



Consultation: insurance requirements for single person entities

Purpose

1. This consultation seeks to gather views on insurance requirements for single person entities. Single person entities comprise of just one barrister who owns and manages that entity. This consultation discusses whether or not single person entities should be required to purchase their primary layer of professional indemnity insurance from a single provider – the Bar Mutual Indemnity Fund (BMIF) – or should be allowed to purchase their insurance on the open market. It considers the consequences that allowing single person entities to purchase their primary layer of insurance might have for the BMIF's future viability and the availability and cost of professional indemnity insurance for barristers as a whole. The consultation's scope is strictly limited to single person entities and does not extend to multi-person entities at this stage.
2. This consultation should be of interest to the Bar, entities considering Bar Standards Board (BSB) authorisation, solicitors and other lawyers who instruct barristers, insurers providing professional indemnity cover, and consumers of legal services.

Executive summary

3. At present, self-employed barristers are required to take out their primary layer of insurance with the BMIF. In contrast, single person entities can currently obtain insurance from the BMIF or the open market as they choose – so long as this meets the minimum terms stipulated by the BSB. The present position – whereby all entities, including single person entities, seek their insurance on the open market – was adopted on the explicit basis it would be subject to further consultation.
4. The BSB is considering whether to extend the BMIF's monopoly to single person entities. Particular attention is paid to the impact that maintaining the current position could have on the BMIF's sustainability, as a mutual model, should significant numbers of the self-employed Bar seek to incorporate their practices, take out insurance elsewhere, and leave the mutual. This consultation paper considers the advantages and disadvantages of each approach and seeks views on the BSB's proposed extension of the BMIF's monopoly to single person entities.
5. The rule change considered here relates solely to single person entities. However, it cannot be considered in isolation. The issues raised are closely bound up with the view that is taken on the value of the mutual insurance model and the impact that the differing approaches under consideration would have on that model.
6. The BSB believes that the existing rule, under which the mutual has a monopoly on providing the primary layer of cover to the self-employed Bar has operated in the public interest by providing barristers with a stable source of primary layer cover. An extension of

the monopoly to single person entities will help to achieve a level playing field between individual barristers operating on a self-employed basis or through single person entities. It will also avoid an adverse impact on the viability of the mutual in the event that a significant proportion of individual barristers (as a proportion of the BMIF's premium income) go to alternative providers. Extending the BMIF monopoly to single person entities will ensure the mutual model can continue to operate in the public interest in future. It will still be the case (as it is for self-employed barristers now) that single person entities can look to the open market for any top-up cover beyond the BMIF's maximum. As the market develops, the BSB will review its position on multi-person entities. At present, there is no evidence available to suggest that the rate or extent of take up of multi-person entities, which may seek to insure with an insurer other than the BMIF, will be as likely to challenge the viability of the mutual. In any event, multi-person entities raise additional issues that go beyond the scope of this consultation.

Background

7. The BSB submitted an application to the Legal Services Board (LSB) in 2014. This sought approval for a number of changes to the BSB Handbook. These allowed the BSB to authorise entities for the first time.¹ The application was approved and the BSB began receiving applications from prospective entities in January 2015. To date, the BSB has authorised 17 entities. Of those, 16 are single person entities and one is a partnership between two barristers.
8. The BSB has created a specialist regulation regime for entities whose range of services, risks, and regulatory requirements are similar to those of the self-employed Bar. The scope of the BSB's regime is set out in its entity regulation policy statement.²
9. When the BSB submitted its entity regulation application to the LSB it set out the requirement for entities to have in place adequate insurance, in light of the legal services they provide, in addition to complying with any minimum terms stipulated by the BSB. The content of the minimum terms was subject to a separate consultation.³
10. The BMIF responded to the BSB's consultation. It expressed concerns about the BMIF's sustainability as a mutual model of insurance cover for the self-employed Bar, should large numbers of barrister-only (particularly single person) entities incorporate and significantly reduce the membership of the mutual by going to alternative providers.
11. When considering the BMIF's response, the BSB considered its arguments to be persuasive, especially as it was then anticipated that most entities are likely to be single person entities, at least in the short term. In fact, 16 out of the 17 entities the BSB has since authorised are single person entities. However, the BSB had not included in its previous consultations on entity regulation any proposal that single person entities must purchase their primary layer of cover from the BMIF. The BSB took the view that further consideration and consultation would be necessary, before adopting any such measure. The Board committed to carrying out further research and consulting separately on the proposal.

Current insurance requirements

12. Prior to 1980 self-employed barristers were not required to have professional indemnity insurance. Such a requirement was then introduced, and barristers were initially permitted to

¹ The application is available at <http://bit.ly/1HvrJyE>.

² The policy statement is available at <http://bit.ly/1EuLU00>

³ The consultation, including a summary of responses and the BSB's response, is available at <http://bit.ly/1aUtvMV>.

take out insurance on the open market with commercial insurers. By 1985, however, there were comparatively few insurers willing to insure barristers; some barristers experienced difficulties in securing cover and/or substantial increases in premium. These difficulties prompted the Bar Council to establish the BMIF in 1988 as the compulsory provider of primary professional indemnity insurance. The requirement for self-employed barristers to take out primary insurance with the BMIF was contained in section 402 of the old Code of Conduct. Those barristers requiring insurance over and above the limit of insurance provided by the BMIF have been able to take out insurance from the commercial market. Currently, there are two panels of insurers providing excess insurance through different insurance brokers. Commercial insurers also participate in the market as reinsurers of the BMIF.⁴

