

**BAR
STANDARDS
BOARD**

REGULATING BARRISTERS

Regulating Entities– Consultation Report

The Bar Standards Board’s response to Regulating entities: The Legal Services Act 2007: Implications for the Bar of England and Wales: Third consultation

May 2011

INTRODUCTION

This report summarises the responses received to the Bar Standards Board's (BSB) consultation paper 'Regulating Entities' published in September 2010. It also seeks to respond to some of the comments made by respondents and to demonstrate how the Board's policy position has evolved in light of the consultation.

The consultation closed on 23 December 2010 and responses have been given careful consideration by members of the BSB's Entity Regulation Working Group, by the Professional Practice Team and by members of the Board. The Board took a number of policy decisions following public debate on 28 April, and these are reflected in the report.

The BSB also held a number of 'roadshow' events during autumn 2010, hosted by the Bar's Circuits, which provided an opportunity for those attending to ask questions and give further feedback on the BSB's proposals.

The original consultation document is available at:

<http://www.barstandardsboard.org.uk/consultations/closedconsultations/>

The regulatory objectives

The Board is under a statutory duty to consider how best to protect and promote the public interest and to achieve the other regulatory objectives laid out in section 1(1) of the Legal Services Act 2007 (LSA). The regulatory objectives are:

- Protecting and promoting the public interest;
- Supporting the constitutional principle of the rule of law;
- Improving access to justice;
- Protecting and promoting the interests of consumers;
- Promoting competition in the provision of services;
- Encouraging an independent, strong, diverse and effective legal profession;
- Increasing public understanding of the citizen's legal rights and duties; and
- Promoting and maintaining adherence to the professional principles.

The Board has decided to proceed to establish a regime for regulating entities and for regulating conduct of litigation. The detailed work of designing that regime will be guided by policies which the Board has adopted after having regard to the consultation responses and which it considers are those which are most appropriate for meeting the regulatory objectives (see Annex 1). There will be a further consultation on the detail of the regime, once the necessary rules and code amendments have been drafted. The Board has also had regard to the principles of good regulation, including proportionality and targeting regulatory action only where action is needed. Annex 1 sets out the impact of its proposals on the regulatory objectives. As will be seen, the Board considers that its proposals are either positive or neutral for each of the regulatory objectives and that overall they are in the public interest. The arguments which have been advanced during the consultation are discussed below.

The order of the discussion is arranged thematically and generally follows the order of the consultation paper. The consultation questions are included in the text for ease of reference.

Next steps

The Board has now taken the decision to design and consult on a regulatory framework for entities.

The BSB will publish a further, more detailed consultation paper on what it proposes should be the features of a regulatory framework for entities. This paper will include draft rules as well as a detailed explanation of the costs and charges associated with regulating entities. The BSB hopes to be in a position to consult further in the autumn of this year.

Following further consultation, the Board will need to evaluate the feasibility of the proposed regulatory framework for entities. If it concludes that this framework should be established it will need to seek approval from the Legal Services Board and the Ministry of Justice. This process will take time and the BSB estimates that it would not be in a position to begin to regulate entities before 2013.

SUMMARY POLICY DECISIONS

The following is a summary of policy decisions taken by the Board in response to the consultation.

Purpose and objectives of the entity regulation regime

- **The BSB will operate as a specialist entity regulator, providing a regulatory regime suited to the efficient and cost-effective regulation of entities.**

Scope of permitted services

- **The scope of services that a BSB regulated entity can offer should be the same as the scope of service that the self-employed Bar can offer**
- **BSB regulated entities and the self-employed Bar may not hold client money**
- **The BSB will (if feasible) facilitate and regulate a central custodian service for the Bar and for BSB regulated entities (to be provided as a business service by a third party)**
- **The BSB will permit self-employed barristers and BSB regulated entities to conduct litigation (provided that they apply for, and meet the criteria for an extension to their practising certificates or authorisation)**

Approach to entity regulation

- **The BSB's regulatory regime for entities should build upon its regime for the self-employed Bar, differing only so far as essential and that as far as possible entities of different types should be subject to the same regime**
- **Conduct rules should apply according to function, rather than whether someone works on a self-employed basis or in an entity, what sort of entity or their status within an entity**
- **Entities which do not require to be licensed, BOEs and LDPs, will also have to make arrangements to have in place a HOLP and a HOFA (who might be the same person)**

Cab-rank Rule and non-discrimination

- **The Cab-rank Rule will apply to individual advocates (named persons) within a BSB regulated entity, in respect of instructions on a referral basis from a professional client, on a comparable basis to the way the rule applies to individual self employed barristers**

Extension of regulation to non-lawyers

- **The BSB will extend its regulatory reach to non-lawyers (whether employed by barristers or working as managers or employees of a BSB regulated entity) but to do so in a proportionate way**
- **The BSB will impose a minimum duty on employees not to breach the rules to which a BSB regulated entity is subject**
- **The Board will establish a power to disqualify employees and managers from working in BSB regulated entities or for self-employed barristers where there is good cause, and subject to appropriate safeguards**

Restrictions on structure

- **The BSB will regulate LDPs and ABSs as well as BOEs**
- **The BSB will not regulate MDPs**
- **There must be at least one barrister manager in a BSB regulated entity, who is also an owner**
- **The BSB will not regulate entities that have owners that are not also managers**
- **The BSB will impose a 25% limit on non-lawyer management of a BSB regulated entity**
- **The majority of the managers of a BSB regulated entity must be qualified to exercise rights of audience in the higher courts (whether as a barrister or as a HCA)**
- **There will be no limit on the number or proportion of non-advocate employees**

Mechanics of authorisation

- **The BSB's policy is that authorisation, once granted to an entity, will continue unless or until revoked, suspended or subjected to conditions**
- **Entities will have to supply information annually (and in answer to BSB requests) and will be subject to monitoring**

Criteria for authorisation of entities

- **The BSB's policy is to provide as far as possible, clear, 'bright line' rules for the types of entity it will regulate, but also to preserve some discretion to allow some flexibility (in order to safeguard the purpose and objectives, above)**

Protection for clients

- **The BSB will establish an interventions regime for entities which will enable client's interests to be safeguarded by an orderly handover of work and emergency representation if an entity ceases business**
- **The BSB's policy is that a compensation fund is in general not necessary (given the prohibition on holding client money) but it will consult further on whether a fund or additional insurance might be necessary for a custodian service**
- **BSB regulated entities will be required to have insurance offering the same level of protection as to that which is required if participating in a SRA regulated entity (subject to differences as a result of the prohibition on client money)**

Disciplinary arrangements and appeal processes

- **So far as possible, disciplinary arrangements and appeal processes for entities and those within them should be compatible with arrangements for self-employed barristers**

Costs

- **The BSB's policy is that set up costs should be borne by the Bar as a whole (because the impact on the practising certificate fee is likely to be minimal, and any barrister now in practice may at some stage take advantage of the changes); running costs will be covered by entities which choose to be regulated by the BSB**

THE BSB AS A REGULATOR OF ENTITIES

Q1. Do you agree that it is in the public interest for the BSB to become a specialist regulator of advocacy focussed entities?

Q44. In light of the regulatory implications do you think that the BSB should begin to regulate entities?

Q46. Are there any other regulatory implications which the BSB needs to consider in making this decision?

Support for BSB regulated entities

There was relatively strong overall support for the BSB to begin to regulate entities.

The majority of respondents (approximately 75%) said they thought it is in the public interest for the BSB to become a specialist regulator of advocacy focussed entities.

The majority (approximately 66%) stated that, in light of the regulatory implications, the BSB should begin to regulate entities.

This level of support is consistent with the results of the YouGov Survey in June 2010, where approximately two thirds of barrister respondents stated that it would be in the public interest for the BSB to be the regulator of new business structures.

External pressures

Some respondents highlighted the external pressures facing the Bar which make setting up entities desirable. In particular, respondents mentioned the effects of one case one fee arrangements and competitive tendering in the criminal justice system. (It is well-reported elsewhere that the pressures on the publicly-funded Bar are especially acute, and are forcing barristers to consider new ways of working.)

Many suggested that contracts that entities might win are likely to involve the conduct of litigation and many respondents argued that the Bar must be in a position to compete for these contracts (the conduct of litigation is discussed later).

The Board is sensitive to concerns about external pressures and it believes that it must design a regulatory regime that is responsive to the needs of the public and of the Bar. There is limited evidence available about how the legal services markets will change in the future, but it is important to acknowledge that the situation is dynamic and fast-changing. 'Doing nothing' is not necessarily the lowest risk option because changes to the markets, and to regulation of legal services, will continue to happen as economic pressures make themselves felt and as other regulators continue to implement changes facilitated by the Legal Services Act 2007. The BSB believes that it would be in the interests of the Bar and of the public generally for it to take an active part in responding to these changes.

Impact on the nature of the Bar

A number of respondents were concerned about the impact of entities on the future of the Bar as a whole. If barristers form entities, this might diminish the numbers of the self-employed Bar and reduce choice for consumers.

The Chancery Bar Association (ChBA) argued that the culture of the self-employed Bar has nothing to do with law firm culture; its culture is defined by quality of service, the price of services and the range of choice; BSB regulated entities would develop a law firm culture which is different to that of the self-employed Bar. This might lead to a gradual erosion of the defining characteristics of the Bar, which would be to the detriment of consumers of legal services and against the public interest in general.

However, the question the Board needs to consider at this stage is not whether barristers should be allowed to form entities, because they already have the opportunity to form and participate in entities regulated by other regulators. If practice within entities proves to be attractive to the Bar, then to the extent that this poses risks, those risks will exist even if the BSB does not itself regulate entities. The question that must now be addressed is whether or not the BSB should provide a regulatory home for entities and whether doing so would be in the public interest.

As discussed below, the Board believes that its regulatory framework would in fact be supportive of the culture of the Bar and it would serve to retain the emphasis on quality of service, the price of services and the range of choice, which it agrees are among the most attractive features of the Bar.

Entities would be subject to similar measures to protect the standards and quality of the services they provide, as self-employed barristers. Barristers working in entities would be subject to the same training and qualification requirements as well as conduct and practising rules as self-employed barristers providing the same services. Entities and all those within them (including non-barristers) would be subject to the same disciplinary processes. The BSB, as entity regulator, would be the primary regulator (whereas if an entity is regulated by another approved regulator, the BSB's role becomes merely residual). This promotes consistency and avoids the greater degree of fragmentation of regulation of the Bar that would follow if those wishing to practise within entities or to extend their services to litigation had no option but to switch their primary regulator to another regulator able to provide that regulation. By limiting the risks and hence the cost of its regulatory regime, and the compliance requirements, the BSB would support the ability of entities to maintain the relatively low overheads which characterise the Bar's services.

