

Toby Frost
Bar Standards Board
289-293 High Holborn
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8 May 2008

Dear Mr Frost

Re: Response to the consultation on the Impact of the Legal Service Act 2007

Thank you for giving us the opportunity to respond to the BSB's consultation on The Impact of the Legal Service Act 2007. The Legal Services Commission fully endorses the timeliness and focus of the consultation and wishes to continue our joint working with the Bar Standard's Board. Our full response is attached.

If you have any queries about the contents of this response please do not hesitate to contact my office or Louise Sowden, Project Manager, Quality, Efficiencies and Diversity on 01173023132 or louise.sowden@legalservices.gov.uk.

Yours sincerely

Carolyn Regan
Chief Executive

Cc. Louse Sowden, Project Manager

LEGAL SERVICE COMMISSION'S RESPONSE; CONSULTATION ON THE IMPACT OF THE LEGAL SERVICES ACT.

Introduction

The Legal Services Commission (LSC) is a non – departmental public body sponsored by the Ministry of Justice (MoJ). With an annual spend of £2billion, 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. As a result the LSC welcomes the opportunity to respond to this consultation.

General Comments

The key quality assurance principles are that it should be robust and independent.

The LSC is of the opinion that central independent regulation will have a beneficial impact on the quality for the consumer because quality is affected by the way professions are regulated. The Legal Services Act follows the Administration of Justice Act 1985 which permitted licensed conveyancers to compete with solicitors, and The Courts and Legal Services Act which enabled solicitors to acquire rights of audience in the higher courts. The revised regulator should protect and promote the interests of the consumer and offer a higher degree of client choice¹ in relation to where they choose to seek legal services and equally, lawyer and barrister choice, about where they choose to work.

The LSC within its reform programme is actively promoting competition in the provisions of procuring services. The Legal Services Act enables this approach by increasing competition within the market place. This in turn should improve quality and create more choices for the consumer in seeking legal assistance while ensuring that price is set competitively by the market. That said, caution must be applied when considering changes to the existing principles governing legal services, to assure that core values of independence are maintained and consumers retain access to providers.

Clients should have reasonable choice in the selection of barristers. Their ability to choose and their choices should be explained fully to clients, and no less so where in-house representation is available. The potential for multi disciplinary organisations (be they LDPs or ABSs) to be driven to cherry pick cases cannot be overlooked as a significant risk to client choice that could result in unprofitable or unpalatable cases being left without representation.

Methods of monitoring and assuring that the best quality barrister is instructed should remain paramount to selection and not be compromised by cheaper, less capable barristers. The implementation of the Quality Assurance Scheme for Advocates (QAA) proposes to assess advocates at a particular level to match case complexity that will give greater confidence that appropriate allocation and quality is guaranteed. Beyond this, careful thought must be given to retention of key aspects of the cab-rank rule. While it may be difficult to apply the rule in its current form to LDPs and ABSs (as it is to employed advocates already) and therefore 'unfair' to apply only to the independent bar, its value in enabling service provision for all clients is fundamental to the ethos of the Bar and to protecting the client.

¹ Which? *House of commons 2nd Reading Briefing on the Legal Services Bill, May 2007*: Found that 75% of consumers think that the idea of obtaining legal services from 'one stop shops' is a good idea, with 6 in 10 saying they would considering getting advise through a supermarket or high street bank

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Finally, there is a balance to strike between enabling the widest possible range of service provision provided for within the act, and ensuring that such extension does not unwittingly reduce or remove consumer choice.

The business opportunity to jointly provide seamless legal services and in meeting the demands of procurers offering block or favourable contracts will face very many barristers. Revised governance must support advocates to take an equal share of these opportunities, without losing sight of the fact that the clients' best interests must always come first. Those interests may be served when barristers work together and with others, in new entities. However, sometimes they will not. For example, the risk of 'conflicting out' becomes a real threat to choice and even to service provision, where large groups, or highly specialist, individuals come together in single entities.

Also, taking a broader view, such entities may offer a highly economic solution to an individual procurer in the short term, but stifle future provision, either by dominating the marketplace so as to present barriers to new or emerging supply, or by acting to drive up costs in the future which may impact on the services that can be afforded for clients. This position must also be avoided if clients' best and long term interests are to be protected.

Question 1:

The approach to review the rules that clearly conflict with the introduction of the Legal Services Act whilst maintaining independence and quality are considered appropriate. From procurement perspective the LSC welcomes the approach of the BSB to seek to define high quality services, which will inevitably be of value for procurement options. The notion that public interest will be central to the Board's decisions is also supported.

Question 2, 3, 4 and 5:

It would be extremely difficult and almost impossible to apply the "cab-rank" rule to barristers employed in ABS/LDPs. Presumably, case acceptance and allocation would not be the role of the barrister but may be the role of alternative staff within that business entity. Also, applicability to barristers would be deemed unfair as the rule does not apply (in full) to barristers employed in solicitors offices. Inevitably, credible arguments would be forthcoming and the code challenged if this restriction on the inability to select cases other than on a first come first served basis would put them at a commercial disadvantage.