13. Rule rC76 of the current Code of Conduct requires that BSB-regulated persons have adequate insurance (taking into account the nature of their practice), which covers all the legal services supplied to the public. There is a further requirement to comply with any notice from the BSB stipulating a minimum level of insurance and/or minimum terms for the insurance. rC77 requires all self-employed barristers to be members of the BMIF. Whilst all self-employed members of the Bar are covered by the BMIF they may need to take out additional cover, depending on their needs. The minimum level of cover provided by the BMIF for the self-employed Bar is £500,000; the maximum is £2,500,000. Depending on the nature of a self-employed barrister's practice they may choose to top up their cover with additional insurance purchased from the wider market.
14. All BSB regulated entities are currently subject to the general duty to have adequate insurance. This is in addition to a condition of their authorisation that they confirm (and provide evidence) that they have obtained adequate insurance, sufficient to meet their obligations under rC76 (the relevant authorisation rules are at rS83). Entities must undertake an annual risk assessment of the legal services they provide, confirm they have undertaken this, and that, based on this assessment, they continue to have an adequate level of insurance.
15. The BSB has recently issued a notice under rC76, specifying minimum terms for entities. The minimum terms are attached at **annex A**. In devising the minimum terms the BSB considered the terms on which the self-employed Bar is currently mandatorily insured by the BMIF and compared these terms with the requirements of other regulators of entities providing legal services, particularly the SRA. The main objective was to ensure that consumers should, substantively, have no less protection if they are clients of a BSB-authorized entity than they would if they were clients of a self-employed barrister or an entity regulated by another Approved Regulator.
16. Notably, there is no equivalent to rC77 applicable to regulated entities requiring them to take out primary insurance with the BMIF. The Code of Conduct therefore treats self-employed barristers and regulated entities differently as it permits the latter to take out primary insurance with commercial insurers.

Scope of paper

17. This consultation paper seeks views relating to insurance requirements for single person entities only. It specifically excludes insurance arrangements for multi-person entities. This is because the issues and implications of requiring all entities to insure with the BMIF

⁴ The background is conveniently set out in the BMIF's response to the LSB's consultation on its business plan is available at <http://bit.ly/1HYRzvy>.

(including, in time, alternative business structures) are significantly different and would require more research before this could properly be considered. It would also be prudent for the BSB to gather more information about the types of multi-person entities seeking authorisation (in terms of size, numbers of authorised persons, and services offered). This would help to ensure the BSB is able to make a more informed decision about the wider implications of any additional insurance requirements for multi-person entities. Therefore, it would not be feasible to conduct a larger scale review until at least April 2016, at which point the BSB would have been authorising entities for a year. The views expressed in this consultation in respect of single person entities do not seek to prejudge the position as regards multi-person entities.

18. The BSB has been gathering evidence to enable it to determine whether single person entities should be required to take out primary insurance with the BMIF in the same way as self-employed barristers. As part of this process, the BSB has sought to determine the appetite of commercial insurers to provide PI cover for BSB-regulated single person entities. It has also sought to identify the potential consequences for the viability of the BMIF (and the availability and cost of professional indemnity insurance for barristers as a whole) if single person entities were left free to take their primary layer of cover from the open market. To ensure that its eventual decision is evidence-based, the BSB is continuing to gather and analyse further information and evidence, in tandem with this consultation process.

Options considered and the BSB's provisional view on those options

Option 1: Maintain status quo (insurance from the open market)

19. At the moment there is no requirement for BSB-regulated entities to obtain their primary layer of cover from a particular provider. The only requirement on them is to ensure they have adequate insurance (taking into account the nature of their practice) and to comply with any minimum terms issued by the BSB. Entities are free to seek insurance on the open market – so long as these conditions are fulfilled – and this, of course, includes the option to purchase their primary layer of cover from the BMIF.

Option 2: Require single person entities to purchase their primary layer of cover from the BMIF

20. This would equate the position of single person entities with that of individual barristers operating on a self-employed basis.

Provisional view

21. As set out in more detail below, the BSB has considered views from the commercial insurance market, as well as the history of the solicitors' insurance market and that of the Bar before the introduction of the BMIF. It is continuing to gather evidence, of which responses to this consultation will form part. However, the BSB's provisional view is that the wider public interest and the regulatory objectives set out in the Legal Services Act will be better served by the proposed extension of the monopoly to single person entities.
22. The BSB considers the mutual model to have worked well. Regulated barristers can obtain their primary layer of insurance from a well-run, financially solvent provider, which is in the market for the long term. However, individual barristers in certain fields might be able to obtain cover more cheaply (at least in the short term) in the commercial market. The BMIF argues that the nature of the mutual model means the cost of professional indemnity insurance to the professional as a whole is much reduced; there is continuity of cover, and

the problems that have beset the professional indemnity market for solicitors (and which were the reason for the BMIF being established) have been avoided.

23. For this reason, the BSB's preferred policy option is Option 2. However, in reaching this position, the BSB has considered the advantages and disadvantages of such a change. Whilst some individual single person entities might be able to find insurance at lower cost on the open market, others may find it more difficult to do so without being able to turn to the BMIF as an insurer of last resort. It would not be reasonable (or realistic) to expect the BMIF to perform that role (ie, sweep up the least desirable risks) without a monopoly, (ie, a guarantee that the most desirable risks in the same category – single person entities – will also be required to insure with the BMIF).

Analysis

Views from the commercial insurance market

24. The BSB consulted the commercial insurance market to determine the appetite for professional indemnity cover for entities on the open market. As part of the research 26 insurers were approached. In response to a question about whether these insurers would be willing to insure BSB-regulated entities, the following answers were given:

- 8 yes
- 12 no
- 3 possible
- 3 no response

25. Generally, the research indicated a reasonable level of interest in underwriting BSB-regulated entities. Of the 26 insurers consulted, eight were, in principle, willing to insure BSB-regulated entities. However, there was also some indication that smaller entities would be of limited interest to these commercial providers. Of the eight insurers who were willing to insure BSB regulated entities, at least one indicated that they would not be interested in sole traders; one commented that they would “not be interested in the smallest firms”; and one indicated a minimum premium amount that may be necessary for a single person entity (depending on the type of services they provide). There was some indication that commercial insurers would wish to impose significant deductibles – in the region of £1,000-£5,000 (the BMIF currently applies a £350 deductible, but only in very limited circumstances).

26. Commercial insurers expressed some concern about how they might co-exist with the BMIF. Some insurers indicated either a reluctance to compete with the BMIF or satisfaction with the current arrangements for self-employed barristers, whereby commercial insurers are able to participate on the excess layers or as a reinsurer of the BMIF. There were also indications that if the BMIF was permitted to compete across the market, and offer cover to any size of entity, which might reduce interest from commercial providers to insure BSB-regulated entities. The insurers that were interested in offering terms mostly had “A” or better ratings. Most of the insurers that indicated they would be interested in insuring BSB-regulated entities currently participate significantly in the solicitors' primary professional indemnity market.