The ChBA also suggested that the self-employed Bar benefits the public because it provides a wide range of choice among a class of dedicated specialist advocates and advisors. The Board does not propose to limit the services provided by entities beyond those restrictions already imposed on the self-employed Bar and it is of the view that by facilitating more opportunities for direct access to consumers of legal services it will help to promote choice

and access to justice.

Some respondents expressed related concerns, about the potential fusion of the legal professions, suggesting that the proposals will change the fundamental nature of the Bar in terms of how barristers will work and that they will become indistinguishable from solicitors. They suggested that one reason to anticipate fusion is the impact of the proposal to remove the prohibition on conducting litigation (discussed later); another reason is because barristers might increasingly participate in entities and form partnerships.

However, the risk of fusion is already present, given that barristers can already participate in entities and there is already considerable overlap in the services that solicitors and barristers can provide. In particular, solicitors can combine advocacy and litigation services. By creating an alternative regulatory framework, that is tailored to the needs of the Bar, the BSB could help to reduce the likelihood of fusion, in that the BSB will have created a framework within which the Bar can provide its own distinctive offering, including alternatives to the types of one-stop service available from SRA regulated entities, without needing to switch regulator to access these options.

Lastly, it is important to remember that the proposed changes are intended to be facilitative only, and those barristers who wish to remain self-employed or working on a referral basis will be able to do so.

Meeting the regulatory objectives

The Board considers that providing BSB regulation for entities that meet its proposed criteria will promote the regulatory objectives. An analysis of how the proposals advance the regulatory objectives is attached at Annex 1. In particular, as discussed in the BSB's accompanying policy statement, available on its website, the proposals offer the advantages of: 1) specialist regulation; 2) choice; 3) cost-effectiveness. These features are now discussed in turn, in response to comments made by respondents.

1) Specialist regulation

A number of respondents stated that it is in the public interest that there is one regulator of advocacy focussed entities. Some suggested there should be a single regulator for all entities which provide advocacy services, whether as the whole or part of the services offered. It was felt that a distinct regulatory structure, focussed on advocacy and ancillary services would promote the regulatory objectives.

The Legal Services Act envisages that there will be more than one Approved Regulator for those with rights of audience and for entities which provide advocacy services. The BSB is not in a position to seek to become the sole regulator of such activities.

Some argued that if barristers continue to be separate from solicitors, it follows that they should have their own regulator – this helps to hold the profession together. It was also argued that it is potentially confusing to the public for another regulator, such as the SRA, to

regulate barristers.

The consultation paper proposed that the BSB should become a specialist regulator of 'advocacy focussed' entities, including ancillary litigation services. Advocacy and litigation have in common the characteristics that they are legal services which engage a wider public interest than that of the immediate consumer of the services and that those providing the services are subject to an overriding duty to the Court. They are very closely related services, raising similar regulatory concerns. For reasons explained in more detail below, the Board does not accept that the ability to combine the two, and to do so within an entity, will undermine the specialism of the Bar, or its own specialism as a regulator.

However, several respondents raised concerns that it will be difficult for the BSB to determine whether or not an entity is advocacy focussed or to police a rule requiring any litigation to be ancillary. Others also raised the concern that entities should not be more restricted in their services than is the case for the self-employed Bar.

The Board acknowledges these concerns. The Board will seek to ensure that the entities it regulates are predominantly advocacy focussed, by maintaining the prohibition on holding client money and by placing restrictions on the ownership and management of entities, rather than by restricting permitted services beyond what the self-employed Bar is allowed to do. (Permitted services are discussed in more detail below.) These criteria will make the BSB a natural choice of regulator for businesses that are primarily advocacy focussed but wish also to offer ancillary services of a type which the self employed bar is also able to offer. A business which is primarily litigation focussed and which is not to a significant degree also providing advocacy services is unlikely to fit the proposed structural criteria or to opt for BSB regulation. Whilst there may be some cases where barristers wish to form an entity to offer non-contentious legal services, these are likely to be exceptional and therefore this possibility does not justify a restrictive approach. The Board will also exercise a discretion to exclude businesses that are considered unsuitable for its regulatory regime (as described in annex 1).

2) Choice of regulation

The proposals in the consultation paper are premised on the proposition that there was little if any advantage in the BSB establishing a regulatory regime which simply replicated that of the SRA or other regulators. On the other hand, by adopting a different approach, the BSB could offer a choice of regulation, which might be attractive to certain types of business, and which would increase the public's choice in access to justice. By regulating certain kinds of entities, the BSB would broaden the range of choice available to barristers who want to work in entities, allowing them to achieve this while remaining with the same regulator. In this way it is hoped that barristers, and other professionals, might be encouraged to devise new business models that do not simply replicate those regulated by other regulators, and provide greater choice.

In order to achieve this aim, the BSB will have to take careful decisions as to the necessary permissions and restrictions it places on entities. Respondents pointed out that too many

restrictions on practice will reduce the demand for BSB regulation compared to other regulators.

Some respondents challenged the above assumption and claimed that BSB regulated entities would be identical to those specialising in advocacy that are regulated by other regulators and consumers would therefore gain no extra choice.

The BSB does not accept this argument. By regulating only certain types of relatively low risk entity, it can design a regulatory system which is more appropriate and proportionate for those kinds of entity at a lower cost and with less risk of regulatory failure. Consumers can, if they wish, opt to deal with an entity that does not hold client money or allow external ownership, avoiding the associated risks and regulatory costs. Barristers should have scope, within the proposed constraints, to design competitive alternatives to the types of one-stop services available elsewhere, without having to change their primary regulator to access those choices. For those barristers who wish to develop their business in ways the BSB's proposals do not accommodate, the option will still be there to apply to another approved regulator or licensing authority to authorise the entity, but fewer will have to pursue that route than would otherwise be the case.

3) Cost-effectiveness

The Board acknowledges that although barristers have expressed strong preference for BSB regulation as being in the public interest, in practice, the choice of regulator might not be based on the quality of regulation, but rather on cost. The Board believes that cost-effectiveness must be central to any regulatory framework that it establishes. It intends, by restricting the types of entity it regulates, to offer a proportionate and cost effective alternative to other regulators, but without any diminution in the quality of its regulation.

The suggestion that BSB regulation of entities might be more cost-effective than that of other regulators was challenged on the grounds that the BSB will have to emulate the same aspects of their regulatory structures and this will lead to similar costs. For example, it was suggested that in practice it will not be possible to avoid rules for client money and a compensation scheme (see further discussion below).

The Board disagrees with that suggestion, taking the view that conduct of litigation is possible without handling client money, and it therefore does not propose to permit, or provide a regulatory regime for, client money handling. This should be a major saving, in terms of regulatory complexity, cost of regulation, cost of compliance and insurance costs. The Board also intends to focus on regulating relatively low risk entities, which should likewise simplify the regime and keep down costs. More generally, the Board proposes to build on its existing regulatory regime, and on the new code of conduct on which it has recently consulted, making only such changes as necessarily flow from practising in entities and/or extending services to litigation. How this will be achieved will be addressed in greater detail in the further consultation, which will also provide an opportunity to comment on draft rules.

Concerns were also raised about 'regulatory arbitrage', where an entity's owners will be attracted to the lowest cost regulatory option, which could lead to a 'race to the bottom'. It is part of the role of the Legal Services Board to ensure that this does not happen. The rules of all Approved Regulators and Licensing authorities are subject to approval by the Board which has the power to reject amendments which do not meet the regulatory objectives. The Board sees its proposed role as an entity regulator as an opportunity to ensure that standards are maintained and regulatory arbitrage avoided. (Costs are addressed further, later in this report.)

Other regulatory implications

Some respondents questioned the BSB's competence to extend its field of regulation and suggested that the BSB must provide further details of how it intends to gain the necessary levels of expertise to become a specialist entity regulator and/or regulate litigation. Another respondent commented that not enough research has been conducted. It was also suggested that the BSB should follow more of an outcomes-focussed approach.

One of the BSB's reasons for regulating only a limited range of entities is that it would involve only a limited extension of its existing role as a regulator of individual barristers and their Chambers, ensuring that it remains within its regulatory competence. Likewise, the BSB considers that regulating litigation will require only incremental developments to its existing regime. It will be considering further the regulatory structure and staff training that will be necessary. The regulatory regime it will adopt will be based on the new Code on which a consultation has just closed, which moves in the direction of principles supported by rules and guidance, and away from more detailed rules.

BACFI and PABA commented that they would like to see new forms of practice creating more opportunities for the growing number of barristers without practising certificates, who have been unable to obtain pupillages. The BSB would expect some of the entities which it proposes to regulate to wish to employ barristers not entitled to practise as individuals but able to work as non-authorized employees in such firms. Such experience could be a valuable staging post in career progression for individuals who might otherwise struggle to enter the profession at all. Equally, BSB regulated entities may be better able to fund investment in pupillage places and in training and developing junior barristers than is the currently case in those sectors of the self-employed bar that are finding themselves under greatest economic pressure.

The Bar Council emphasised the need to consider practical implications at the next stage, and offered its support in determining the potential costs and take-up of entities.

Some respondents questioned whether the demand for entities amongst the Bar is likely to be sufficient to justify BSB entity regulation. The BSB is aware that the pressures faced by the publicly funded Bar have led to many barristers to seek new ways of working. The results of the YouGov survey commissioned by the BSB also suggest interest amongst members of the Bar for participation in entities, with 35% of barristers interested in joining an entity. (The full survey report is available at

<http://www.barstandardsboard.org.uk/assets/documents/BSB%20business%20structures%20survey%2012-07-10.pdf>). The proposed restrictions on the structure of entities the BSB will regulate, together with a risk-based approach in exercising its discretion (as described in Annex 1), are believed to offer sufficient flexibility to accommodate the types of entity the Bar are most likely to wish to form.

BSB response

The Board believes that the level of support for the BSB to regulate entities is sufficient to justify it now proceeding **to develop, and consult on an entity regulation framework**. The rest of this paper discusses the key features of that framework.

PERMITTED SERVICES

Chapter 1 of the consultation paper discussed the services which BSB regulated entities could be permitted to provide and specifically whether the current restrictions on barristers conducting litigation should be relaxed. It proposed that barrister managers and employees of BSB regulated entities should be permitted to conduct litigation, to the extent that litigation is ancillary to advocacy, and that the restrictions should also be removed for self-employed barristers.

Litigation

Q2. Do you agree it is in the public interest for the BSB to permit entities that it may regulate in the future to provide litigation services which are ancillary to the provision of advocacy and advice services?

Q3. If so, do you agree that barristers who are managers or employees of BSB regulated entities should be permitted to conduct litigation, rather than being required to have in-house solicitors to do this work?

