rule 401A below.
 - ~~(iii) investigate or collect evidence for use in any Court;~~ (iii) provide advocacy services in any case in which the barrister has investigated or collected evidence and where it appears likely that the barrister will be called as a witness or that his conduct in gathering evidence may be impugned.
 - ~~(iv) except as permitted by paragraph 707, or by the Public Access Rules, take any proof of evidence in any criminal case;~~
 - ~~(v)(iii)~~ attend at a police station without the presence of a solicitor to advise a suspect or interviewee as to the handling and conduct of police interviews unless the barrister has complied with such training requirements as may be imposed by the Bar Standards Board in respect of such work.-

(iv) act as a supervisor for the purposes of section 84(2) of the Immigration and Asylum Act 1999.

~~(vi)~~(v) Provide advocacy services in any case in which the barrister has attended at a police station without the presence of a solicitor to advise the client or any other person involved in the case.

(c) must not supply legal services for reward otherwise than in the course of his practice except as permitted by paragraph 806.¹

Conduct of correspondence

401A.1 If instructed to do so, a self-employed barrister may, but is not, under para 602 obliged to conduct correspondence of an inter-partes nature (in the form of letters, faxes, emails or the like) providing:

(a) that the barrister is satisfied

(i) it is in the lay client's best interests that the barrister undertakes the work of conducting correspondence; and

(ii) he has adequate systems, experience and resources for managing appropriately the conduct of correspondence on behalf of the lay client, to ensure that the lay client's interests are not prejudiced by his writing correspondence; and;

(b) that the barrister has adequate insurance cover in the event that the lay client suffers any loss arising from the conduct of the correspondence for which the barrister is responsible.

Insurance

402.1 Every self-employed barrister (other than a pupil who is covered under his pupil supervisor's insurance) and a barrister called to the Bar under Part IV(E) of the Consolidated Regulations must be entered as a member with BMIF².

402.2 Every barrister entered as a member with BMIF shall:

(a) pay immediately when due the appropriate insurance premium required by BMIF for the purpose of insurance against claims for professional negligence for such amount and upon such terms as may be approved by the Bar Council from time to time;

(b) supply immediately upon being requested to do so such information as BMIF may from time to time require pursuant to its Rules.

Administration and conduct of self-employed practice

403.1 Except as permitted in paragraphs 403.2 and 403.3, a self-employed barrister must not share office facilities or other premises and must not practise ~~from the office of or in any unincorporated association (including any arrangement which involves sharing the administration of his practice)~~ in any association with any person other than a self-employed barrister or any of the following:

- (a) a registered European lawyer;
- (b) subject to compliance with the Foreign Lawyers (Chambers) Rules (reproduced in Annex H) and with the consent of the Bar Council a foreign lawyer;
- (c) a non-practising barrister
- (d) a person who is:
 - (i) a lawyer from a jurisdiction other than England and Wales;
 - (ii) a retired judge; or
 - (iii) an employed barrister³

to the extent that that person is practising as an arbitrator or mediator.⁴

403.2 A self-employed barrister may share office facilities or other premises with any person or persons (not falling within 403.1 above) and will not be treated as thereby practising in breach of rule 403.1, provided that:

- (1) there is complete separation between the barrister's business and that of any person with whom he shares office facilities or premises [and there is no business sharing or profit or fee sharing arrangement with that person or those persons];
- (2) the separate nature of the businesses is made clear and nothing is done that might reasonably create the contrary impression;
- (3) there is no general referral arrangement or understanding between the barrister and that person or those persons; and
- (4) prior notification in writing of the sharing, identifying the premises in question and the names and occupations of the persons or body with whom the barrister is sharing, has been given to the Bar Standards Board by the barrister.

403.3 The restrictions in paragraphs (1), (2) and (3) in paragraph 403.2 shall not apply where [self employed] barristers share premises with any entity which is controlled by them and used as a vehicle for procurement or block contracting purposes or as otherwise permitted for the purposes of and ancillary to their practice as self-employed barristers.

403.4 Where a self-employed barrister shares premises with other persons under paragraph 403.2, the barrister must keep a record of any work or clients referred to the barrister by any such persons or referred to any such persons by the barrister.

Please note that there are no proposed amendments to rules 403.5 onwards. They remain unchanged.

APPENDIX B - List of Consultees

Bar Standards Board Committees/Panels

Consumer Panel and its constituent organisations
Complaints Committee
Education and Training Committee
Qualifications Committee
Quality Assurance Committee
Diversity Sub-group

Bar organisations

Chairman of the Bar
All members of the Bar Council
Access to the Bar Committee
Alternative Dispute Resolution Committee
Bar Human Rights Committee
Employed Barristers' Committee
Equality and Diversity Committee
European Committee
Fees Collection Committee
Information Technology Committee
International Relations Committee
Law Reform Committee
Legal Services Committee
Professional Practice Committee
Public Affairs Committee
Remuneration Committee
Training for the Bar Committee
Young Barristers' Committee
All Circuit Leaders
All Heads of Chambers
All Chairs of Specialist Bar Associations
Inns of Court
Association of Women Barristers

Other bodies

Advocacy Training Council
Association of District Judges
Association of Muslim Lawyers
Attorney General
Bar Council of Northern Ireland
Bar Mutual Indemnity Fund
Chancellor of the High Court
Council of HM Circuit Judges
Council of the Inns of Court
Council for Licensed Conveyancers
Citizens' Advice
Crown Prosecution Service
Department for Business, Enterprise and Regulatory Reform
Faculty of Advocates
Government Legal Service
Immigration Legal Practitioners Association

Institute of Barristers' Clerks
Institute of Chartered Accountants of England and Wales
Institute of Chartered Secretaries and Administrators
Institute of Legal Executives
Institute of Paralegals
Institute of Taxation
Institute of Trade Mark Attorneys
The Law Society
Legal Complaints Service
Legal Practice Management Association
Legal Services Board
Legal Services Consultative Panel
Legal Services Commission
Legal Services Ombudsman
Lord Chief Justice
Master of the Rolls
Ministry of Justice
National Consumer Council
Office of Fair Trading
Office of the Immigration Services Commissioner
President of the Family Division
President of the Queen's Bench Division
Queen's Counsel Appointments Panel
Society of Asian Lawyers
Society of Black Lawyers
Solicitor General
Solicitors Regulation Authority
Which?