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

Summary of responses to the Board's consultation document

1. This note attempts to summarise the responses to the Board's consultation document on the implications of the Legal Services Act 2007 for regulation of the Bar in England and Wales.

   Attached to it are four Appendices:

   - Appendix A contains a brief précis of each of the responses, other than the one from the Bar Council, which because of its significance is summarised separately in Appendix B;
   - Appendix C is a spreadsheet recording the answers to the individual questions in the consultation document so far as they are conclusive or can be inferred with reasonable certainty;
   - Appendix D is a statistical analysis of the answers in the spreadsheet relating to the main questions of principle raised in the consultation document.

General

2. 51 substantive responses were received. They can be analysed as follows.

Sole practitioner	12
Employed barrister	2
Chambers	9
Other lawyer	2
Legal organisation	18
Consumer body	2
Public body	5
Member of the public	1
Total number of responses	51

   The overwhelming majority were from lawyers or organisations of lawyers (43) or public bodies (5). There were only two responses from consumer bodies (the BSB's own Consumer Panel and the Legal Complaints Service), and only one from a member of the public, who in fact had close links with the legal profession.

3. The responses varied very widely in length, coverage, and depth of analysis. Some ran to several dozen pages; others were confined to a single page. Some directly answered all the questions posed in the consultation document; some, even of the longer responses, did not directly answer any; and there were many in between. The material in the Appendices therefore needs to be treated with some caution, although it gives a reasonable impression of the balance of views.

Do you agree with the Board's approach? (Question 1)

4. A number of responses either did not address this question at all, or did so in such indefinite terms that no clear answer could be inferred. That said, the responses on the whole supported the Board's approach: 21 said that they agreed with the Board's approach; 13 said that they disagreed. The negative responses had much in common. Several argued that the Board was mistaken in its view that it should start from a presumption that it should facilitate all that the Legal Services Act 2007 permitted unless there was strong reason to the

contrary. They held that it should instead start from the premise that nothing in the present Code of Conduct should be changed unless there was strong reason (other than the Act) for doing so. A variant of this was to point out that the Act contained several objectives, of which promoting competition in the supply of legal services was only one. The likely consequences of the suggestions in the consultation document, it was argued, would run counter to the other objectives, and the public interest more generally, by restricting the availability of advocates and access to justice, jeopardising the independence of the Bar, or leading to a fused legal profession.

5. The affirmative responses were more varied. They ranged from, at one end, an attitude of hostility to the Legal Services Act 2007 coupled with an acceptance that the Board would have to work with its provisions to, at the other, an enthusiastic welcome for the new business opportunities created by the Act. A few (including the response from the Bar Council) attached so many reservations and qualifications that they could only just be regarded as agreement. It is, however, worth observing that all the public bodies who answered the question explicitly endorsed the approach in the consultation document.

The cab-rank rule (Questions 2 to 5)

6. A clear majority of the responses (26 to 8) supported at least the principle, and usually the detail, of the cab-rank rule. Similar support was expressed at the seminars held in Cardiff, Leeds and London. Less than one quarter (8 out of 34) doubted its effectiveness or its value. However, a majority of respondents (24 to 13) agreed that it would not be possible, or at any rate not practicable, to apply it to barristers practising in ABSs or LDPs. Several of those who did agree argued that this was a good reason for forbidding such practice.[1] They made the same point in favour of forbidding barristers to practise in partnerships, as regards which views were evenly divided (16 affirmative answers and 15 negative) on whether the rule should be abolished. On the other hand, a clear majority (21 to 11) said that even if the rule was abolished for others it should be maintained for sole practitioners.