The conduct of litigation

The Access to Justice Act 1999, as amended by section 28 of the Courts and Legal Services Act 1990, grants the Bar Council authorised body status and allows it to confer the right to conduct litigation. Under the Code of Conduct, employed barristers are permitted to conduct litigation, provided they have complied with supervision and training requirements. As matters stand, however, self-employed barristers are prevented from conducting litigation by rule 401 of the Code of Conduct.

‘Conducting litigation’ has a statutory definition in Schedule 2 LSA:

- 4 (1) The ‘conduct of litigation’ means –*
- (a) the issuing of proceedings before any court in England and Wales,*
 - (b) the commencement, prosecution and defence of such proceedings, and*
 - (c) the performance of any ancillary functions in relation to such proceedings (such as entering appearances to actions)*

The last subheading ‘ancillary functions’ has been defined further in *Agassi v Robinson* [2005] EWCA Civ 1507. The definition of ancillary functions is construed narrowly and is limited to the formal steps required in the conduct of litigation. However, the court's decision falls short of providing a comprehensive definition of what these functions encompass.

The BSB's rule changes, which came into effect on 1st April 2010, relaxed restrictions on self-employed barristers conducting correspondence, collecting evidence and conducting interviews at police stations. Whilst rule 401 still prevents self-employed barristers from

'conducting litigation', in effect there are very few litigation tasks which they are unable to do. One respondent to the consultation said: '... the distinction between the services barristers currently offer and those which the law would classify as conducting litigation is outdated and artificial'.

The remaining restrictions for self-employed barristers identified in the consultation paper are:

- Issuing any claim or process or application notice
- Signing off on a list of disclosure
- Instructing expert witnesses on behalf of a lay client
- Accepting liability for the payment of expert witnesses, and
- Any other 'formal steps' in the litigation of a sort that are currently required to be taken either by the client personally or by the solicitor on the record

Responses were divided on how well suited members of the Bar are to conducting litigation. For example, one respondent suggested that the conduct of litigation consists of simple tasks which it would be easy for the Bar to do; others cautioned that the skills involved in conducting litigation should not be underestimated.

The Board's view is that barristers are already closely involved in and directly contribute to many of the formal steps, and ancillary functions, involved in litigation, and that there is no sufficient justification to maintain a prohibition on their undertaking the steps that amount, formally, to conduct of litigation, provided that those members of the Bar who wish to conduct litigation receive appropriate training, have appropriate systems in place and are appropriately insured.

Competition and access to justice

The BSB suggested in the consultation paper that permitting barristers to conduct litigation will allow them to provide a 'one stop shop' for clients, making their services more competitive, and providing greater access to justice.

Respondents argued that BSB regulated entities would be at a competitive disadvantage if they could not offer similar services to those offered by their competitors. They also urged the BSB to consider the services it permits in the wider context of cuts to publicly-funded work and the Bar's desire to become more competitive in the face of these cuts.

The Law Society responded that there are over 10,000 solicitors' firms able to offer litigation services, so the BSB regulation of entities would add nothing in terms of access to justice or competition.

However, the BSB believes that the Bar is already very competitive in the legal services market and that BSB-regulated entities could provide an attractive alternative to solicitors' firms, if they take advantage of lower regulatory and insurance costs to create relatively low overhead entities offering a good combination of price and value. This is likely to be

particularly relevant at either end of the scale of legal services: direct access, expanded to permit conduct of litigation, offering a low cost one-stop shop for cases that do not require the resources of a typical law firm; and, on the other hand, block tendering for bulk purchasers of legal services, or other forms of one-stop services for sophisticated clients, such as large in-house legal departments. There is scope for the Bar to cater for this demand for one stop advocacy and litigation services, alongside maintaining a referral model for the many cases that will continue to be best served by that mode of service.

The BSB recognises that permitting litigation might result in a reduction in referrals to independent advocates, possibly reducing access to justice if the advocate used was not the best person for the job. This appears to be a similar risk to that posed by solicitor-advocates operating within firms, where referrals are made in-house, rather than to the independent Bar. The risk can be managed in a proportionate way by requiring the interests of the client to be decisive when considering which advocate to use, rather than by maintaining a prohibition.

Some respondents made comparisons with the position of those lawyers who are already permitted to conduct litigation. It was, for example, argued that, given that the employed Bar can already conduct litigation, there is no public interest reason why self-employed barristers should not be able to do the same.

Some respondents argued that the Public Access Scheme has demonstrated that the absence of a solicitor does not cause any diminution of the quality of services provided, but can offer reduced cost and greater access to justice. Other respondents argued that comparisons with Public Access are misconceived. The Board believes that direct access work currently undertaken by self-employed barristers does provide some evidence of how direct access might work for BSB regulated entities offering combined advocacy and litigation services. Direct access offers a model for a low cost alternative for those cases that do not require the resources of a traditional law firm. As noted below, the Board proposes that self-employed barristers offering direct access should now be permitted to extend their services to include those steps that are classified as conduct of litigation.

The Board agrees with the observation that not all cases will be suitable for a one stop shop service provided by an entity consisting only of barristers. In some areas of law, the client often requires significantly more support than a barrister could offer whilst continuing to be primarily a provider of advocacy services. Barristers will continue to have a duty to consider the best interests of their clients, and this includes instructing a solicitor where this would better meet their client's needs. Barristers will also, under the BSB's proposals, have the alternative of establishing a BSB regulated entity offering combined services from solicitors working alongside barristers. As discussed below, it will be for them to rise to the commercial challenge of achieving this in a way that does not undermine their expertise or merely replicate what is already available to consumers elsewhere.

The first entities to be set up would have to be monitored to identify any problems and to provide an evidence base for any subsequent regulatory changes.

Fusion of the legal professions

Some respondents argued that if barristers are permitted to conduct litigation, this will lead to the fusion of the legal professions because barristers and solicitors will then be able to provide exactly the same services and they will be indistinguishable from each other.

However, solicitors are able to obtain higher court advocacy rights and can exercise these as well as conducting litigation. This does not mean that all solicitors choose to do so – Higher Court Advocates remain in the minority of solicitors. In the same way, if barristers had the choice to be authorised to conduct litigation, this does not mean that all barristers would make litigation a significant part of their practice. The other restrictions which the BSB proposes to retain, notably the structural restrictions and the prohibition on holding client money, together with the fact that the BSB will only authorise conduct of litigation by those entities or individuals it already authorises for advocacy, will mean that litigation services will be likely to be an adjunct to the advocacy services supplied. The services provided by barristers and BSB regulated entities will remain, in essence, those of specialist consultants (albeit capable of being directly accessed by lay clients in cases where that is appropriate) and will not extend to conducting the lay client's affairs (which will remain prohibited) or providing commoditised services unrelated to advocacy and litigation such as mass conveyancing or will-writing services. The role of solicitors and barristers will therefore remain in many respects distinct even though there will be some increase in the range of work they can both do and in the area of overlap. The Bar can and does already provide other legal services which overlap those provided by solicitors (for example, non-contentious advice and work falling within the definition of probate services and reserved instrument activities) whilst remaining recognisably a profession which is predominantly advocacy focussed.

Furthermore, employed barristers can already conduct litigation, and they manage to preserve their distinct professional identity and independence, in terms of their training as well as the focus of their work and the services they provide, whether these are provided to their employers or to the public.

Possible reduction in expertise and risks to quality

The prohibition on conducting litigation arguably allows barristers to focus on specialist advocacy and advice work. If barristers are permitted to conduct litigation, their skills and experience could be reduced by undertaking litigation tasks which are more administrative in nature. This is one of the main public interest arguments made in the consultation responses.

Related to this concern, some of the consultation responses identified lack of resources as a possible reason why barristers should not be permitted to conduct litigation – they would end up undertaking litigation tasks themselves, distracting them from their specialism and creating risks that litigation tasks would not be completed on time or to an adequate standard.

Whilst the Board acknowledges that small entities (or self-employed individuals) will sometimes have limited resources, the Board believes that the Bar should have the opportunity to find commercial solutions to the provision of integrated litigation services, at the same time as keeping overheads low and remaining competitive – one of the traditional strengths of the self-employed Bar.

Nor does the Board believe that permitting litigation will necessarily lead to a reduction in expertise in advocacy and advice. Higher Court Advocates, and advocates in other jurisdictions, are able to maintain advocacy skills in business settings where litigation is also conducted. Furthermore, barristers naturally have an investment in their expertise and status as advocates and have strong incentives to ensure that the development of their advocacy expertise is not undermined. They will be able to employ staff to undertake routine litigation tasks under their supervision or, in entities, to delegate them to solicitors. The quality of services should be protected by meeting a high standard of training and experience. The new joint Quality Assurance for Advocates (QAA) Scheme is an example of how quality can be assured. Any risks to consumers will be mitigated by appropriate training, systems, and insurance cover.

The consultation proposed that, as a minimum, there would be training requirements for those conducting litigation in entities similar to the existing requirements for employed barristers. The majority of respondents agreed with the training proposals. The BSB will be developing proposals on training and supervision in the next stage of work.

It has also been argued that there is a risk that newly-qualified members of the Bar might be given procedural and administrative litigation tasks, lessening their opportunities to undertake substantive advocacy work and gain in experience. This could be detrimental to how new generations of barristers are trained and allowed to develop. On the other hand, permissions to conduct litigation might create greater opportunities for pupils and newly-qualified barristers and could provide valuable experience and a wider perspective on both advocacy and litigation. Advocates in other jurisdictions often begin their careers conducting litigation before focussing on advocacy as a specialism.

Client money

Some respondents said that barristers should not be permitted to conduct litigation because they are unable to hold client money. However, whether or not client money holding is permitted cannot be a reason in itself to either allow or prohibit the conduct of litigation. It might affect the efficiency and competitiveness of the services provided, but it would still be possible for at least some litigation to be conducted with alternative payment arrangements in place. The Board considers it both feasible and desirable to permit conduct of litigation without also permitting the holding of client money. The reasons for maintaining the prohibition on client money are addressed in Chapter 2.

Permissive approach

Any permission to conduct litigation would be simply that – a permission rather than a

requirement – barristers could continue to focus on providing quality specialist advocacy services if they find that this best meets market demands. Barristers and entities would not have to provide litigation services if they did not wish to. However, barristers would be able to apply to be authorised to conduct litigation where they felt this might augment their practice or allow them to provide more competitive and integrated services. It would also potentially allow greater flexibility and more diverse practices.

Barrister managers and employees

Some respondents suggested that BSB regulated entities would be able to employ solicitors who could conduct litigation and that there would therefore be no public interest in allowing barrister managers and employees to conduct litigation.

The Bar Council pointed to the attractively low overheads of the Bar and suggested that entities should not have to develop a business structure which increases overheads, passing costs onto the consumer. If BSB regulated entities are permitted to conduct litigation but barristers are not, entities would have no choice but to recruit solicitors to do so.

Barrister only entities who chose to employ solicitors to conduct litigation would be in the position that the entity's managers, who would necessarily be barristers, would not share the permissions that their employees had.