27. The indication given by commercial insurers from the consultation exercise is that they would only be (or that they would be more) interested in larger premium accounts. This supports

the view expressed by the BMIF itself.⁵ That is, to the extent that commercial providers are interested in providing cover for single person entities, they will focus on the most attractive accounts, from an insurer's perspective - ie, entities involving barristers operating in comparatively lucrative areas of private commercial work with a high insurance "spend". If significant numbers of such practitioners chose to form single person entities, and take out primary insurance with commercial insurers instead of the BMIF, this could have a substantial effect on the BMIF's premium volume. This could then affect the cost and availability of insurance for other barristers. Equally, there is a risk that if insurance provision for single person entities is left entirely to commercial forces, some single person entities (in particular, those with the lowest turnovers) may experience difficulty in obtaining insurance – at least unless they accept a higher minimum premium or a higher deductible. In the absence of a monopoly, the BMIF may face a situation where the commercial market "cherry picks" the most attractive single person entity risks and leaves the BMIF to underwrite those who find themselves unable to attract insurance, at a reasonable cost, on the open market.

28. In this context, we have considered the regulatory objectives. These include improving access to justice; protecting and promoting the interests of consumers; and encouraging an independent, strong, diverse, and effective legal profession. Competition in the insurance market is not in itself one of the regulatory objectives. Rather, the BSB must evaluate the impact that differing approaches will have on the legal services market and on the public who depend on those services. And so our focus is on evaluating the risks that continuing with the current approach (ie, without a BMIF monopoly for single person entities) will adversely impact on competition in the legal sector; whether because cover could not reliably be obtained or could only be obtained at higher cost; and in particular, whether this may make it harder for those providing socially valuable – but generally less well remunerated services (such as, for example, family law or criminal law) – to obtain cover reliably and at reasonable rates.

Other regulators

29. In considering whether maintaining the status quo would be a preferred option the BSB has looked at insurance requirements in other regulatory regimes. The solicitors' profession, for example, abandoned its mutual scheme (the Solicitors Indemnity Fund) in 2000, so as to allow firms to secure their own insurance under minimum terms set out in its Qualifying Insurers Agreement. While premiums for many firms dropped when the agreement was introduced, it placed the profession at risk of market fluctuations and premiums have increased in recent years. Several insurers writing solicitors professional indemnity insurance have become insolvent; others have decided to pull out of the market for commercial reasons – often at comparatively short notice. Some small firms, and sole practitioners in particular, have struggled to secure commercial insurance; as such, entities were seen by many insurers as presenting the greatest risk. The Solicitors Regulation Authority (SRA) attempted to address this problem through the introduction of the Assigned Risk Pool (ARP). Under this scheme, the SRA charged premiums and issued policies to those who were unable to obtain insurance on the open market. Firms entering the ARP would have to pay substantially higher premiums and stayed there longer than intended. The ARP generated substantial losses and was eventually abandoned for this reason.

30. Since departing from its original mutual model, the market for solicitors' professional indemnity cover has experienced significant instability. This has adversely impacted consumers in those cases where firms have been forced to cease practising through their inability to renew their cover (ie, entities – which were an acceptable risk from a regulatory perspective – were unable to obtain insurance on the commercial market), or where firms

⁵ The BMIF response to the LSB consultation on its draft business plan is available at <http://bit.ly/1HYRzvy>.

have insured with insurers who subsequently became insolvent. In contrast to the SRA's experience (and that of the Bar before the BMIF was established), the existing monopoly for the BMIF has assured stability in the reliable provision of professional indemnity insurance for the self-employed Bar, avoiding those consumer detriments. The SRA's experience (and that of the Bar before the BMIF was set up) suggests sole traders are more likely to find themselves unable to renew their cover in a purely commercial market. And so the BSB would have to consider alternatives (such as an assigned risks pool) if the existing monopoly were not to be maintained and extended to single person entities.

Pros and cons of maintaining the status quo versus extending the monopoly

31. As well as considering what has and has not worked for other regulators in respect of insuring on the open market, the BSB has considered the advantages and disadvantages of maintaining the status quo for single person entities – ie, the freedom to insure with any insurer of their choice (it being a matter for the BMIF to decide whether to offer insurance to single person entities in competition with the rest of the market).
32. The following arguments could, in principle, be made in favour of the status quo:
- (i) Permitting entities to obtain commercial insurance from the open market, in line with the minimum terms set by the BSB, would enable entities to negotiate the most competitive premiums whilst still protecting consumers. Under a mutual scheme, there is little reward for not generating claims and so some low risk entities may end up paying higher premiums than they would on the open market. There would also be less incentive for market forces to weed out higher risk entities. Low risk entities should be rewarded with lower premiums and would not bear the costs of entities that have claims upheld against them. Ultimately, lower insurance costs could lead to lower prices for consumers of legal services.
 - (ii) Entities would still have to obtain insurance in line with the minimum terms set by the BSB. From the market research conducted, eight out of the 26 insurers that responded stated they would be content to provide cover in line with the BSB's minimum terms (when shown a nearly final version of those terms). This will ensure consumer protection. Any insurer will have to meet the requirements of the minimum terms, which include requirements to provide cover in circumstances that might not otherwise be covered by professional indemnity insurance policies.
 - (iii) Even if single person entities were not obliged to insure with the BMIF, it is arguable they would generally choose to do so in any event, as long as the BMIF is willing to accept applications from such entities. However, if the status quo was maintained there would at least be the option of single person entities seeking more competitive cover on the open market than that which was offered to them by the BMIF.
24. As to (i), the BSB accepts it may well be the case that some single person entities would be able to obtain their primary cover more cheaply, through the commercial market, than via the BMIF. (The same may also be true of some individual self-employed barristers, under the existing monopoly.) Clearly, having that option available is then an advantage for those individual entities who find themselves in that position. Being deprived of it by the imposition of a monopoly would be a disadvantage. The issue is whether that can reasonably be regarded as outweighed by the disadvantages that may, in time, flow from continuing to maintain the status quo as the market develops. In particular, is the BSB right to see the monopoly as operating in the public interest, because of the stability it brings to this sector as a whole? If so, is it reasonable to see that as outweighing the fact that some individual

single person entities might have been able to obtain their primary layer of insurance at lower cost, if free to go to commercial providers?