7. Several of those respondents who argued that it would be possible to apply the cab-rank rule to barristers practising in ABSs or LDPs seemed to be answering the question "Would it be feasible to devise a form of ABS or LDP that was subject to the cab-rank rule?" But that, in my view, was not the question that the consultation document intended to ask: indeed, the answer is so obvious that the question is hardly worth asking. The intended question was rather "Would it be possible to impose the cab-rank rule on all ABSs or LDPs, however constituted, without making it impossible to manage the organisation?" The responses which argued for imposition of the rule failed to address the obvious business and managerial difficulties that it would cause. In particular, many types of ABS, as well as Limited Liability Partnerships (LLPs) would have legal personality; the contractual relationship, including the acceptance of instructions, would be between the client and the business entity; and it would not be possible to apply the cab-rank rule to the entity. (Any attempt by the Board to do so could easily be circumvented by obtaining a licence from another approved regulator, such as the SRA, which did not apply the rule). The only way of imposing the rule would be to forbid barristers to practise in a business entity that did not observe the rule. None of the responses addressed these points.

8. A point that the Board may wish to consider is that a number of respondents said that although it would probably be impossible to retain the letter of the rule as it now stands it might be possible to retain its substance. The underlying thought was that it was clearly desirable that all litigants should be entitled to have their case argued before a court as

[1] A closely related suggestion was that barristers who were not subject to the cab-rank rule should not be allowed to practise under the name of "barrister".

strongly as it properly could be; and that it was for the court, not counsel, to decide whether it should or should not be upheld. There was also the consideration that it was desirable in order both to protect barristers from criticism and to safeguard their objectivity that an advocate should not be regarded as personally espousing the case that he or she was advancing. But it is not clear that the cab-rank rule as it now stands is necessary to achieve these ends. Members of the healthcare professions, for instance, have nothing analogous to the rule but treat those patients who are presented to them without regard to their lifestyle or character or whether the patient can be regarded as responsible for his or her illness. Convicted murderers receive normal healthcare in prison, and the professionals who provide it are not criticised for doing so. The Board may therefore wish to consider whether it would be possible, as the ICAEW suggested in its response, to find some more general professional principle that would uphold the spirit of the rule, if not its present form.

Practice in ABSs and LDPs (Questions 6 and 7)

9. A clear majority of responses agreed that the Code of Conduct should be revised so as to permit a barrister to supply legal services to the public while acting as a manager[2] of an ABS firm (24 to 8) or LDP (23 to 8).

10. However, it seems appropriate to bring out here a point that underlay several of the responses, and which is relevant both to this issue and to the possible application of the cab-rank rule to ABSs and LDPs. There was no disposition in the responses to suggest that barristers should be forbidden to supply legal services to the public as *employees* of an ABS or LDP. Indeed, several respondents who argued that barristers should not be allowed to practise as managers explicitly said that they should be allowed to do so as employees. Similarly, several respondents who argued that barristers practising as managers should be subject to the cab-rank rule said that employed barristers in an ABS or LDP should not be subject to it. However, it would be easy to arrange that a barrister who was a director or shareholder in an ABS should also have a contract of employment under which he or she would supply legal services. If that is right, it seems that one of the following must hold:

    - it would be futile to forbid barristers to practise as managers of ABSs or LDPs, or to seek to apply the cab-rank rule to them, since they could readily avoid the prohibition by becoming employees as well as managers; or
    - the treatment of employed barristers in the Code of Conduct would have to be extensively amended, so as, in particular, to subject them to the cab-rank rule; or
    - a new category of barristers, subject to a separate set of rules, would have to be created to include those managers of ABSs or LDPs who were also employees.

Practice in partnerships (Questions 8, 14 and 15)

11. Questions 8 and 14 in the consultation document are in very similar terms; and one would have expected the figures for the responses to be the same. In fact, they are different, though not by large amounts. A majority of respondents did indeed give an affirmative answer to both questions, but by 19 to 13 for Question 8, and by 20 to 11 for Question 14. It may be that some respondents thought that their (negative) response to Question 8 was sufficient and that it need not be repeated later. Whatever the truth of that may be, the basis of the negative replies was clear and consistent: first, to allow practise in partnerships would,

[2]By an oversight the terms of Q6 in the body of the consultation document refer to practice "as manager or as an employee of an ABS firm" whereas the terms of the question in the summary refer to practice "as manager of an ABS firm or LDP". However, the group does not believe that the difference affected the responses.

because of the increased likelihood of "conflicting out", reduce competition and access to justice; secondly, the Legal Services Act 2007 is silent on the matter of partnerships, so that there can be no presumption that Parliament intended that legal services should be supplied extensively through partnerships as it had arguably created such a presumption as regards ABSs and LDPs.