There appears to be no other regulatory reason to prevent barrister managers and employees from conducting litigation, provided that they are appropriately trained and qualified and doing so offers a greater range of choice in terms of business structures.

BSB Response

In taking any decision about whether it should regulate entities that could provide litigation services, the Board has to consider carefully what best promotes the regulatory objectives. As anticipated in the consultation paper, it has taken into account factors including: the possible advantages of entities being able to provide a more competitive 'one-stop shop' service direct to lay clients; the public interest in strengthening the BSB's position as a specialist regulator; the potential impact on the Bar's independence and specialisation; and the additional regulatory risks and how these risks could be mitigated through education and training.

The Board has also had regard to the consultation responses, the majority of which were in favour of permitting the conduct of litigation. The majority of barristers and chambers (approximately 75%) agreed that it is in the public interest for BSB regulated entities to provide litigation services.

The consultation paper proposed that permission to conduct litigation would be granted, to the extent that litigation was ancillary to advocacy. However, the Board also agrees with the comment from respondents that it would be difficult to define and police a rule restricting the services to ancillary litigation services. This would also risk excluding too many of the

services which the self-employed Bar can provide. As described elsewhere in this report, the restrictions on management/ownership and a prohibition on client money handling will have the effect of making it unlikely that a BSB regulated entity would undertake litigation except as an adjunct to its advocacy and advisory services.

In light of the above considerations, the Board considers that **BSB regulated entities should be permitted to conduct litigation. Barrister managers and employees within entities will also be permitted to conduct litigation. Authorisation to conduct litigation will be granted separately from rights of audience and only to those who seek authorisation and meet whatever training and supervision arrangements are imposed. A higher practising certificate fee may apply.**

However, as proposed in the consultation paper, restrictions on managing clients' affairs will remain, both for the self-employed Bar and for entities, helping to preserve the distinction between the roles of barrister and solicitor.

Self-employed barristers

Q4. If BSB regulated entities are allowed to conduct litigation, do you agree that it is in the public interest for self-employed barristers to be permitted to conduct litigation?

The majority of respondents agreed that if entities are permitted to conduct litigation, self-employed barristers should also be permitted to do so. The following points were raised.

Consistency

Some respondents argued for a consistent regulatory approach across the Bar, in that there would be no grounds for allowing some but not all barristers to conduct litigation. The present position is inconsistent in that employed barristers are already permitted to conduct litigation but self-employed barristers are not. The Employed Bar appears to conduct litigation without difficulties.

Direct access

A number of respondents were critical of the lack of logic in the fact that barristers acting on a direct access basis can, for example, draft the claim form for their clients are unable to take the next step of getting it issued. The Board considers that there is considerable force in that criticism. That said, it will be a matter for individual barristers to decide whether or not they wish to extend their direct access offering to include conduct of litigation. Doing so will not be mandatory.

Anti-competitive

The consultation document suggested that it would be disproportionate and anti-competitive to prohibit self-employed barristers from conducting litigation if entities

regulated by the BSB were allowed to do so. Some respondents agreed that maintaining the restrictions might be anti-competitive, however others said there was a lack of evidence for this assertion.

It was suggested that conducting litigation will increase overheads, but that the packaged costs of combining litigation and advocacy should be no more than if the client had to pay solicitors for litigation services. On the other hand, if barristers do not conduct litigation, they will have to turn down work.

One respondent suggested that the proposal might lead solicitors not to refer clients to entities or self-employed barristers to ensure they do not lose litigation business.

Competence and resources

Some respondents raised concerns about barristers' poor administrative skills in relation to conducting litigation. Poor administration poses an obvious risk to consumers of legal services. However, others felt that administrative competence and diary management skills should be well within barristers' capabilities. It was noted that much of the work underlying litigation in the field of criminal law is already undertaken by counsel without any significant increase in the risk to the management of cases. Providing an integrated litigation service inhouse reduces the risk of outsourced services failing and reducing the continuity of litigation.

Related to these issues, some respondents were concerned that self-employed barristers will not have the resources to conduct litigation. However, barristers would have to exercise their professional judgement as to whether or not they have adequate resources to provide litigation services to clients. The rules would be permissive only and a barrister need not conduct litigation if he or she lacks the resources to do so.

The Board believes that the competence of barristers, or otherwise, to conduct litigation should depend on meeting appropriate training requirements, as discussed above in relation to entities. They would need to have appropriate systems in place and this could be monitored as part of the evolving arrangements for monitoring Chambers.

Impact on the Bar

Concerns were raised about potential threats to the independence of the Bar. A risk was identified that barristers will become more generalist and that skills will be diluted. Junior barristers might be pressurised into performing roles equivalent to those of solicitors. These are essentially the same concerns as were raised in relation to permitting litigation within BSB regulated entities (see above). The Board is not persuaded that these concerns justify a continued prohibition, for reasons already discussed above.

The Access to the Bar Committee proposed a rule providing that self-employed barristers providing services direct to the lay client must practise principally in the provision of advocacy, draftsmanship or the provision of specialist advice. This would reflect what the

consultation document proposed in relation to restricting the activities of an entity to advocacy and ancillary litigation services.

On further consideration, however, the Board considers it impractical to seek to impose a rule on BSB regulated entities that any litigation services should be ancillary (see above). By the same token, the Board does not believe that it would be feasible or desirable to impose such a restriction on the self-employed Bar. As it is, the self-employed Bar provides a broader range of services than advocacy alone and indeed some members of the self-employed Bar may seldom find themselves in court. On the other hand, solicitors and SRA regulated firms have for some time been able to provide advocacy services. The self-employed Bar has hitherto managed to maintain its expertise, its identity and its appeal to users of its services, despite this overlap, and must in future continue to do so if it is to survive. The Board is therefore not persuaded that it should adopt the restriction suggested by the Access to the Bar Committee.

The Board agrees with some of the suggestions made in respect of training and quality assurance. Soft skills around client care are very important in litigation and should be integrated into training and supervision. There must also be robust quality assurance measures in place.

BSB Response

The Board proposes **to permit self-employed barristers to conduct litigation**. In reaching this decision, the Board has had regard to the benefits to the public from being able to obtain a wider range of services from public access barristers and the lack of an identifiable public interest reason not to permit self-employed barristers to conduct litigation. It is also important that the changes would be permissive and not mandatory. This approach also reflects the views of the majority of respondents. Authorisation to conduct litigation would be granted separately from rights of audience and only to those who seek (and pay for) that additional authorisation and who meet whatever training and/or supervision arrangements are imposed. The additional fee payable for authorisation to conduct litigation would be designed to cover the associated regulatory costs.

Reserved instrument activities and probate

Q7. Do you agree that the BSB should not regulate entities which provide reserved instrument activities or probate services that are unconnected with advocacy or litigation?

Q8. Are there any specific reserved instrument activities or probate activities, unconnected with advocacy or litigation, that self-employed barristers currently conduct that they should continue to be permitted to conduct if they were to join an entity?

Q9. Would prohibiting BSB regulated entities from providing reserved instrument activities or probate services have any impact for people from different ethnic groups, men and women or disabled people?

The following activities (set out in section 12(1) of the LSA are 'reserved activities' and can only be carried out by authorised persons (qualified lawyers):

- the exercise of a right of audience
- the conduct of litigation
- reserved instrument activities
- probate activities
- notarial activities
- the administration of oaths

As well as rights of audience and the conduct of litigation, the consultation paper discussed other reserved legal activities. It asked whether the BSB should regulate entities which provide conveyancing or probate services that are ancillary to the primary provision of advocacy services.

Respondents were divided on the proposal in the consultation paper that the BSB should not regulate entities which provide reserved instrument activities or probate services that are unconnected with advocacy or litigation. Approximately 58% of barristers and chambers agreed that the BSB should not regulate entities providing these services. However, some respondents identified types of reserved instrument, drafting activities currently undertaken by self-employed barristers, which can be unconnected with advocacy or litigation:

- Drafting trusts, wills, conveyances
- Drafting settlements and *inter vivos* documents

Respondents did not generally identify any equality impact if the BSB were to prohibit these services, though the Law Society noted that a substantive number of solicitor's firms already provide these services, limiting concerns about access to justice.

BSB response

The Board notes, however, that the self-employed Bar (in particular, the Chancery Bar) already provides a range of services that include services falling within the scope of probate or reserved instrument activities. Typically, however, the Bar provides such services as a specialised consultancy service supplied on a bespoke basis to sophisticated purchasers, rather than a commoditised, bulk service direct to the man in the street. In the event (perhaps unlikely) that any barristers wished to establish an entity to offer these types of service, which barristers already can and do offer on a self-employed basis, it is difficult to see the justification for excluding their entity from regulation by the BSB. The Board proposes to exercise a discretion to exclude from BSB authorisation entities that are unsuitable for its regulatory approach, such as entities operating on a bulk, commoditised basis and requiring a systems-focussed, rather than people-focussed regulatory regime, which the BSB is unsuited to provide (see Annex 1). The details of how this discretion will operate will need to be worked out as part of the next phase of work and will be consulted

on in the next consultation.

The Board proposes that **entities should be permitted to provide the same services that self-employed barristers are currently permitted to provide.** Barristers whose work includes reserved instrument and probate services should have the opportunity to set up entities. The provision of large scale conveyancing or other standardised services is discussed below.

Advisory and non-contentious work

Q11. Should the BSB seek to regulate entities whose work is primarily advisory and non-contentious in nature and unrelated to advocacy or litigation work? If so, is it envisaged that such entities would be supplying services primarily on a referral basis or direct to the public?

The majority of respondents agreed with the proposal the BSB should regulate entities whose work is primarily advisory and non-contentious in nature and unrelated to advocacy or litigation work.

Respondents generally took an inclusive approach to the non-contentious and advisory services which entities should be permitted to provide, on the basis that taking too restrictive an approach might discourage entities from applying to be regulated by the BSB. It was noted that much of the Chancery Bar's work is non-contentious and that it would be illogical not to regulate entities providing such services. It was also noted that there is a growing market in advisory work for the criminal Bar, for example advising and assisting corporate entities in internal processes, in order to comply with the Bribery Act 2010.

It was suggested by some respondents that the majority of users of advisory and non-contentious services would be likely to be sophisticated financial services professionals, or high net worth individuals, who pose less of a regulatory risk in terms of the regulatory objectives.

It was also argued that entities must be able to provide any services provided by the self-employed Bar, to avoid causing those services to be regarded as peripheral to the activities of the Bar.

Some respondents argued against permitting advisory and non-contentious work. One respondent said that regulating these services would seem to be contrary to the BSB's objective of focussing on regulating specialist advocacy services. Furthermore, it would be contrary to the BSB's intention not to emulate the regulatory position of other regulators.