25. As to (ii), whilst the minimum terms do ensure that any cover obtained meets the BSB's requirements, and so they protect consumers to that extent, they do not mitigate the risks of consumer detriment that were identified in the preceding section - ie, of being unable to obtain cover or of obtaining cover from an insurer who enters the market offering low price premiums only to collapse into insolvency.
26. As to (iii), the BSB has considered whether it is realistic and preferable to expect the mutual to compete with the commercial market for the primary layer of cover for single person entities. This is something that has happened in relation to patent and trade mark attorneys. They can seek insurance on the open market. However, a mutual (PAMIA) was set up to provide cover that regulated individuals were free to choose. PAMIA, in fact, provides professional indemnity insurance to 95% of the UK and Irish patent and trade mark attorneys in private practice. Yet, as indicated above, the BSB is concerned that the available evidence suggests some types of single person entities might have more success than others in securing insurance from the commercial market, and that there could then be adverse consequences for BMIF and for practitioners in other areas. A regulatory monopoly would necessarily be coupled with agreement on the part of the BMIF that it will insure all those who are within the scope of that monopoly. That provides certainty of cover – whereas, in the absence of a monopoly, the BMIF could not be forced to compete for this segment of business. Its presence in the market could not be guaranteed and still less could it be guaranteed that it would pick up those risks that prove unattractive to its competitors (indeed the members of the mutual might question the BMIF's stance, should it voluntarily assume the position of an insurer of last resort without the benefit of a monopoly).
27. The disadvantages of continuing without a BMIF monopoly for the primary layer of cover for single person entities include that:
 - (i) Allowing entities to obtain insurance on the open market could jeopardise the mutual scheme for the self-employed Bar.
 - (ii) It is possible that relatively low risk single person and small entities could struggle to get cover on the open market. As explained above, initial consultation with the insurance market suggests that, of those interested, some would not be interested in providing cover for smaller entities.
 - (iii) Maintaining a monopoly in respect of the self-employed Bar whilst allowing single person entities to insure on the open market would create a difference of treatment that would require sound regulatory justification. Whilst multi-person entities pose some risks of a kind that are different in nature, single person entities are likely to pose risks that are very similar to those posed by self-employed barristers, making it difficult to see how that difference in treatment could be justified.
28. As noted above, the existing rule for the self-employed Bar – ie, providing the mutual insurer with a monopoly – has contributed to stability when compared either with the market for solicitors' insurance or the position faced by the self-employed Bar before the BMIF was established. The BMIF has expressed concerns that its survival cannot be guaranteed in an environment where single person entities are free to insure with commercial providers. There is potential for commercial insurers to "cherry-pick" the best risks (ie, those generating the highest premiums and with the best claims records) and / or to seek to build market share with "loss-leader" premiums – meaning the BMIF could be left as an insurer of last resort for those unable to find cover elsewhere. The BMIF has concluded that, if such a

scenario occurred, it would have to consider whether the protection of the members' interests would be best served by winding up the Bar Mutual.

29. The BSB agrees that, in principle, there is a potential risk of this occurring (not immediately, but over time) due to single-person entities purchasing their primary layer of cover from the open market. The numbers taking up the option of forming a single person entity currently exceed those applying to form multi-person entities by a significant margin and are likely to continue to grow further and faster than the numbers of multi-person entities. However, even supposing (as the BSB thinks reasonable) that the majority of the Bar (in absolute numbers) are likely to remain self-employed and insured with the BMIF for the foreseeable future, there will nevertheless be an adverse impact on the financial position of the mutual if those who do form single person entities and insure outside the BMIF (albeit a minority in absolute terms) represent a big enough proportion of the BMIF's premium income.
30. And so a key consideration is the risk that, without a monopoly, cherry-picking behavior by the commercial market would be most likely to remove from the BMIF those insureds on whom the overall, longer term viability of the mutual model depends. The BSB is undertaking further research to determine the effect on the mutual scheme, including: the likely reduction in the BMIF's premium base; the additional costs that might be incurred by the BMIF (for example, if barristers had to be individually underwritten, which is not the case at present); the increased premiums that might have to be paid by the BMIF's remaining members; and the "tipping point" at which the mutual scheme would no longer be viable to operate. However, in the end, whatever research is done, there will remain an element of judgment about how to balance risks that cannot be predicted with certainty.

BMIF's position currently and how that would be affected by the proposal

31. At the time of writing, the majority of entities that have applied for authorisation have indicated that the BMIF would be their insurer of choice. The BMIF's current position is as follows:
 - The BMIF will provide primary layer professional indemnity insurance at the 2015 renewal to all single person entities on the same basis as if the individual behind the single person entity were seeking cover as a self-employed barrister.
 - The BMIF will provide primary layer professional indemnity insurance at the 2015 renewal to BSB regulated multi-person entities on a case-by-case basis, with the intention of providing insurance to barrister-like entities.
 - The BMIF will not provide run-off cover to those of its self-employed members who elect to establish any entity that will be regulated by the BSB where that entity does not purchase its primary layer of cover with the BMIF.
32. The BMIF has reserved its position as to whether it will provide any cover to entities as from the 2016 renewal.
33. The BMIF does not calculate premiums for individual barristers on the basis of their claims record. It charges a premium based on the income of the barrister and the areas of work in which he or she practices. There is no individual underwriting and so administration costs are kept low. No self-employed barrister authorised to practice by the BSB is refused cover.

