

Appendix B

Response from the Bar Council

The Bar Council's response has been produced by a working group. The response says that it does not represent the opinion of the Bar Council as a whole or of the associations to which members of the working group belong. The Council has written to members of the profession asking them for their views on whether the existing prohibition on practice in partnerships should be maintained, modified or abolished, and whether the cab-rank rule should be maintained.

The first part of this response, accounting for more than half its total length, is devoted to an exposition of the approach underlying the response, an analysis of the law, and a discussion of how the market for legal services may develop.

The response says that the high quality of the Bar and its reputation for independence owe much to the fact that barristers specialise in advisory and advocacy work and are not tied to others. Distinguishing features of the Bar in England and Wales are that it works predominantly on a referral basis; that barristers operate independently; and that barristers are bound by the cab-rank rule.

The response suggests that the cab-rank rule is of particular importance, and that the consultation document gives insufficient regard to the fact that because of the rule barristers are not permitted to refuse instructions simply because they or their chambers would usually act for the "other side". The rule ensures that the public has available to it a wide range of expert advocates.

The response recognises that the Legal Services Act 2007 creates a positive obligation on regulators to promote competition, and that this is bound to call into question paragraph 205 of the Code of Conduct, which prohibits barristers from practising except as sole practitioners or employed barristers. The response suggests that the question to be answered in this context is whether the prohibition fails to comply with the objectives of the Act.

The fact that the Code of Conduct is designed to ensure that barristers concentrate on advisory and advocacy services is important to the public interest. It safeguards quality of service. And because barristers remain specialists in their field, they can be regulated economically. In particular, as barristers cannot handle client funds there has been no need for elaborate rules in that area, or for a compensation fund. This keeps costs down. The Board must bear in mind the balance between removing a rule and the increased regulatory costs that would be consequent on removal.

The response contains an extended analysis of the way in which the market for legal services is likely to develop. The analysis draws attention to the increase over the last 20 years in the number of lawyers relative to the population and in the number of solicitor advocates; but it also points out that it is increasingly accepted that not all legal services require an expert knowledge base. This suggests that there may have been an overextension in the knowledge base of legal services. There has also been a shift in the attitude of the Government towards the procurement of legal services. On this basis the response suggests that there will be:

- a thriving market for barristers supplying specialist advocacy and advisory services to private clients and Government departments;

- downward pressure on the cost of providing litigation and advocacy services in the “public procurement” sector;
- an increasingly commoditised market sector, principally for such services as will-writing and conveyancing, but also for accident and personal injury cases, leading to the creation of block arrangements for advocacy services.

The response goes on to discuss various business models that could serve such a market. It argues that the models need not, and should not, include partnerships of barristers or partnerships of barristers and solicitors. Whatever happens, it would be contrary to the public interest for any branch of the legal profession to be placed under pressure to supply services in a way that diminished choice or quality.

The response continues by summarising the law relating to partnerships (including Limited Liability Partnerships (LLPs)). The summary explains that members of partnerships under the Partnership Act 1890 owe one another a duty of loyalty, whereas members of LLPs, which has its own legal personality, owe a duty to the LLP but not to one another. In a partnership fiduciary duties and client confidentiality would prevent one partner from appearing against another in the same case. As a barrister in such a situation could not accept instructions the cab-rank rule could not apply to him or her, so that there is no good reason to disapply the rule to barristers in partnerships.

If barristers were allowed to practise in partnerships (including LLPs) the possibility of conflicts of interest and problems of confidentiality arising in the partnership would be very high, especially in small specialisms. Arrangements to monitor possible conflicts of interest would be costly. There could be a decline in access to the specialist Bar. A barrister could not sit as a part-time judge in a case in which another member of the partnership appeared. The response sets out at length reasons why it would not be possible to resolve conflicts of interest by obtaining informed consent from clients. It also stresses the risk of breaches of client confidentiality and the difficulty of avoiding such breaches. Finally, the risk of “commercial conflict” – barristers or sets of chambers coming under pressure from influential clients not to take on the “wrong” type of case or client – would be increased by the emergence of partnerships or LLPs including barristers.

The response then turns to the particular questions posed in the consultation document.

As regards Question 1 (do you agree with the general approach in the consultation document?) the response says that it “does not disagree” with the general thrust. However, it proceeds to take issue with the consultation document at so many points that it is hard to regard this as an affirmative answer. It argues that the Board was mistaken in starting from the assumption that since Parliament has legislated to permit legal services to be delivered through ABS firms it would be wrong for the Board’s rules to prohibit barristers from being involved in such firms. The Board should instead have asked whether such practice (and such business structures) would further the regulatory objectives of the Legal Services Act 2007. Barristers should not be allowed to practise in partnerships with barristers or solicitors (though the response also says that a minority of those who produced it thought that the Code of Conduct should be relaxed so as to permit partnerships of barristers regulated by the Board, since such partnerships were most unlikely to be formed).

Similarly the response suggests that there is nothing in the Legal Services Act 2007 that would imply that the cab-rank rule should be modified or abolished in order to permit barristers to supply advocacy services to ABS firms or LDPs. The cab-rank rule in its entirety should apply to barristers who provide their services in any form of business structure, whether ABSs, LDPs or partnerships.

As regards barristers practising in ABSs, the response suggests that the question “jumps the gun.” The first question that should be addressed is whether barristers should be allowed to practise in partnership with barristers or other lawyers. The Code of Conduct should be amended “to permit a barrister to provide legal services to the public whilst employed as the manager of a LDP” and to provide legal services through units of delivery of service which fall short of partnership.

(Note: this area of the response appears to be directed to the position of employed barristers, whereas the question was concerned with barristers practising as managers, who would not necessarily be employees.)

The response opposes relaxation of the restrictions contained in paragraph 307f of the Code. It bases its opposition on the need to retain the specialisation of barristers, and to ensure that they do not handle clients’ money, which would entail additional regulatory complexity and expense. It does, however, favour some relaxation of the restrictions in paragraph 401b.

The response appears to accept that the Board should be the professional regulator of barristers working in ABS firms, and that it should also be the business regulator of such firms, provided that they do not handle client money and are confined to the provision of advocacy services and legal advice.

As regards the questions discussed in Part V of the consultation document the response says that provided the independence of barristers is safeguarded, there is no slackening of regulation, and there is no increase in regulatory costs, the restrictions in paragraph 403.1 of the Code should be relaxed. However, it is opposed to relaxation of the rules regarding “prohibited work”, with the limited exceptions referred to in paragraph 14 above.

The response says that the Board as regulator should not have to set up a compensation fund if it limits changes in the Code of Conduct to those accepted in the response. In general, its philosophy is that any increase in regulatory costs should fall on those who have occasioned the increase, not the Bar as a whole.