There were few views expressed as to whether entities should supply advisory and non-contentious services primarily on a referral basis or direct to the public, though some respondents suggested that these services would ordinarily be provided on a referral basis.

BSB Response

The Board is persuaded by the arguments that it should not take too restrictive an approach

to advisory and non-contentious work. Similar considerations apply to those already discussed in the preceding section. The Board therefore proposes **to allow entities it regulates to provide advisory and non-contentious services to the same extent as the self-employed Bar** and will be prepared to regulate entities which provide only such services provided they meet the other criteria. It is hoped that this will provide entities with sufficient flexibility and choice in the services they provide. The BSB proposes to regulate the supply of non-reserved services by BSB regulated entities, in the same way that it regulates non-reserved activities of the self-employed Bar.

Administering oaths

Q10. Do you agree that BSB regulated entities should be permitted to administer oaths?

The consultation proposed that entities should be permitted to administer oaths, which is a reserved activity presenting a low risk. Respondents identified no regulatory reason why BSB entities should be prevented from undertaking these services and the majority of respondents agreed that they should be permitted. The BSB is not an Approved Regulator for notarial activities so any entity which wished to provide such services would have to apply to the Master of the Faculties.

Multi-Disciplinary Practices (MDPs) and non-legal services

The Board did not propose in the consultation that it should, at least at this stage, regulate multi-disciplinary practices (MDPs), i.e. entities that could provide non-legal services alongside legal services. These present additional challenges. The BSB intends to keep this under review.

PAYMENT OPTIONS AND CLIENT MONEY

Q12. If barristers are permitted to conduct litigation, will it be necessary for them to hold client money to pay disbursements?

Q13. Would it be feasible for entities conducting civil and commercial litigation to receive payments for fees and disbursements in arrears?

Q14. If entities receive fees and disbursements in arrears, what impacts might this have for consumers and access to justice?

The consultation paper discussed options for paying fees and disbursements, at the various stages of proceedings. It considered the viability of requiring clients to pay fees and disbursements in advance, and/or in arrears; and whether it would be possible for a client to 'pay as you go'. The paper also considered whether the entity would have to hold client money on account in order to conduct litigation effectively.

Several respondents made a distinction between fees and disbursements on the grounds that arrangements to pay fees in advance or in arrears may not work as well for paying disbursements. Other respondents made distinctions between different types of proceedings, requiring differing payment options.

Payment in arrears

Respondents were relatively divided as to whether it would be feasible for entities conducting civil and commercial litigation to receive payments for fees and disbursements in arrears, though a majority said this would be possible.

One respondent drew attention to the relationship with financial services regulation. It was suggested that barristers would have to be able to arrange after the event (ATE) insurance to cover such disbursements in the event that they do not become recoverable, and that insurance arrangements would have to reflect those offered by solicitors' firms and other recognised bodies in order to be competitive. It was suggested that the BSB would have to become a Designated Professional Body (DPB) for the purposes of financial services regulation, in order to regulate barristers in providing insurance intermediation services. This will be addressed in the context of the work on the detailed of the proposed regime.

Protecting the public

A number of respondents identified concerns about the protection of clients, and the public more widely, if payments are made in arrears. One respondent suggested this could lead to a potential 'chilling effect' on access to justice. The following threats to access to justice were identified:

- A negative impact on how well an entity deals with a client's case, particularly where there are signs that the client might be unable to pay

- Only credit-worthy clients might have access to an entity's services
- The cost of the legal services provided might increase in order to compensate for the delays in payment and the risk of default
- A possible reduction in the numbers of barristers willing to take cases on this basis, reducing competition and availability for consumers
- A system of payment in arrears might encourage entities to sue their clients in the event of non-payment, which might have a particular impact on vulnerable clients.

Commercial feasibility

The feasibility of paying in arrears, from a commercial perspective, will depend on the scale and nature of the litigation being conducted. For a large scale litigation, where there is a significant exposure to outstanding fees, payment in arrears is likely to be less attractive for the entity.

A number of potential business risks were identified by respondents, including:

- Cash flow pressures
- Credit risk exposure
- Risk of financial failure as a result of being under-capitalised
- In the case of non-payment for small-scale litigation, it might not be cost-effective to pursue clients for unpaid fees.

A more general concern was raised that establishing this approach as a payment practice might lead to pressure from consumers on all litigators to fund all litigation in arrears.

The Bar Council suggested that in order to mitigate these risks an entity would need to ensure both that it had sufficient 'working capital'; and that the basis on which work is conducted is clear and contractual (e.g. making use of the Bar Council's proposed Standards Contractual Terms).

The Law Society noted that solicitor's firms undertake work on a conditional or contingency fee basis where payment is made in arrears. However, in this case, a firm reduces its risk by receiving fees and costs directly from the other side if the case is successful, or disbursements from an insurer under an ATE policy in the event of failure. The Society also noted that solicitors firms are also able to choose which cases to take on. (NB under the BSB's proposals for the Cab-rank Rule and the non-discrimination principle, this would also be the case for a BSB entity if it was instructed direct by the client and not by a professional client)

One individual respondent suggested that payment by the client in arrears (with

disbursements funded via ATE insurance or by the barrister), with the barrister acting on a conditional fee basis in respect of his 'profit costs' would be more likely to win clients in a competitive marketplace.

Another respondent questioned whether litigating barristers would have permissions to access disbursement funding via loans in the same way that solicitors do.

Payment in advance

The majority of respondents agreed that it would be possible to make payments in advance for fixed fees and disbursements.

In order for fixed payments in advance to be viable, the stages of litigation would need to be clearly identified in advance and explained to the client. However, the EBC suggested that in most cases the level of uncertainty regarding the amount of work required and the variable timescales of a hearing would make this difficult.

It would be possible for fees to be paid in advance on contractual terms, however disbursements such as expert fees are very complex and the contractual basis would have to be very clear.

ILEX suggested that if the fixed fee included disbursement costs, that portion of the fixed fee would count as 'client money' on the grounds that disbursements are not 'office money' and always remain as 'client money' whilst in the lawyer's possession.

Public Access Scheme

Q15. How well do you think the Public Access Scheme works in respect of fees and disbursements? Could a similar approach be taken by entities?

The consultation paper identified the Public Access Scheme as a source of some possible evidence to establish how entities might manage litigation payments. However, some respondents pointed out that the Public Access Scheme provides only limited evidence, due to its relative infancy, and also due to its narrow scope in terms of the type of cases which the Scheme covers - so any evidence which it provides must be treated with caution.

Some respondents who undertake public access work said that replicating the Scheme's payment methods would work well for entities. The Bar Council agreed with the suggestion that the Scheme has been shown to work well, and that it has been the subject of a very limited number of complaints. As such it provides a 'tried and tested' approach for entities.

Distinctions were drawn between the various purposes for which payments might be made. Some respondents felt that the Scheme works well in respect of fees; but less so in respect of disbursements.

Some respondents felt that the Scheme works well when operated on a fixed fee basis, and

this approach could be adopted by entities, however the need to fix fees in advance can lead to difficulties:

- An unsatisfactory commercial choice between accepting a credit risk or either underestimating or over-quoting for work;
- Entities might have to define the scope of their work in discrete stages, which might require a separate engagement letter to be agreed. This requirement could be cumbersome and uncompetitive when compared with what other entities could offer.

Q16. Would an entity be able to conduct litigation where fees and disbursements are paid in advance, on contractual terms?

Client money

Q17. Do you agree that the BSB should continue to prevent all barristers (except those who are practising as managers of recognised bodies regulated by other approved regulators) from holding client money?

Opinion was divided on the question as to whether it is necessary for barristers to hold client money in order for them to pay disbursements, if they are permitted to conduct litigation.

Many respondents felt strongly that relaxing the prohibition on client money was a regulatory stage too far, one set commenting that 'this is a red line' and that it would increase the risks to the Bar as a whole. However, others felt that the Bar would be uncompetitive if the prohibition is continued.

Respondents generally agreed with the BSB that it was desirable to keep the regulatory system as simple as possible and on that basis alternatives to holding client money should be found. Respondents were also in agreement that holding client money is an area where other professions require a high level of regulation and that putting this in place would dramatically increase the cost to the consumer. This would be against the public interest purpose of the Legal Services Act 2007.

The fundamental reason identified by those who supported granting permissions to hold client money, was that relying on the alternatives would put BSB regulated entities at a competitive disadvantage compared to solicitors' firms and recognised bodies regulated by other regulators. Respondents who felt that client money holding would be necessary generally referred to where litigation was largescale or across a wide range of clients.

As with other payment options, client money holding may be more useful for some types of litigation than for others. In some areas of practice, solicitors operate on a no win- no fee basis and therefore do not take money from their clients. This approach could be replicated by BSB regulated entities.

The Bar Council agreed with the BSB's 'generally cautious approach' in relation to handling

client money and did not believe that it will be necessary for barristers permitted to conduct litigation to hold client money to pay disbursements. It felt that the alternatives identified by the BSB should be adequate, although there were risks attached to them, as discussed.

Custodian accounts

Q18. Do you think that, in principle, a custodian service for holding court awards and settlements could be a sufficient alternative to allowing entities to hold client money?

Q19. Are there any alternative approaches you can suggest?

Respondents were generally supportive of the proposal for a 'third party' or 'custodian' account in which money arising from settlements and court awards could be managed.

Concern was raised that the costs associated with alternatives to holding client money, such as a custodian account arrangement, should not be shared throughout the Bar. In particular the Criminal Bar would not benefit from the arrangement and should not have to bear the cost.

It was observed that the success of a custodian arrangement would depend on the number of payment transactions and the number of entities opting to make use of the service.

BSB Response

In cases where entities take instructions on a referral basis, where there is a professional client, arrangements for fees and disbursements can operate on a similar basis as for the self-employed Bar. However, it is anticipated that entities would take many of their instructions direct from the lay client, and greater opportunities for direct access is one of the main intended attractions for barristers setting up an entity.

The Board considers that, notwithstanding the potential credit risks discussed above, entities would be in a position to conduct litigation effectively for direct access clients, receiving fees in advance on a contractual basis, or in some cases in arrears. Disbursements could be paid by clients direct, or in some cases the entity might decide to pay disbursements and seek reimbursement from the client afterwards, taking the credit risk. As to settlement monies: it is desirable that there should be a method of ensuring fees can be recovered out of settlement monies and/or that settlement monies should be able to be held in escrow pending satisfaction of a condition. However, the Bar have hitherto managed direct access services without the ability to hold client money, including any settlement monies. The custodian account was proposed in the consultation document as an alternative to a client account, in particular, for settlement monies (although if the concept was established and proved successful, it could later perhaps be extended in its scope). Its attraction is in removing the risk that client monies will be misappropriated or mismanaged in the hands of individual entities or individual barristers, and avoiding the need for correspondingly

complex client money rules and the accompanying, costly regulatory mechanism. The risks of misappropriation or incompetence on the part of the custodian would remain. The BSB will explore ways in which those risks could be mitigated, including whether they would be insurable at a proportionate cost, paid by users of the service. The BSB will continue to explore and develop the possibility of a custodian account as a third party service regulated by the BSB. However, its current view is that a custodian account is a desirable add on rather than a necessity and that conduct of litigation would, if necessary, be feasible without it, should it not be possible to establish such a service (either at all, or not within the timescale within which the BSB is otherwise ready to regulate conduct of litigation).

