Implications of the Legal Services Act 2007 for the regulation of the Bar in England and Wales

Responses to the second consultation paper

Introduction

1. In December 2008 the Board published a second consultation paper on the implications of the Legal Services Act 2007 for the regulation of the Bar in England and Wales. This dealt with two main issues:

   (i) Whether barristers should be allowed to practise, that is, to supply legal services to the public as managers of Legal Disciplinary Practices (LDPs). The consultation paper also discussed a number of matters that would arise if they were allowed so to practise.

   (ii) Whether barristers should be allowed to practise in barrister-only partnerships; and if so, whether these should be restricted to the provision of advice and advocacy services. Again, the consultation paper discussed a number of matters that would arise if they were allowed so to practise.

2. For convenience, the detailed questions in the consultation paper are reproduced at Annex A.

Responses received

3. At the time of writing, 34 substantive responses had been received. The breakdown of the responses is as follows.

Sole practitioner	3
Employed barrister	0
Chambers	11
Organisation of lawyers	15
Public body	3
Consumer body	1
Member of the public	1
Total	34

4. Only one consumer body (the BSB's Consumer Panel) responded, and only one member of the public (who is the director of a body called Barrister Futures). No employed barrister responded.

5. Annex B contains summaries of the responses. It is selective, in that it concentrates on arguments of policy and (in a neutral sense) expediency, and does not try to summarise the arguments of law, which some responses developed in great detail and at great length.

6. Annex C is a spreadsheet showing affirmative (Y) and negative (N) answers to the questions in the consultation paper where the answers were either explicit or could be

inferred with reasonable certainty. Some of the questions could not be answered Yes or No. In these cases Y indicates broad agreement with the thrust of the Board's arguments and suggestions, and N indicates broad disagreement. The annex omits the answers to Q.8 (there were only 10 of them, and the question was attacked in many responses as unscientific and inappropriate), and to Q.10, since these were too discursive to be summarised..

7. Some answers to the questions in the consultation paper were to the effect that the respondent did not agree with the Board's proposals, so that the question ought not to arise, but that if the proposals were to be adopted the correct approach would be such-and-such. These answers are recorded in Annex D. They must not, of course, be taken as negating the answer given by the respondent to the question of principle. Again, the annex omits the answers to Q.8 and Q.10.

Practice as manager of a LDP

8. The breakdown of responses to the question of principle in Q.1 – whether barristers should be permitted to practise as managers of LDPs – was as follows.

	Y	N
Sole practitioner	1	1
Chambers	8	3
Organisation of lawyers	9	6
Public body	3	0
Consumer body	1	0
Member of the public	1	0
Total	23	10

9. Overall, the responses are quite strongly affirmative, although several which were broadly affirmative contained significant reservations or qualifications: in particular, several responses argued that the cab-rank rule should apply to barristers practising as managers of LDPs, although the consultation paper indicated that the Board regarded this as not practicable.

10. As regards matters of more detail, Annex D indicates that (on the assumption, which some responses contested, that barristers would be permitted to practise as managers of LDPs) there was broad agreement with the approach in the consultation paper, the breakdown of the figures being as follows

	Y	N
Q.2 (need for restrictions)	15	5
Q.3 (shareholdings)	20	5
Q.4 (multiple practice)	18	5

11. The responses on balance did not favour strengthening paragraph 601 of the Code of Conduct, there being 8 affirmative and 12 negative responses. However, several negative responses were based on the argument that the cab-rank rule should be retained, so that there was no merit in strengthening paragraph 601.

Practice as a member of a barrister-only partnership

12. The breakdown of responses to the question of principle in Q.7(a) – whether barristers should be allowed to practise in barrister-only partnerships – was as follows.

	Y	N
Sole practitioner	2	1
Chambers	6	3
Organisation of lawyers	3	10
Public body	3	0
Consumer organisation	1	0
Member of the public	1	0
Total	16	14

13. The figures show a fairly narrow overall majority *in favour* of allowing barristers to practise in barrister-only partnerships, and a majority (also narrow) *against* this among members of the Bar.

14. As regards matters of more detail, Annex D (again, on the assumption, contested by some respondents, that barristers should be permitted to practise in barrister-only partnerships) suggests that there was a reasonable degree of acceptance of the Board's suggestions, the figures being as follows.

	Y	N
Q.7(b) (scope of partnerships)	9	4
Q.9 (cab-rank rule to apply)	15	8
Q.11 (multiple practice)	7	13

15. Note that an *affirmative* answer to Q.4 but a *negative* answer to Q.11 indicates that barristers should not be allowed to practise in more than one capacity.

Common arguments

16. There were some common threads that ran through the responses, and especially those that were generally opposed to the proposals in the consultation paper, which it may be helpful to mention.

17. One set of arguments, put in different ways but in substance closely related, was that the Board's "fundamental premise" – that barristers should be allowed to do whatever is lawful and, in particular, should be able to practise in whatever form of business organisation they think suitable unless there are good reasons based on the public interest for taking a contrary view – was mistaken. This was sometimes expressed as criticism of the Board for, as the respondents put it, "having reversed the onus of proof." The thrust of this line of argument was that the Board should have considered whether the existing restrictions in the Code of Conduct were unlawful as being contrary to competition law or to the Legal Services Act 2007. If they were lawful (and all the responses under discussion agreed that they were) then the Board should not have proposed removing or amending them without strong reasons – preferably based on evidence and economic analysis – that this was the most appropriate way of achieving the regulatory objectives set out in the Act. This was supported in several responses by criticism of the Opinion of Mr Peter Roth QC suggesting that some of the existing restrictions might be anti-competitive. A related argument was that the Board was wrong to assume that the Legal Services Act created a presumption that barristers should be allowed to practise in new business organisations.

18. These arguments were mostly advanced in the context of whether barrister-only partnerships should be permitted. In that context, however, the response (albeit brief and informal) of the Executive of the Legal Services Board is also significant.

19. A second common strand was the argument put forward by, in particular, the Bar Council, the Family Law Bar Association, the South Eastern Circuit and the Western Circuit was that the Board should consider new business structures other than partnerships within which barristers could practise. However, the implications of that argument differed between:

- the Bar Council, and the Family Law Bar Association, who suggested that new business structures, such as contracting companies, would be a more appropriate response than partnerships to the problems currently faced by, in particular, the Criminal Bar and the Family Law Bar, and that barrister-only partnerships should therefore not be allowed; and
- the Western Circuit, who accepted that barrister-only partnerships should be allowed, but argued that they were not an attractive business model and that alternatives, such as contracting companies, would be better suited to contemporary requirements.

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