The cab-rank rule undoubtedly embodies much about what the independent bar believes, and reflects well their ethos of acting in the client's best interest. However, there is only limited evidence that it works well as a "rule", and in a climate where there are an increasing number of opt-outs (e.g. Graduated Fee Scheme) and individual's to whom it cannot apply for commercial reasons. Surely the time has come for an entire review so as to preserve the elements that are of value and that should continue to apply to all barristers in the future.

The revised "cab rank " rule should be re-written with a strong focus on core values, which could be applied to employed and self-employed barristers. In doing so replication of the rules on fair, competent and ethical benefits/strengths (rule 601 and 603) should be retained, whereas elements of work allocations (rule 602) should cease to apply.

Embodied within rule 603 is the requirement of barristers not to take on work with which they

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are not competent to do. Retention of this rule is considered paramount and a preferred approach could be to replicate the SRA's proposals for the higher rights accreditation scheme to incorporate their standards within the Code of Conduct to recognise and measure competence throughout an advocate's career against the QAA competency framework.

Question 6, 7, 8 and 9

The Code of Conduct focuses on those that provide services, while the new framework will place the interests of consumers at its centre. It is clear that the code will need to be amended significantly to accommodate this shift in position and to ensure that barristers practices are not unreasonably restricted and that the client's best interests remain key.

In relation to partnerships (also applicable to **questions 14-18**) identification of the purpose of such partnerships would need further clarification in order to consider whether they should be permitted. Assurance is required that such partnerships would be established a) in the client's best interests and b) only to put barristers on an equal commercial footing with their litigator/solicitor advocate counterparts.

There is a danger, if they are set up with the express purpose of providing greater leverage in bidding for commercial contracts (as expressed at a recent BSB seminar), they will not operate in the public interest. For example access issues are foreseeable if partnerships become particularly large or are formed by particular specialists (by application of a conflict of interest). They may also present a longer-term threat to services (particularly publicly funded services) if leverage forces cost above that which is economically sustainable from the public purse.

Questions: 10

This consultation makes the assumption that the BSB should remain the regulator of all barristers in professional terms, and leaves only regulation of business open for discussion in consultation. This is problematic because at present they are not the regulator – the Bar Council (BC) is, and the BC delegates its functions in this regard to the BSB. It is questionable whether it is in the consumer's best interest for a representative body to maintain approved regulatory status, in promoting objective quality assurance.

The LSA07 also suggests that individual barristers should have choices about who regulates them. In theory a barrister could choose to be regulated by SRA (or any other approved regulator or licensing authority). The LSC has no preference in relation to choice of regulator. Priority for the LSC is the requirement that regulation from the BSB, SRA or any new regulator that is permitted under the act has a focus and commitment to driving quality for the client without acting as a barrier to entry or limits the market. Clementi and the LSC believe that competition between regulators will drive best balance between quality assurance and open access.

In reality the BSB or any other regulator could regulate professional conduct in ABS firms of barristers in England and Wales. The SRA as regulators could equally hold this role. With a noticeable increase in solicitors exercising higher rights of audience within the higher courts² clearly regulation of either solicitors or barristers share consistent principles and standards.

² Gazette, "*Solicitor –advocates hit bar*", pg3, Catherine Baksi, 28 March 08.

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While it will be beneficial to advocates (both solicitor advocates and barristers) to have choice about who regulates them, there will also be value (most specifically in terms of public confidence that can be derived) in there being a high degree of commonality between different sets of regulatory requirements. All potential regulators will need to work collaboratively to ensure synergy in regulation.

Question 11- As above, the most obvious issue arising out of a divergence between different regulators is any perception that one set of regulatory requirements is less demanding than another. Such an issue will rapidly come into focus if these requirements are seen to equate to a reduced level of quality assurance or customer care.

Question: 12

In considering whether the Board should apply to be a licensed regulator of ABS firm's consideration of the advantages and disadvantages (paragraph 90 and 91) is required. Clearly, the disadvantages outweigh the advantages and this would lead to the conclusion that if the Board were to apply as a regulator this role would be limited to the provision of advocacy services and legal advice. It will be the role of the Legal Services Board (LSB), once set up and empowered to establish the requirements under which it will authorise regulatory bodies, such as the Board, to become a "licensing authority".

Question: 13

In relation to business regulation the best option would be for the LDP to have the freedom of choice. The Act itself provides that some LDPs may have a choice of regulator. Therefore, anyone considering establishing an LDP should be aware of the requirements of other legal regulators, so as to understand what choices may be available to them. If the Board were to acquire the power to regulate this should be limited to the type of work undertaken by the self-employed bar, for reasons stated in paragraph 91. If the Board fail to acquire the power to regulate regulation should be the sole responsibility of the SRA.