The BSB is revisiting the definition of client money in order to clarify what is and is not permissible, consistent with maintaining a prohibition on holding client money, and therefore what payment methods are available to the Bar without infringing that prohibition. Recent enquiries of the ethical helpline and some of the consultation responses suggest there is currently a lack of clarity in this area.

The Board does not propose to permit entities or self-employed barristers to hold client money.

The Board will consult on more detailed proposals for a custodian account to hold settlements and awards.

Accepting instructions

Q20. Do you have any comments on the proposal for regulating conflicts of interest in BSB regulated entities?

Q21. Are any further safeguards required to protect consumers of legal services?

Respondents were generally favourable to the BSB's proposals for managing conflicts of interest. However, several respondents identified that specialist areas of the Bar might experience particular difficulties with managing conflicts.

A minority of respondents felt that the realities of financial interests in another barrister's success in a case would be the same in an entity as in chambers, without the risk of conflict being any greater. It is common to have a prosecuting and defending barrister within the same chambers and such situations have been managed without difficulty and should therefore be accepted for entities.

The BSB does not agree with the view that entities are no different to chambers, in this respect. Those operating within an entity plainly could not represent opposing sides in litigation, or co-defendants with conflicting interests. Unlike members of a chambers, their interest in the revenue generated by one another's work is more than *de minimis*.

Impact of conflicts

Some respondents thought that entity regulation poses materially different, and higher, risks in relation to conflicts of interest than in the self-employed Bar. The incidence of conflicts might be higher and conflicts might be more complex in entities.

Concerns were raised about the ability of entities to identify conflicts at an early stage, and it was pointed out that if a conflict is discovered after the acceptance of instructions, it might be necessary for instructions from all parties to be returned.

Some particular areas of work might be more affected than others by the impact of conflicts (in particular, highly specialised areas such as tax and intellectual property, or criminal work, where co-defendants may have divergent interests not immediately apparent at the outset).

BSB Response

The BSB agrees that conflicts will arise more frequently in the context of practise within an entity. This is a difference of degree rather than of kind: in other words, the regulatory challenge is not fundamentally different from policing the way an individual barrister identifies and manages his or her own conflicts, but the problem will arise more frequently. From another perspective, the greater incidence of conflicts within entities will serve as a

commercial check on the number and size of entities that are formed, particularly in specialist fields, which mitigates concerns that access to justice may suffer in those areas.

A number of respondents made helpful suggestions about regulating the management of conflicts. Proper administration was identified as key. The rules will require entities to have systems in place to identify and manage conflicts, including practical arrangements such as information barriers for situations in which it is acceptable to be involved with more than one party. Entities will also need to have arrangements for enforcing their internal requirements. The BSB's monitoring system will cover these arrangements (as will also be the case in respect of chambers). Draft rules will be included in the next consultation. The BSB will also review the implications for education and training and how conflict training can be included in the BPTC, pupillage and CPD, and will develop guidance. Consideration will be given to whether similar rules should apply to Chambers where similar but generally simpler issues can arise.

The Cab-rank Rule (CRR)

Q22. Do you agree that the cab-rank rule should apply to entities and advocates in the entity context in a similar fashion to the way it operates for self-employed barristers?

Q23. Do you agree in principle that the cab-rank rule should apply to all advocates in an entity and not just to barristers?

Q24. Should the cab-rank rule be limited in its application to “advocacy and advice on a referral basis from a professional client” or to “advocacy in substantive hearings, on a referral basis from a professional client”? Is there a better way to define its scope?

Q25. Do any of the proposals in relation to the cab-rank rule have any equality implications or positive or negative effects on people from different ethnic groups, men and women or disabled people?

Q26. How serious do you think is the risk of clients abusing the cab-rank rule and how might it be mitigated?

The majority of respondents (approximately 80%) agreed with the proposal that the CRR should apply to entities and advocates in the entity context in a similar fashion to the way it operates for self-employed barristers.

Public benefit

A number of benefits of applying the CRR to entities were identified. Respondents generally agreed that the CRR retains the positive characteristics laid out in the consultation paper, which have a genuine public benefit in terms of enhancing access to justice, promoting competition and independence, and enhancing client choice.

Some respondents commented that the CRR is overrated in its effect. One respondent suggested that commercial pressures could cause the rule to remain unobserved, unenforced, making it fall into disrepute, rather than sustaining it as a distinguishing mark between BSB regulated entities and others.

One respondent commented that applying the CRR to referral work but not to direct access, as proposed in the consultation paper, could inhibit consumer choice.

Effect on competition

Concerns about applying the CRR to entities generally related to the impact on the commercial competitiveness of the entity.

A number of respondents felt that the CRR would reduce an entity’s capacity to be competitive, compared to business regulated by other regulators. It is potentially uncompetitive for barrister members and employees of entities to be bound by different

rules from others. There is no equivalent to the CRR for solicitors, so BSB regulated entities could be at a competitive disadvantage to solicitors' firms.

Competition in relation to other types of barrister was also considered. Exempting entities from the CRR could put self-employed barristers at a material competitive disadvantage. However, it was also noted that the CRR does not apply to barristers employed by entities regulated by other Approved Regulators.

Applying the CRR to all advocates in entities, not just barristers (Q 23)

Responses were overwhelmingly in support of this proposal. However, the EBC suggested that, given solicitors are not bound by their Code of Conduct as individuals in the same way, the imposition of the rule might inhibit solicitor-advocates from joining BSB regulated entities.

Defining the scope of the CRR (Q 24)

The consultation paper proposed that the CRR would be applied only to referral work and not to direct work. It proposed limiting the CRR in its application to a defined scope. It suggested two possible definitions:

- 'Advocacy and advice on a referral basis from a professional client'
- 'Advocacy in substantive hearings, on a referral basis from a professional client'

Respondents were fairly equally divided on these definitions, with a slight preference for the first option.

Equalities considerations for the CRR and non-discrimination rule (Q 25)

In general, respondents felt that the CRR and non-discrimination rule would play a positive part in helping to avoid discrimination and promote equality.

Some respondents suggested that it is likely that there will be positive implications for BME groups, women and disabled people; and that the CRR plays an important role in the retention of women in the profession.

The risk that the CRR could be abused, and how that might be mitigated (Q 26)

As discussed above, there were concerns raised about the potential for entities to be conflicted out as a litigation tactic.

There was general agreement that the risk of abuse would be most acute in practice areas where barristers are grouped in a limited number of entities, as this might allow clients to conflict out a significant number of leading advocates by instructing these entities on minor related matters.

However, the responses were polarized as to the question how serious is the risk of clients abusing the CRR, with some respondents saying the risk was 'minimal' or 'minor', and even 'scaremongering'; whilst others said the risk was 'huge' or 'serious'. Some respondents felt the risk was no greater than it always has been in applying the CRR to the self-employed Bar.

Some respondents agreed with the proposal in the consultation paper that this risk could be mitigated by applying the CRR only to substantive hearings. There was also some support for allowing entities to opt out where they suspect abuse, or to have in place a waiver procedure.

It was suggested that clear guidance would also help to mitigate the risk of abuse.

BSB Response

The BSB is aware that there are some existing difficulties with the application and scope of the CRR, but there is evidently strong support for retaining the CRR in an entity context. The CRR helps to preserve the independent and public interest nature of the Bar. That said, there was no clear consensus amongst respondents on its proper scope: in particular whether it should apply "advocacy and advice on a referral basis from a professional client" or to "advocacy in substantive hearings, on a referral basis from a professional client", and this is an area the BSB proposes to revisit in the context of drafting the detailed rules. The CRR does not apply to the self employed bar when conducting work on a direct access basis and likewise should not apply to entities when conducting direct access work. Its scope and application should, as far as possible, be like for like, as between advocates operating at the self-employed Bar or within BSB regulated entities.

The Board will give further consideration to ways to mitigate the risks of abuse of the CRR. It will consider further whether the CRR should be applied only to substantive hearings.

The Board proposes to apply the CRR in a similar way to how it is applied to the self-employed Bar. The CRR will apply to the entity and to all advocates working for it. It will only be applicable to referral work, where the entity is instructed by a professional client and a particular advocate is requested. The Board does not propose to apply the CRR to entities in respect of their direct access work.

Interventions

Q27. Do you agree with the BSB's proposals for the interventions regime it proposes to establish, if it begins to regulate entities?

Q28. Do you agree with the BSB's proposals for how the intervention regime should be funded?

The majority of respondents (approximately 77%) agreed with the BSB's proposals for an intervention scheme.

However, several respondents felt that further details about the circumstances in which interventions might be necessary, and the costs involved, would have to be provided in order to comment further. The comparison with the SRA's costs is of limited value because it is an established regulator in this area.

The BSB intends to provide further details of an interventions scheme in the next consultation paper.

Necessity for a scheme

Some respondents felt that if the Bar is not permitted to handle client money, an interventions scheme would be unnecessary. Others suggested that if the BSB permits the conduct of litigation, this will necessitate strengthening its approach to enforcement and intervention generally.

Nature of the scheme

Respondents were concerned that intervention can be a disproportionate regulatory power, and can be destructive of practices, careers and solvency.

The BSB will need to develop specific criteria under which an intervention might be necessary.

Costs

The majority of respondents agreed with the proposals in the consultation paper to recover a proportion of the costs from entities intervened into, following the 'polluter pays' principle, and otherwise to spread the costs across entities.

However, it was noted that the possibility of recovering money from entities intervened into would be limited where there was insolvency.

Some respondents felt that the cost of an interventions arrangement would not be proportionate to the risks that it sought to mitigate.

BSB response

Given that an interventions regime is obligatory for ABSs (this is a requirement of the statutory regime), the Board's view is that it is right in principle to introduce it across the board. In circumstances where client money is not handled, the occasions when it would be necessary for the BSB to use the power should only arise rarely and the cost of any intervention should be more modest than when client money has to be managed as part of the intervention.

The Board proposes to establish an interventions regime for entities it regulates. It will consult further on the details of the scheme.

The Board considers that the risk to the public and the profession of an entity requiring intervention is likely to be low, but that in that relatively rare event, its impact on the public and on the Bar's reputation would be sufficiently serious to require a scheme to be established (besides being a requirement, in any event, in relation to ABSs).