12. In this context, it is useful to note the attention of the Board to the response from the Office of Fair Trading. This 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 practice in these entities then the BSB should revise the Code of Conduct to reflect the wishes of Parliament."

13. Very few of the responses that argued against allowing barristers to practise in partnerships addressed the point raised in the consultation document that the prohibition could easily be circumvented by giving a small interest in the partnership to a non-lawyer. The partnership would then fall to be treated as an ABS. However, several of the respondents also argued against allowing barristers to supply legal services as managers of an ABS, and if this were accepted the point would fall.

14. As regards the question of whether such partnerships, if they were permitted, should be restricted to the provision of advocacy and advisory services, responses were evenly divided: 14 favoured the limitation and 12 opposed it.

Professional and business regulation (Questions 10, 12 and 13)

15. An overwhelming majority (27 to 3) considered that the Board should be the prime regulator of the professional conduct of barristers in ABS firms. A clear majority (20 to 10) considered that the Board should seek to become a licensed regulator of ABS firms (and some of the negative answers to the question were based on the premise that barristers should not be allowed to practise in ABS firms anyway). A majority (16 to 9) also said that the Solicitors Regulation Authority (SRA) should not be the sole business regulator for all LDPs with solicitor and barrister members.

16. In this context, some important points were made by the SRA. The SRA observed that under sections 52 and 53 of the Legal Services Act 2007 regulatory conflicts are to be avoided, and if in any business entity there is a conflict between the requirements of the business regulator and those of a professional regulator, those of the business regulator prevail. The SRA therefore intends:

    - to disapply all its rules except certain core principles to solicitors working in bodies regulated by another regulator; and
    - to apply its own requirements to members of other professions working in bodies that it regulates.
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On this basis the SRA says that it should not be possible to apply the cab-rank rule to barristers practising in a firm regulated by an approved regulator that does not apply the rule to firms that it regulates.[3] More generally, it argues that all those working within a given

[3]And since, as the SRA response points out, under the Legal Services Act 2007 firms have a choice of regulator a firm consisting of barristers could no doubt find such a regulator without much difficulty.

organisation should be subject to the same rules, or clients will be confused. Its response says explicitly "we do not believe that there should be a situation where the business regulator allows a type of conduct forbidden by a professional regulator."

17. There is nothing that is fundamentally inconsistent between the SRA's response and the approach in the consultation document. The SRA explicitly recognises that the Board will remain the ultimate disciplinary authority for barristers, since it alone could remove a barrister from the profession. Nor does it intend to disapply the core principles of its own professional code. And it would be open to the Board, if it so chose, to forbid barristers to practise under that title if they supplied legal services through an ABS or LDP or did not accept the cab-rank rule. However, the SRA's comments do indicate that there would be serious difficulty in trying to apply a special set of detailed rules to barristers practising in an ABS or LDP while solicitors, in particular, were subject to different rules laid down by the business regulator.

Self-employed practice (Questions 19 and 23)

17. A majority of respondents agreed with the Board's approach to the questions raised in Part V of the consultation document relating to the administration of practices (16 to 11) and to "prohibited work" (14 to 11). Most of those who gave negative answers did so on the grounds that the relaxations under discussion would dilute the specialisation of the Bar, and would involve barristers in activities for which they had no skill or training. Some respondents also expressed misgivings about the potential consequences for the complexity and cost of regulation.

Compensation arrangements

19. Views on whether it would be necessary to set up a compensation fund were so varied, and started from such different assumptions, that it would make any attempt to summarise misleading. However, there was a clear thread that if any compensation arrangements had to be established, whether by way of a fund or by commercial insurance, the cost should fall on those engaged in the type of business that made such arrangements necessary. It is worth recording that the SRA observed that "it is unlikely that any statutory regulator such as the SRA would have the power to extend the cover of its compensation fund to barristers or organisations consisting solely of barristers" (a possibility suggested by several respondents).

Sir Michael Buckley
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