

Toby Frost
The Bar Standards Board
289-293 High Holborn
London WC1V 7HZ

By E-Mail: TFrost@barstandardsboard.org.uk

The Legal Services Act 2007 - Implications for the regulation of the Bar of England and Wales (Second consultation paper)

The Legal Services Commission (LSC) welcomes the opportunity to respond to this consultation. Please find below our comments on the above consultation.

Introduction

The LSC is a non – departmental public body sponsored by the Ministry of Justice (MoJ). With an annual spend of £2 billion; we are responsible for the delivery of civil and criminal legal aid services and the development of community legal services.

The LSC is committed to ensuring that clients have access to quality legal services that meet their needs, and that providers deliver client focused quality services that represent value for money.

General Comment

The implementation of the Legal Services Act 2007 poses much opportunity to dramatically increase competition and ensure greater flexibility in response to legal demand and a changing landscape. The existence of new business entities will inevitably see new additional players in the market and predictably they will be larger and all encompassing. Any restrictions enforced by the Bar's Code of Conduct to prevent a barrister to compete within this market could be considered unfair and anti competitive.

For these reasons the LSC agrees with the consultation proposals that the Code should be amended in order to allow a level playing field to ensure fair competition. That said, safeguards are required to ensure that such entities do not stifle the market or become too big and controlling so as to have the adverse effect and not promote competition, impacting on client choice and, as a consequence driving up costs.

Response to The Implications of the Legal Services Act 2007 (Part 2)

This second consultation on the impact of the Legal Services Act 2007 focuses on two questions:

- 1. Should barristers be allowed to practice, that is to supply legal**

services to the public, as managers of Legal Disciplinary Practices?

2. Should barristers be allowed to practise as members of a partnership consisting exclusively of barristers?

The overall responses to the original consultation on these two questions were by majority in favour of barristers acting as managers in Legal Disciplinary Practices (LDPs)/Alternative Business Structures (ABSs) and by a reduced majority in favour of barristers practicing in partnerships. The LSC, in the initial response agree with the majority, but also recognised potential disbenefits, such as conflicting interests and potential negative impact this could have on supply and competition.

Question 1

The LSC agree in principle with the Board's approach and proposals, but ideally would require further information on how issues relating to conflicts of interests and client confidentiality would be managed.

Question 2

Safeguards are required to ensure that barristers who wish to be employed as managers of LDPs are subject to not only the Bar's Code of Conduct but also any regulatory regime of the business entity. The BSB and SRA are clearly working collaboratively in developing the regulatory regime and proposals forwarded so far are commendable.

Although there are benefits in offering continuity of service (one-stop-shop) a client should always be advised of their rights to elect an alternative advocate and select advocates from the self-employed bar. The overriding principle is that a barrister or solicitor should always ensure that a client has the most appropriate representation, even if this means instruction outside of the firms/chambers or LDP. For these reasons retention of rule 603 is paramount.

Question 3

The LSC agrees in principle with this approach, and agrees with the safeguards proposed. However, in practice we imagine that this would be very difficult to police, and welcome the Board's proposals to draft further rules. Further information is also required in relation to how this potential risk would be regulated and audited.

Question 4

The LSC agrees that barristers should not practice as both a manager of an LDP and as an independent practitioner for reasons stated within this consultation.

Question 5 and 6

The LSC is of the view that the cab-rank rule should not be applied to employed advocates working in LDPs, for the reasons given in its first response. The LSC is in agreement with the BSB's opinion that imposing the rule would provide a major disincentive to any partnerships of barristers or LDPs and that such a restriction may be anti-competition. Reiterating comment from the first response, applying the code of conduct to employed barristers would be inconsistent and unfair, given that the rule does not apply to barristers employed in solicitor's offices (in full) or by way of direct access. It

would be desirable if the rule were re-written with a strong focus on core values, which could then be applied to both employed and self-employed barristers.

We suggest that the code should be amended to reflect this. Amendments to the code as suggested in Appendix B appear relevant, although please see above suggestion for re-write of the code on the cab-rank rule.

Question 7 (a) and (b)

In reiterating extracts from the LSC's response to the first consultation, we consider that revised regulation and relaxation on the inflexibility applied to barristers rights of working will undoubtedly result in increased competition, resulting in more choices for the consumer in seeking legal services. The LSC agrees with the opinion of the Office of Fair Trading that this could increase competition and even more importantly could increase supply in new areas of practice. Thus, working partnerships could offer significant benefits to clients and barristers and ensure equality of opportunity with solicitor/litigator counterparts.

However, if the reason for entering partnerships is expressly for the purpose of providing greater leverage in bidding for commercial contracts, this may reduce client choice, which would not be operating in the public's interest and thus should be prohibited.

Question 8 – Not applicable

Question 9 – See response to question 5 and 6

Question 10 – See response to question 2

Question 11

Barristers should not be permitted to work as both members of partnerships and as sole practitioners for reasons stated in this consultation. In addition, there is a risk that barristers may work in a partnership for the purpose of controlling bidding for contracts with the intention to then be permitted to undertake work in a self-employed capacity (as suggested by a participant at a BSB seminar event) this has the potential to be anti-competitive, and to artificially set price. Neither of which can be in the public interest.

Question 12

Agree with the list at 68.

Question 13

As per question 10 to the first consultation response. The ideal of the BSB regulating entities such as LLPs and limited companies is problematic because at present they are not the regulator – the Bar Council (BC) is, and the BC delegates its function in this regard to the BSB. It is questionable whether it is in the clients' best interests for a representative body to maintain approved regulatory status.

I hope you would find this response useful. If you have any queries about its contents, please do not hesitate to contact Louise Sowden, Project Manager for Quality Assurance Scheme for Advocates, at louise.sowden@legalservices.gov.uk.

Yours sincerely

Carolyn Regan
Chief Executive
Legal Services Commission

cc. Louise Sowden