However, the interventions scheme will have to be proportionate, both in terms of the risks it seeks to mitigate, and also in terms of its cost to the profession.

For ABSs, the necessary powers to operate an intervention scheme are provided by the legal Services Act. The Board is in discussion with the LSB and MOJ about obtaining similar powers in relation to other entities. The Board is conscious of the need to ensure the proportionality of any regime put in place.

Insurance and compensation

Q29. If the BSB does decide to regulate entities, what is your preference between using a mutual scheme for entities or commercial insurance based on minimum standards set by the BSB?

Q30. Do you agree with the BSB's view that a Compensation Fund is not necessary provided that client money is not held by BSB regulated entities or self-employed barristers?

The consultation paper presented an 'in principle' option between entities using a mutual scheme for insurance, along the lines of the Bar Mutual Indemnity Fund (BMIF) (which could be extended), or commercial insurance based on minimum standards set by the BSB.

The majority of respondents (approximately 70%) stated a preference for a mutual scheme.

Transition to entities and dual practice

One respondent commented that using a mutual scheme for both individuals and entities would have the greatest chance of providing a more 'seamless' move from one mode of operating to the other, and may provide continuity of cover for existing clients. Similarly, where a barrister decides to move from an entity to self-employed practice, competitive run-off cover provided by a mutual scheme would make this easier. The BSB considers it is probable that barristers might initially set up entities on a dual practice basis, retaining their self-employed practice in chambers, so consistency of insurance cover might be attractive.

Relative costs

Some respondents suggested that contributions to a mutual fund are likely to be significantly higher because the risks associated with the operation of entities are likely to be greater. It would not be desirable to have a scheme where the self-employed Bar is penalised by having premiums raised because of entities. For this reason, one respondent suggested that any mutual scheme should be separate from the BMIF scheme for self-employed barristers. The increased overheads associated with insurance for an entity might also make entities less commercially attractive.

Competition

Respondents who favoured commercial insurance tended to comment that it is more competitive and therefore potentially cheaper.

Others felt that although mutual would be preferable, it is not clear why it would have to be the sole option, and suggested there could be an opt out.

Some respondents referred to difficulties in obtaining commercial insurance. The development of appropriate consumer protection through professional indemnity (PI) insurance is increasingly difficult in the legal services market.

Compensation fund

Respondents naturally linked this question to any decision taken on prohibitions on handling client money.

The consultation paper proposed that a compensation fund is not necessary, provided that client money is not held by BSB regulated entities or self-employed barristers. Approximately 80% of respondents agreed with this proposal.

However, others felt that the expanded range of services would mean a compensation fund would be in the interest of the client. A fund might be necessary where entities charge fees and disbursements in advance, but then fail to have carried out the work. A compensation fund might also be necessary to cover theft.

BSB Response

The BSB acknowledges the importance of not undermining the BMIF scheme, which has hitherto served the needs of the Bar well. However, it would be premature at this stage to conclude that the BSB must choose between the BMIF or commercial alternatives for insuring entities and/or litigation services. It will be necessary to explore in more detail the willingness and ability of the BMIF to offer the necessary cover and whether the availability of commercial alternatives, in parallel, might undermine the viability of any BMIF scheme. The details of any insurance requirements for entities, and how these are best addressed, will need to be worked out in the context of the next phase of work.

The Board will consider further the options for insurance.

The BSB agrees with respondents that, although the risk of theft might be less if, as is intended, client money holding is prohibited, there will still be a residual risk.

The Board will consider further whether to set up a compensation fund.

Non-barristers

Q31. Do you agree that all managers should be subject to the same conduct rules (with authorised persons and specific management roles (HOLPs and HOFAs) being subject to relevant further rules)?

Q32. Do you agree that entities which do not require to be licensed, BOEs and LDPs, should also be required to have in place a HOLP and a HOFA, in order to improve compliance? What implications might this have for smaller firms and how could the BSB mitigate any negative impacts?

Q33. Do you agree that all employees (in LDPs and BOEs, as well as within ABSs, where this is a statutory requirement) should be made subject to a minimum duty not to cause the entity or an authorised person working in it to breach the rules applicable to them?

Q34. Do you agree that the BSB should have a power to prohibit BSB regulated entities or self-employed barristers from employing named persons who have been found, after due process, to be unsuitable to be employed in such a business?

The consultation paper proposed that all managers of entities should be subject to the same conduct rules (with authorised persons and specific management roles (e.g. HOLPs and HOFAs) being subject to relevant further rules). All respondents were in favour of this proposal.

Consistency

The IBC commented that it will be necessary to have different rules to enable regulators to differentiate between individuals being barred from owning or managing an entity, and practising as a self employed barrister. It should not follow that if you are barred from owning/managing an entity, you should necessarily lose your practising certificate.

The Law Society noted that the SRA has the power to give a written rebuke or impose a financial penalty – if the BSB regulates entities all managers should be subject to equivalent sanctions and penalties.

HOLPs and HOFAs

The consultation asked whether entities which do not need to be licensed should be required to have Heads of Legal Practice (HOLPs) and Heads of Finance and Administration (HOFAs) in place; and what implications this might have for smaller firms, and how those implications could be mitigated.

The majority of barristers and chambers agreed with this proposal. However, a number of respondents raised concerns about the burden on sole practitioners or small firms,

suggesting that the roles might be either outsourced or performed by the same individual on a part-time basis.

Minimum duty on employees

Respondents were almost unanimous in agreeing with the proposal that employees should be subject to a minimum duty not to breach the rules.

However, Lincoln's Inn did not favour the BSB having any disciplinary powers over non-lawyers, and argued that regulation should be indirect, via an entity's managers.

Disqualification

There was strong agreement for the proposal that the BSB should have a power to prohibit employees working for an entity where there is good cause.

One respondent suggested there should be a limit on disqualification – e.g. along the lines of directors' disqualification periods.

It was argued that there must be no way to circumvent the high regulatory standards set, which would erode consumer confidence, for example if employees barred by the SRA were able to find employment in BSB regulated entities.

It was also suggested that there should be mechanisms to protect vulnerable individuals from contact with those working in entities who might pose a risk to them.

BSB response

All managers of entities should be subject to the same conduct rules (with authorised persons and specific management roles (e.g. HOLPs and HOFAs) being subject to relevant further rules, according to their function)

Entities which do not require to be licensed, BOEs and LDPs, will also have to make arrangements to have in place a HOLP and a HOFA (who might be the same person)

The Board will impose a minimum duty on employees not to breach the rules to which a BSB regulated entity is subject

The Board also proposes to establish a power to disqualify employees and managers from working in BSB regulated entities or for self employed barristers where there is good cause.

The BSB will consult in more detail on the core duties to be imposed on non-lawyer employees, the grounds for and scope of disqualification, and the mechanism for appeal from such orders.

The BSB is in discussion with the Legal Services Board and the Ministry of Justice as to the extent and sources of any extra powers which may need to be conferred on it in order to regulate non-barristers.

Costs

Q35. Do you have any comments on the proposals for covering the costs of entity regulation?

Q36. What equality and diversity implications will recouping set up costs from the whole profession (by way of an increase in the practising certificate fee) have on people from different ethnic groups, men and women or disabled people?

Q37. How important do you think it is that the BSB should set fees for entities that are competitive with other entity regulators? Do you think barristers would be willing to pay slightly more (if this was necessary) to retain the BSB as their primary regulator?

The consultation paper proposed that set up costs for a regulatory regime should be borne by the profession as a whole; and that running costs would be covered by entities themselves.

Respondents expressed frustration at the lack of detail in that the consultation paper provided little detail about costs arrangements. The BSB has now done further work on the costs, as a result of which the set up costs (including set up costs for litigation) are currently estimated at £365,500, giving a cost per capita in the region of £25-£30 which could be spread over several years. (The detailed breakdown of that estimate is commercially confidential at this point, as it includes work which the BSB proposes to tender out to external providers. However, further details will be published after that process is complete.) A future consultation paper will further refine the costs and set out the BSB's proposals for meeting them and for the fees to be charged.

Many respondents voiced concerns about charging the set up costs to the Bar as a whole, considering it unfair that the Bar should fund set up costs for entities which may compete with the services offered by self-employed practitioners, or by barristers in existing entities regulated by others (and in which those barristers employed in the public sector, such as government departments, themselves have no direct interest). Notwithstanding that opposition, the Board considers that spreading set up costs over the Bar as a whole is a fair and proportionate approach. Any barrister now in practice might at some stage in their career take advantage of one or other of the changes being introduced. That will, of course, not be true of everyone, but in circumstances where the changes are being permitted to allow greater flexibility in modes of practice and scope of services in the public interest and in the overall interests of the Bar as a whole, it is not unreasonable to expect even those individuals who will not themselves take advantage of the changes to make what is, on any view a modest, and not disproportionate, contribution towards the set up costs. Any other approach would be likely to be complex and costly to administer and would place a

disproportionate burden on entities, especially early adopters, which would deter take up of changes which the BSB has judged to be in the public interest.

Ongoing costs of regulating entities or litigation will be recovered from the entities and from those extending their authorisation to litigation, respectively.

[The BSB plans to review ongoing fees for entities and practising fees for individuals, in the round, to ensure a fair and equitable approach going forward, as between those practising in different structures.]

Equality and diversity implications of costs (Q 36)

Some respondents identified potential impacts on protected groups. Smaller chambers might be disadvantaged if costs end up being disproportionate to their general costs model. Increases in fees tend to impact more on lower-earning barristers who tend to be at the start of their careers or those working part-time or flexibly. These working practices tend to be correlated with female barristers, ethnic minorities and other protected groups.

The BSB has undertaken an initial equality impact assessment, and will continue to consider these issues in more detail during further consultation.

The cost of fees compared to those of other regulators (Q 37)

The consultation paper asked how important it was that the BSB should charge fees for entities that are competitive with other regulators and whether barristers would be willing to pay more (if necessary) to retain the BSB as their primary regulator.

The majority of respondents felt strongly that the BSB's fees must not only be competitive, but that the costs must be the same or less than those of other regulators. A minority of respondents said they would be prepared to pay more for the BSB to be their regulator.

As discussed above, the Board intends to provide a regulatory regime that is cost-effective, without a reduction in the quality of regulation. It expects the regime to be competitive on cost with that of other regulators.

Characteristics

Q38. Do you agree that if the BSB does decide to regulate entities it should be prepared to regulate entities managed by other authorised persons (LDPs)?

Q39. Do you agree that if the BSB does decide to regulate entities it should be prepared to regulate entities managed by non-lawyers (ABSs)?

Q40. Do you agree that if the BSB did regulate entities it should require that the majority of the managers should be entitled to practise as advocates in the higher courts?

Q41. Do you agree that the BSB should set a requirement for a maximum of 10% non-lawyer management of ABSs it may regulate or do you consider that the BSB should impose a maximum of 25% or some other proportion?