34. If a rule was introduced that required single person entities to insure with the BMIF, then no single person entity would be left without insurance cover. At the moment, the BMIF must grant cover to all self-employed barristers – regardless of their experience, background, practice area, or claims record.
35. The BMIF must indemnify all self-employed barristers – even if they fail to pay their insurance premiums, which would also be the case for single person entities. So any client instructing a single person entity will do so with the guarantee that, if they have a valid claim against a barrister, this will be covered. This will ensure there are similar levels of protections for clients regardless of whether they are instructing a self-employed barrister or a barrister working through a single person entity.
36. The BMIF currently covers 13,000 self-employed barristers. It is argued that this leads to competitive premiums compared to the open market. As the BMIF is a not-for-profit company it does not have to generate profits for outside shareholders and reinvests surpluses in supporting the provision of cost-effective insurance to self-employed barristers. The cost of top up cover in the commercial market is kept down by the fact that, as primary layer insurer, the BMIF provides claims handling, and does so at cost.
37. Using the BMIF scheme would provide continuity of cover for clients of those individual barristers who choose to form single person entities. Expanding the scheme to cover single person entities would have the greatest chance of providing a more “seamless” move from one mode of operating to the other, so providing greater protection for clients. Similarly where a barrister decides to move from an entity to self-employed practice, competitive run-off cover provided by the BMIF would make this easier.
38. Before amending the Handbook to require single person entities to insure with the BMIF, the BSB would need to seek agreement with the BMIF that they would be willing to insure any single person entity authorised by the BSB. The BSB understands the BMIF is, in principle, prepared to offer that agreement, given that the services offered and risks presented are unlikely to differ to any significant degree as between individual self-employed barristers and single person entities.
39. Likewise, because the risks posed by single person entities will be similar (if not the same) as those posed by self-employed practice, extending the existing monopoly to the single person entities will not result in the self-employed Bar cross-subsidising – by way of their BMIF premiums – risks associated with entities that are different in their nature or extent than the risks posed by services offered by the self-employed Bar.
40. In contrast, multi-person entities may pose different risks requiring a different approach to how those risks are underwritten (for example, by way of individual rating of risks). This is one of a number of reasons why the position of multi-person entities raises differing considerations that should be considered with the benefit of the additional evidence that will be available once multi-person entities have been in operation for some time. Judging from the applications received to date, the numbers of self-employed barristers who will move to multi-person entities in substitution for their self-employed practice will be more limited and the rate of uptake will be slower than in the case of single person entities.

Questions

Question 1: Have we correctly identified the range of factors that should be taken into consideration as potential advantages or disadvantages in making a choice between

Option 1 and Option 2 or are there any other relevant factors that we should take into consideration?

Question 2: Should we consider any other options, beyond Option 1 and Option 2 and if so what?

Question 3: Do you agree that the existing BMIF monopoly, in respect of the primary layer of cover for the self-employed Bar, has operated in the public interest overall? Please provide reasons for your answer.

Question 4: Do you agree (a) with the BSB's provisional conclusion that Option 2 should be preferred and (b) with the BSB's reasons for arriving at that conclusion? If you disagree, please provide reasons for your answer.

Responding to This Consultation

41. Responses to this consultation should be sent to the Regulatory Policy Department at the BSB at regulatorypolicy@barstandardsboard.org.uk
42. Responses should be received no later than **Tuesday 30 June 2015**.

Annex A

Note: This is not a draft policy but minimum terms which any policy must meet. Where exclusions are permitted, insurers may not impose more onerous terms but may choose to offer more extensive cover in respect of the matters excluded, or any other respects.



BSB Minimum Terms of Entity Cover

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Effective as from 00:00 Greenwich Mean Time on 1 April 2015.

1 INSURING CLAUSE

- 1.1 Subject to the provisions of these Minimum Terms of Cover, the insurance must indemnify the Insured against any and all Claims:
- (a) which are first made against the Insured during the Period of Insurance, or
 - (b) which are first made against the Insured during or after the Period of Insurance and which arise from circumstances first notified to the Insurer during the Period of Insurance or within 28 days of expiry of the Period of Insurance,
- in respect of any and every description of Civil Liability whatsoever arising out of or in any way in connection with the Insured Practice whensoever and wheresoever the act or omission or other circumstances or event giving rise to such liability may have occurred.
- 1.2 The insurance must indemnify the Insured against Defence Costs.
- 1.3 The insurance must indemnify the Insured against civil liability in like terms to paragraph 1.1 to the extent that it arises from any Claim in connection with a Prior Practice.
- 1.4 The insurance shall have no retroactive date.

2 LIMIT OF INDEMNITY

- 2.1 Subject to sub-paragraphs 2.2-2.7 below, the insurance must provide that the liability of the Insurer is not less than:
- (i) the Limit of Cover, and in addition
 - (ii) Defence Costs without limit of amount.
- 2.2 The insurance may provide that if a sum in excess of the Limit of Cover has to be paid in order to dispose of any Claim, the Insurer's liability in respect of Defence Costs shall be in the same proportion as the Limit of Cover bears to the sum paid to dispose of the Claim. In the event of the Insurer having already indemnified the Insured in respect of Defence Costs, the Insurer shall be entitled to recover from the Insured such proportion of them as may exceed that proportion of the sum paid in order to dispose of the Claim as is represented by the Limit of Cover.
- 2.3 The insurance may provide that if a Claim becomes the subject of proceedings before any court or tribunal in the United States or Canada and is resolved (whether by judgment, settlement or otherwise) in accordance with the law of such jurisdiction, any Defence Costs covered under paragraph 2.1(ii) above shall be included within and not payable in addition to the Limit of Cover.

2.4 The liability of the Insurer under these Minimum Terms of Cover may exclude:

- (i) any award of punitive, exemplary or multiple damages by any court or tribunal in the United States or Canada;
- (ii) any costs and expenses incurred without the prior written consent of the Insurer;
- (iii) any award requiring repayment, reduction or waiver of any fees in whole or in part or case fee ordered by the Legal Ombudsman, and any order in any court proceedings brought to enforce payment of any such award or case fee;
- (iv) any fine ordered by the BSB or any panel thereof or by any other Regulator.