The ABS regime is likely to become available until at least 2011, or more likely, 2012. The introduction of LDPs will not depend on the existence and empowerment of the LSB; therefore changes to enable LDPs can be made as soon as regulators have completed any relevant consultations, regulation and rule changes.

Question: 14, 15, 16, 17 and 18

See response to question 8 – If the expressed aim in forming partnerships is solely concerned around leverage in contract bidding this could potentially enhance access to services by ensuring availability of specialist barristers set up to deliver specific services to specific groups. In some ways this could be a preferred option to the Chamber approach, where returns are not always guaranteed allocation to an appropriately qualified / experienced barrister. Alternatively, such partnerships could be set up to provide greater leverage in bidding for commercial contracts putting pressure on public procurers by reducing options for placing contracts.

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Partnerships of barristers should not be restricted to advisory and advocacy services. Though it is difficult to understand why barristers would want to branch out to work in areas other than advocacy and advice services and what the potential benefit would be to the consumer.

The Code of Conduct applies to individuals and not business entities, as the Act requires. The Board will be required to set up a regulatory regime to extend regulation to firms as well as individuals. Additional rules are required to set standards for organisations offering legal services. If the professional and business rules are to work in the best interests of the client, then a wholesale review would be required in which that focus is forefront of all consideration.

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Questions 19, 20, 21, 22

Agree with approach to question 19 and 20.

Ideally, more information is required on the actual benefits for clients and whether and how it might be possible to overcome the concerns about client confidentiality and conflicts of interest that have led to the retention of current rules that currently prohibit such associations.

Potential benefits for consumers would be more choice, a more unitary approach to the conduct of their case, reduced prices – as ABS firms could realise savings through economies of scale and reduce transaction costs where different types of legal professionals are part of the same firm. ABS firms may also mean better access to justice as they may find it easier to provide services in rural areas or to less mobile consumers. There may be an increase in customer service if ABS firms are able to access external specialist non-legal expertise. Plus greater convenience, some ABS's may provide one –stop- shopping for related services, plus the possibility of increased consumer confidence as increased levels of regulation and an increase in quality by the team having a stronger incentive to uphold the reputation of the entity.

Benefits to barristers could be the potential to increase salaries; ABSs could facilitate the expansion by entering into the international markets and investment into large-scale capital projects. Barristers will also benefit from increased flexibility, ³non-legal firms will have the freedom to realise synergy with legal firms and offering integrated legal and associated services. There will also be wider opportunities for advocates being salaried at the bottom end, which could assist with a more diverse profession. Clearly, the advantages of being employed could see barristers benefiting from greater salary security, contributory pensions and other non financial benefits, such as flexible working and parental leave, as well as potentially offering improvements for them around other core facilities such as recruitment and structured, assessment based, career progression.

Question 22
A and B

Agree that these are what the Board should be considering. All non-legal members and or ownership will need to be registered and comply with employment criteria to ensure they are 'fit for purpose'. Safeguards will need to be a duty placed on non-legal members to refrain from causing breaches of standards and to comply with any additional matter specified in licensing rules.

C, D, E and F

Agree with Board's approach. The costs of this additional regulation should be borne by those in the profession who directly benefit. It is for the BSB to decide what is fair and just in the circumstances.

³ Pg 40-41, *The Future of Legal Services: Putting Consumers First*, CM6679.

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Question 23, 24 and 25

Agree in principle with the Board's approach but would consider additional robust safeguards are in place to protect the consumer. Evidence of compliance monitoring on issues such as customer care and ensuring the duties around ethical and financial standards as well as appropriate process for addressing conflicts of interests are in place. If barristers are to provide services akin to those provided by another profession, then equivalent standards should apply – eg litigation in legal aid cases would require barristers to meet all of the LSC's requirements (contract and quality) that presently apply to solicitors.

Question 26, 27 and 28

Agree in principle with the Board's approach but additional safeguards are needed to ensure barristers operating in ABSs are covered by regulations on handling client's funds.

Question 28, if barristers are permitted to handle funds, a compensation fund will be required to compensate clients whom have sustained financial loss. If barristers were regulated by the SRA they could be monitored and pay into the existing compensation fund. The additional cost would be a disincentive for advocates wanting to undertake this activity.

In reality, the majority of solicitors do not handle client funds. This should and could be a separate function and could be managed by an existing role of "fund handler".

Question 29

See answer 26 above.

The cost should be borne by the regulator and collected via the regulated community.

Question 31

The BSB should work with the other regulator(s) to ensure that any barrister wanting to operate within an LDP can do so and can opt, if they wish, to have that entity regulated by the BSB, however, they cannot do that until they have a revised Code in place. Waiting until the regulatory regime for ABS firms is in place may well put barristers taking advantage of LDP opportunities at a disadvantage alongside their litigator counterparts.