2.5 The indemnity provided by the Insurer under these Minimum Terms of Cover may be provided by the Insurer in its absolute discretion in any one or any combination of the following ways:

- (i) by payment in or towards satisfaction of the Claim and/or claimant's costs to or to the order of the claimant making the Claim against the Insured;
- (ii) by payment in respect of the Claim and/or claimant's costs and/or Defence Costs to or to the order of the Insured against whom the Claim is made;
- (iii) by payment in or towards discharge of Defence Costs to or to the order of the legal advisers, adjusters or other persons by whom or in respect of whose services such costs and expenses were incurred.

2.6 The insurance may provide that if VAT is payable upon any element of the indemnity provided by the Insurer to any of the Insured who is registered for VAT, such VAT shall be paid and accounted for by such Insured and not by the Insurer.

2.7 The insurance may provide for a Deductible. In the event that the Deductible becomes payable by the Insured and is paid by the Insurer to dispose of a Claim, the Insured shall reimburse the Insurer in respect thereof.

3 EXCLUSIONS

3.1 Any liability of the Insurer under these Minimum Terms of Cover for the following may be excluded (and where the Insurer chooses to provide cover for Defence Costs of Disciplinary Proceedings, or otherwise going beyond the

minimum cover that is required by these Minimum Terms of Cover, the remaining exclusions may so far as relevant extend to such cover):

- (i) Claims for bodily injury or death unless arising out of the provision of Legal Services to a client by the Insured;
- (ii) Claims for loss of or physical damage to property unless
 - (a) the property is property in the care of the Insured in connection with, but is not occupied or used by him for the purposes of, the Insured Practice, or
 - (b) the loss or physical damage arose out of the provision of Legal Services to a client by the Insured;
- (iii) Claims arising out of any fraudulent dishonest or malicious act or omission on the part of the Insured, save that (a) the Insurer must indemnify the Insured against Claims arising out of any fraudulent dishonest or malicious act on the part of the Insured's servant or agent for which the Insured is liable in law provided that the Insured establishes to the reasonable satisfaction of the Insurer that it did not commit or condone the fraudulent dishonest or malicious act or omission, and in any event (b) the Insurer must indemnify any other Insured which did not commit or condone the fraudulent dishonest or malicious act or omission;
- (iv) Claims against which the Insured is entitled to be indemnified under any other insurance, but only to the extent that he is entitled to be and is so indemnified;
- (v) Claims arising out of any breach of any duty owed by the Insured as an employer to an employee, or as owner or occupier of any property;
- (vi) Claims in respect of trading debts incurred by the Insured;
- (vii) Claims in respect of any loss or damage directly or indirectly caused by ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel, or the radioactive, toxic, explosive or other hazardous properties of any explosive nuclear assembly or nuclear component thereof;
- (viii) Claims arising out of any dispute between present or former members, pupils, Clerks or Employees of Chambers or other regulated entity in respect of matters relating to or in any way connected with ownership, occupation, possession, management or administration of the Chambers or regulated entity or of any property used in or for the purposes of the Chambers or the regulated entity;

- (ix) Claims made against any Insured in their capacity as a director or officer of a body corporate.
- (x) Claims in respect of any liability incurred under any express term of a contract, save to the extent that such liability would have arisen as a matter of law in the absence of such express term and would otherwise fall within the provisions of these Minimum Terms of Cover.
- (xi) Claims arising out of or in any way in connection with the provision of Legal Services in a system of law and/or jurisdiction in which the Insured is not authorised to provide Legal Services by
 - (a) the BSB or any successor regulator to it; or
 - (b) any competent professional body; or
 - (c) any judicial or other body;
- (xii) Claims arising out of any criminal offence committed or allegedly committed by the Insured or out of an enquiry conducted by Her Majesty's Revenue and Customs into the Insured's tax or VAT affairs.
- (xiii) Costs or penalties incurred in respect of disciplinary proceedings of any type.
- (xiv) Conveyancing, to the extent that this involves services going beyond the scope of reserved instrument activities as defined in the Legal Services Act 2007 and ancillary advice, as for example by carrying out searches or lodging documents with the Land Registry or taking steps to transfer title.

4 AVOIDANCE, REPUDIATION, RESCISSION AND REIMBURSEMENT

4.1 The insurance must provide that, save in the circumstances set out in paragraphs 4.2 to 4.4 below, the Insurer shall not be entitled to cancel, avoid, repudiate or rescind any insurance or any liability thereunder to the Insured or to claim damages against the Insured on any grounds whatsoever, including misrepresentation, non-disclosure, or breach of condition or duty.

4.2 If an Insured

- (i) has fraudulently misrepresented or fraudulently failed to disclose any material fact, or
- (ii) notifies any Claim knowing it to be false or fraudulent,

the insurance may provide the Insurer shall be entitled to claim damages and/or to avoid the insurance and/or to refuse to indemnify the Insured. In such event the Insurer may in its absolute discretion, notwithstanding any such avoidance of the insurance or refusal to indemnify, satisfy all or any part of any Claim made against the Insured responsible for such fraud (including the claimant's costs) by paying the same to the claimant. In such circumstances, the Insurer shall be entitled to recover any amount so paid from the Insured responsible for such fraud.

- 4.3 Where any misrepresentation or non-disclosure that does not otherwise entitle the Insurer to avoid the insurance has resulted in the Insurer effecting the insurance for a lower consideration than would have been the case if the correct and full facts had been disclosed, the insurance may provide that the Insured shall pay to the insurer such additional premium as the insurer would reasonably have required if the correct and full facts had been disclosed to it.
- 4.4 The insurance may provide that where any breach of the insurance has prejudiced the Insurer in its handling of any Claim against the Insured, the Insured responsible for such breach shall reimburse to the Insurer the difference between the sum paid by the Insurer in respect of the Claim and the sum which would have been payable in the absence of such prejudice.

5 NOTICE OF CLAIMS

- 5.1 The Insurance may not make provision in respect of notice of Claims that is more onerous to the Insured than that set out in paragraphs 5.2-5.4 below.
- 5.2 The Insured shall give written notice to the Insurer as soon as practicable of any
- (i) Circumstance that may subsequently give rise to a Claim against the Insured;
 - (ii) Claim that has been made against the Insured.
- 5.3 The Insured shall forward every letter, claim form, application and process to the insurer immediately upon receipt, and shall in all cases upon request give to the insurer such further information and render such assistance as it may reasonably require.
- 5.4 All such notices shall be given and all such documents forwarded to the insurer at the address given in the Cover Note or at such other address as may be notified to the Insured.

6 CONDUCT AND SETTLEMENT OF CLAIMS

- 6.1 The Insurance may not make provision in respect of conduct and settlement of Claims that is more onerous to the Insured than that set out in paragraphs 6.2-6.9 below.
- 6.2 The insurer shall be entitled to take over and conduct in the name of any Insured the defence of any Claim and shall be entitled to appoint such legal representatives to investigate and defend the Claim or, following the notification of a Circumstance pursuant to sub-paragraph 5.2(i), any potential Claim as it considers appropriate. The Insured shall co-operate with, and provide all reasonable assistance to, the insurer in connection with any Circumstance or Claim notified pursuant to section 5.
- 6.3 Neither the insurer nor the Insured shall be required to contest or continue to defend any Claim unless a Queen's Counsel (appointed by agreement or by the Chairman of the Bar Council in the absence of agreement) shall advise that, taking due account of the interests of both the insurer and the Insured, such Claim should be contested or continue to be defended. The insurer and the Insured shall agree to be bound by the opinion of the Queen's Counsel, which shall be treated as having been given as an expert and not as an arbitrator. Liability for the Queen's Counsel's fee for advising under this paragraph shall lie with the party against whose contention the Queen's Counsel advises.
- 6.4 The Insured shall not settle any claim for indemnity, contribution or recovery, nor surrender any right to the same, without the prior written consent of the insurer. The Insured shall not admit liability for any Claim or incur any costs or expenses in connection therewith without the prior written consent of the insurer.
- 6.5 Subject to sub-paragraph 6.6, the insurer shall take all reasonable steps to inform the Insured of any proposals for settlement and shall not admit liability for or settle any claim without the written consent of the Insured.
- 6.6 The insurer shall be entitled to settle any claim without the prior written consent of the Insured if:
- (i) the Insured does not give written notice refusing his consent to a settlement recommended in writing by the insurer within 28 days (or such shorter period as the insurer may stipulate where the circumstances require) of the recommendation being sent to the Insured; or
 - (ii) it is not possible or permissible to obtain instructions from the Insured and where the insurer believes in good faith that settlement is necessary to protect the interests of the Insured and/or the insurer.

- 6.7 If the Insured refuses to consent to a settlement recommended in writing by the insurer, the insurer's liability in connection with the Claim shall not exceed the sum for which it could have been settled and the Defence Costs up to the date when such settlement could have been effected.
- 6.8 If the Insured offers to settle and/or settles any Claim, the insurer shall be under no liability to indemnify him in respect of that offer and/or settlement or to pay any costs or expenses incurred in connection with the same, unless
- (i) The insurer approves the settlement, or
 - (ii) (a) the Insured has notified the insurer in writing of the proposed terms of settlement; and

(b) The insurer has given its written consent to the proposed terms of settlement or has failed within 28 days of receipt of the said notice to give written notice to the Insured objecting to the proposed terms of settlement.
- 6.9 If any payment is made by the insurer in respect of a Claim against the Insured, The insurer will be subrogated to all rights of the Insured of indemnity, contribution or recovery to the extent of that payment.

7 EXTENDED INDEMNITY PERIOD

- 7.1 The insurance must provide cover for no less than the minimum Limit of Cover from time to time prescribed by the BSB until the sixth anniversary of the end of the Period of Insurance in respect of Claims which are made against the Insured arising out of any acts or omissions giving rise to liability which occurred prior to the end of the Period of Insurance unless the Insured or a Successor Practice obtains insurance complying with the minimum terms required by the BSB for the period which immediately follows the period of insurance. In the event of such cover being triggered the Insurer may recover an additional premium in respect thereof. In the event that the Insured or a Successor Practice obtains insurance complying with the minimum terms required by the BSB during the period that the insurer is providing cover in compliance with this provision, the insurance in compliance with this provision shall cease with effect from the date of inception of such replacement insurance.
- 7.2 The insurance must additionally provide cover for no less than the minimum Limit of Cover from time to time prescribed by the BSB for a period of 30 days following the ending of the Period of Insurance, including in respect of claims which are made against the Insured arising out of any acts or omissions giving rise to liability which occurred within that 30 day period, unless before the end of that 30 day period the Insured or a successor practice obtains insurance complying with the minimum terms required by the BSB or the Insured Practice ceases. For the purposes of 7.1, the Period of Insurance includes this 30 day period where appropriate.

- (iii) an EEA Firm of the kind mentioned in paragraph 5(d) of Schedule 3 to that Act, which has permission under paragraph 15 of that Schedule (as a result of qualifying for authorisation under paragraph 12 of that Schedule) to effect or carry out contracts of insurance including professional indemnity insurance; or
- (iv) a person who does not fall within paragraph (a), (b) or (c) and who may lawfully effect or carry out contracts of insurance including professional indemnity insurance in a member state other than the United Kingdom.

Bar Council	The General Council of the Bar of England and Wales.
BSB	The Bar Standards Board
Chambers	The place or places (as notified to the BSB) at or from which the Insured carries on its practice.
Circumstance	An incident, occurrence, fact, matter, act or omission that may give rise to a Claim.
Civil Liability	For the purposes of these Terms of Cover, Civil Liability includes any liability to pay wasted costs;
Claim	A demand for, or an assertion of a right to, civil compensation or civil damages or an intimation of an intention to seek such compensation or damages.
Clerk	The clerk and junior clerks employed (whether under a contract of service or as an independent contractor) by the Insured in connection with Insured Practice.
Code of Conduct	The Chartered Institute of Arbitrators Code of Professional and Ethical Conduct.
Cover Note	The Cover Note issued by the insurer in respect of any Period of Insurance, including where the context so requires a Cessation Cover Note, and any endorsement.
Deductible	The amount set out in the Cover Note for which any Insured shall be responsible to contribute towards any payment made by the insurance in the defence or settlement of any claim.

Defence Costs	<p>Any costs or expenses incurred with the prior written consent of the insurer in any of the following situations:</p> <ul style="list-style-type: none"> (i) As regards a Circumstance notified under subparagraph 5.2(i) in the investigation, defence and settlement of a potential Claim; (ii) in the defence or settlement of any Claim; (iii) in the conduct of any proceedings for indemnity, contribution or recovery relating to a Claim; <p>provided that:</p> <ul style="list-style-type: none"> (i) any such Claim or potential Claim are capable of giving rise falls or would fall within the terms of paragraph 1.1; and (ii) any such Claim or potential Claim are not excluded from cover by any of the exclusions under paragraph 3.1.
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Employee	Any person other than a Clerk who is employed (whether under a contract of employment or as an independent contractor) by the Insured in connection with the Insured practice.
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European Lawyer	As defined in the BSB Handbook.
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Foreign Lawyer	As defined in the BSB Handbook.
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Insured	<p>Each of the following persons:</p> <ul style="list-style-type: none"> (i) The Insured partnership, or limited company and legally qualified partners, directors, principals or employees thereof (including a Foreign Lawyer or European Lawyer in any of the said capacities). (ii) Any pupil of the Insured, but only in respect of work performed in practice whilst a pupil of the Insured. (iii) Any former pupil of the Insured who has not practised since completing that and any other pupillage, but only in respect of work performed in practice whilst a pupil of any Insured.
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- (iv) Any Clerk or employee, but only in respect of matters occurring whilst in employment as a Clerk or employee in connection with the Insured Practice of the Insured, or with the Insured Practice of any pupil or former pupil of any Insured to the extent and within the limits insured under paragraphs (ii) and (iii) above.

- (v) Any estate, legal personal representative or insolvency practitioner of any of the above in respect of any claim made or circumstance reported during the period of insurance in respect of the Insured practice.

Each of the Insured shall be severally insured by virtue of the issue of a Cover Note to the Insured and shall for all purposes in connection with these Terms of Cover be treated as separately insured hereunder as if under a separate insurance, so that (for example) no act or omission (including fraud, committed or condoned) on the part of any one or more of the Insured shall prejudice the rights of or adversely affect any other(s) of the Insured or in any way derogate from the cover granted to any other(s) of the Insured.

Insured Practice	<ul style="list-style-type: none"> (i) The supply of Legal Services regulated by the BSB; (ii) the supply of Legal Services as a Foreign Lawyer or European Lawyer in any jurisdiction by an Insured; (iii) acting as an Arbitrator; (iv) acting as a Mediator; (v) acting as a Legal Secretary; (vi) acting as an Ad Hoc Judge; (vii) employment and voluntary work at the Bar Pro Bono Unit or at a law centre or legal advice centre or in relation to, or as honorary legal adviser to, a charity or other Voluntary Association; (viii) membership of any disciplinary tribunal or investigation committee; (ix) acting as an expert on matters of English law, European Union law, public international law, the law relating to international arbitration, or transnational law anywhere in the world; (x) any other practices and occupations as may be specified in the Cover Note or in any endorsement thereto.
Insurer	The Insurer which issues the policy in compliance with these minimum terms, being an Authorised Insurer.
Legal Ombudsman	An ombudsman under the scheme established under Part 6 of the Legal Services Act 2007.
Legal Secretary	Serving as a legal secretary or assistant to an Arbitrator, Mediator or a domestic or international tribunal.
Legal Services	<p>Legal advice representation and drafting or settling any statement of case witness statement affidavit or other legal document but does not include:</p> <ul style="list-style-type: none"> (i) lecturing in or teaching law or writing or editing law books articles or reports; (ii) examining free of charge newspapers, periodicals, books, scripts and other publications for libel, breach of copyright, contempt of court and the like; (iii) communicating to or in the press or any other media;

- (iv) exercising the powers of a commissioner for oaths;
- (v) giving advice on legal matters free to a friend or;

- (vi) in relation to a barrister or Registered European Lawyer who is a director of a company or a trustee or governor of a charitable benevolent or philanthropic institution or a trustee of any private trust, giving to the other directors trustees or governors the benefit of his learning and experience on matters of general legal principle applicable to the affairs of the company institution or trust.

Limit of Cover	<p>The sum of £500,000 each and every Claim or such other Limit of Cover in excess of the Deductible as may be specified in the Cover Note (subject to a minimum of £500,000), provided that the insurance may stipulate that only one Limit of Cover shall apply to all Claims which in the reasonable opinion of the insurer arise from or are attributable to</p> <ul style="list-style-type: none"> (i) the same act or omission; or (ii) a series or group of related acts or omissions; or (iii) a series or group of similar acts or omissions; or (iv) the same originating cause.
Mediation	A mediation or conciliation.
Mediator	Serving as a mediator or conciliator in a Mediation.
Period of Insurance	The period (all dates inclusive) specified in the Cover Note.
Prior Practice	Each <i>practice</i> which was previously regulated by the BSB and has ceased to exist and to which the <i>Insured practice</i> is ultimately a <i>Successor Practice</i> by way of one or more mergers, acquisitions, absorptions or other transitions. A practice shall not cease to exist by virtue of this definition merely by virtue of a minor change in the number or identity

of partners or the directors, officers or shareholders of a company.

- Registered European Lawyer A European Lawyer registered as such by the BSB and by an Inn pursuant to a direction of the Joint Regulations Committee under Regulation 30 of the Consolidated Regulations and who supplies Legal Services from an Insured entity in England and Wales and who (for the avoidance of any possible doubt) is not employed to supply Legal Services under a contract of employment or by virtue of an office under the Crown or in the institutions of the European Union.
- Successor Practice The practice regulated by the BSB into which a Prior Practice has been merged, acquired by, absorbed or otherwise traced by transition or a sequence thereof. A practice will be a Successor Practice where it has been held out expressly or by implication in any way whatsoever as a successor to a Prior Practice or where the owner or owners of the majority interest in the Prior Practice are owners, part owners or employees of the practice under consideration as Successor Practice.
More than one Successor Practice to a Prior Practice may exist.
- Voluntary Association A body the activities of which are carried on otherwise than for profit, but does not include any public or local authority.