Q42. Would setting a 10% maximum for non-lawyer ownership of ABSs as opposed to 25% have any impact on equality and diversity?

Q43. Do you agree that the BSB should not set a hard limit on the number or proportion of non-advocate employees in BSB regulated entities but should use authorisation to ensure all entities are within its experience and competence to regulate effectively?

Some respondents argued that as the BSB has made the decision in principle that barristers should be permitted to form BOEs, it should now regulate BOEs; but it does not follow that the BSB should regulate all advocacy-focussed entities such as LDPs and ABSs.

The prohibition on BOEs has already been found by the BSB to be no longer to be justified, there is no other available regulator for a 'pure' BoE (without any non-barrister owner/managers) and there is evidence of some demand. In the Board's view, it would be neither consistent nor proportionate, nor targeted at the case for action, to insist that the only type of entity the BSB will regulate is a BOE. When the BSB is establishing a regulatory regime for BOEs (which may employ solicitors or non-lawyers) the question is whether there is then a good enough reason to deny the Bar a wider choice of entity under the BSB's regulatory aegis. In the Board's view there is no reason to prevent this.

LDPs

There was majority support for the BSB regulating LDPs. Approximately 68% of barristers and chambers agreed that the BSB should regulate LDPs.

Other legal professionals

Respondents generally felt that barristers should have the opportunity to own and manage businesses with other legal professionals and be regulated by the BSB. For example, ILEX

argued that Legal Executive Advocates are suitably and appropriately trained and should be able to become managers in BSB regulated entities.

Other respondents observed that there is no reason to distinguish between different categories of authorised person, where they are permitted to provide the same services. One respondent commented that the LSA makes it clear that there is no meaningful difference between practising barristers and solicitor advocates.

Availability of other regulators

Some respondents argued that there will be other regulators available to regulated LDPs and so the BSB does not need to do so. As discussed elsewhere in this report, the Board believes that it would be able to provide an attractive alternative regulatory regime to other regulators for particular types of entity.

ABS

Approximately 86% of barristers and chambers agreed that the BSB should decide to regulate ABSs.

Owner-managers

The BSB proposed in the consultation document that owners should be active managers. Some respondents argued that this was an unnecessary restriction. Owners of ABSs are not required by statute to be managers, active or otherwise.

Another respondent commented that it is unclear what mischief is caused by the presence of 'silent partners'. It was also suggested that the proposal is not well adapted to private companies, where typically the board of directors is a far smaller group of individuals than that of the members of the company.

It is the Board's view, however, that requiring owners also to be active managers will help to ensure that BSB regulated entities maintain an appropriate balance between commercial focus and protecting the interests of clients and the public interest more widely. The risks associated with external ownership are significantly different in nature, especially in the context of advocacy and litigation, where the duty to the Court may run counter to the profit principle and has to be safeguarded. The imposition of this requirement will offer both barristers and consumers an alternative to entities regulated by other regulators, which are permitted to have external ownership, and which therefore enjoy the benefits but are also exposed to the risks which external ownership poses.

Non-lawyer managers

The BSB will impose duties on non-lawyer managers of BSB regulated ABSs, subject to any differences that are necessary due to their non-lawyer status, and will also impose a

suitability test designed to exclude those whose past conduct evidences a risk that they might breach core duties.

Requirement that the majority of managers should be entitled to practise as advocates in the higher courts (Q 40)

The majority of respondents agreed with this proposal, however there were also divisions of opinion. Some respondents favoured a more flexible approach.

Specialist regulation

Some respondents commented that this proposal is consistent with the BSB's stated objective to be a specialist regulator entities focussed on advocacy and related ancillary services.

The focus of services

One respondent commented that where an entity tendered for criminal legal aid work, the majority of that work would be in the Magistrates' Court, and police station work. To control costs in this scenario, barristers might wish to form entities with a substantial number of people without rights of audience. It was also suggested that the proposals would inhibit the employment of senior and experienced lawyers who are not advocates within an LDP regulated by the BSB.

However, the Board proposes that entities would be free to employ lawyers without rights of audience at different levels of employment, depending on the nature and proportion of the services provided.

There were concerns raised about the BSB's lack of regulatory hold on non-barristers (this is addressed above).

It was also felt that an unnecessarily restrictive stance might drive entities to seek other regulators.

The Board believes that it should impose a requirement that the majority of owner/managers should have higher rights of audience and that it should not set a specific percentage limit. This leaves sufficient flexibility to include lawyers who are not higher court advocates, for example solicitors whose role would be to provide or supervise litigation services.

The Board believes that a majority requirement will act to help focus the services provided by BSB regulated entities and will act as a mechanism to ensure that entities match the specialist nature of BSB regulation. It believes that it is reasonable to assume that solicitors who have and maintain higher rights of audience do so because they wish to exercise them.

This requirement should help ensure that BSB regulated entities services are significantly 'advocacy focussed'.

Setting a maximum of 10% or 25% (or some other maximum) non-lawyer management of ABSs (Q 41)

Opinion was divided on the percentage maximum for non-lawyer management of ABS. The majority of chambers favoured a 10% limit. It was noted that a 10% limit is in line with the lower risk ABSs which the BSB is proposing to regulate and will enable the BSB to simplify its arrangements.

Some respondents argued that the proportion should be as low as possible to maintain standards. Others felt that percentage limits are potentially arbitrary. It was also suggested that there should be a settling in period before decisions are made on percentages.

One respondent suggested this should be approached as a question of economics: would the additional demand from higher risk bodies cover the costs of the additional regulatory burden, over and above what is required for low-risk bodies? This could be tested by funding the additional set-up costs from those practitioners who are interested in establishing entities that breach the 10% threshold.

The Board acknowledges the arguments made for the 10% limit however it is concerned that this limit would prevent smaller ABSs, effectively imposing a minimum size of 10 managers before one non-lawyer could be involved. It therefore proposes to impose a 25% limit to enable smaller ABSs to be set up. This should also provide flexibility for clerks and practice managers, or other managers with business experience, to become owner/managers, whilst ensuring that management and ownership remains predominantly in the hands of those who are individually subject to regulation as authorised persons.

Moreover, the Board has come to the view, in the light of the responses, that it should not take an overly rigid approach to this or other proposed structural requirements but should allow a margin of discretion around these, by reference to the primary objective and purpose of providing specialist regulation for low risk, advocacy-focussed entities. The proposed structural requirements should in general serve to promote that objective but the tail should not be allowed to wag the dog. The BSB's current view is that it should seek to develop and apply a risk-based scoring system (the details of which will need to be developed as part and parcel of working out the detailed regime) on the basis of which it would exercise a discretion to authorise and regulate low risk entities which were in some respect outside the structural requirements but which otherwise met the BSB's remit (for example, in terms of advocacy focus) and, on the other hand, to refuse to authorise entities which met the letter of the structural requirements but which were for other reasons judged to be high risk or unsuitable, in terms of scope of services, for regulation by the BSB and which should therefore be left to look elsewhere for regulation. Clearly, it will be necessary

for any such discretion to be exercised on a rational basis and for proper purposes and that applicants are given guidance to reduce the risk of applications being made for authorisation which are bound to be rejected. The next consultation will need to include proposals for how this is to be managed.

Equality and diversity

The BSB will undertake further work to establish the potential impact on equality and diversity of setting a percentage limit on non-lawyer management. Some respondents suggested that there might be a disproportionate equality impact on smaller entities, who are likely to be the employers of minority groups (similar to concerns discussed above in relation to costs).

No limit on the number or proportion of non-advocate employees

The overwhelming majority of respondents agreed with this proposal. One respondent suggested that there should be certainty about the proportion of non-advocate employees. The BSB believes that set limits are unlikely to be apt, in this respect, and that this could be better dealt with in appropriate guidance and through the proposed risk-based exercise of discretion, within the authorisation process (see above).

BSB response

The Board proposes to regulate LDPs and ABSs as well as BOEs

The Board proposes to impose a requirement that there must be at least one barrister owner/manager.

A majority of managers are to be qualified as advocates in the higher courts (whether as barristers or HCAs)

All owners of BSB regulated entities will also be managers.

There will be a 25% limit on non-lawyer owner/management of ABSs

The BSB will not apply structural requirements rigidly but will develop a risk-based approach for exercising a discretion to authorise entities which depart from (or to refuse to authorise entities which meet) these prima facie structural requirements, depending on whether they do or do not nevertheless demonstrably fit the objective of providing specialist regulation for low risk, advocacy focussed entities.

There will be no set limit on the number or proportion of non-advocate employees but this will be one factor to be taken into account in exercising discretion as to the suitability of an entity for BSB regulation

Annex 1

Meeting the Regulatory Objectives

In reaching the policy decisions contained in this report, the Board has carefully evaluated different outcomes against the regulatory objectives, listed in the introduction. The Board has also had due regard for the regulatory principles which ensure that its regulatory activities are:

- Transparent;
- Accountable;
- Proportionate;
- Consistent;
- And targeted only at cases in which action is needed

The regulatory objectives are referred to in the above discussion of the arguments raised in consultation. However, the following sections summarise the Board's overall assessment of how its proposals will impact on the objectives.

It is for the BSB (to whom this task is delegated by the Bar Council as Approved Regulator) to determine what route is 'most appropriate' for meeting the regulatory objectives. The BSB is both entitled and required to act where it considers that what it is proposing would be a better way of promoting the regulatory objectives than maintaining the current regime. The Board can act to improve delivery of the objectives and its power is not limited to a situation where it judges its existing rules to be actively undermining the objectives such that it would be exposed to sanction by the Legal Services Board.

It is consistent with the regulatory principles that the BSB should remove prohibitions that it can no longer regard as justified (such as the conduct of litigation) rather than leaving the Bar to seek alternative regulation elsewhere.

Improving access to justice

Increased and expanded direct access for clients is intended to be a central outcome of the proposals. The Board aims to provide a regulatory structure which will allow BSB regulated entities to provide services directly to clients, including litigation, without being obliged to employ a solicitor or other professional unless this is judged to be necessary, and which also will allow the self employed Bar to include litigation in their direct access offering, if they choose to do so. This should help to maintain the cost-effectiveness traditionally associated with the Bar. BSB regulated entities that are able to provide relatively cheap services, and an expansion in the scope of direct access available from the self-employed Bar, should provide benefits in extending access to justice for those who may otherwise struggle to afford litigation.

In some specialist areas of legal services, there is likely to be an increased risk of conflicts,

which could impact on access to justice. However, the Board believes that barristers are unlikely to form entities where doing so will result in significant amounts of work being lost due to conflicts, rendering clients unable to obtain representation. Access to justice in specialist areas is unlikely to be adversely affected because of the strong commercial disincentives.

The non-discrimination principle will apply to entities, helping to ensure that the public has a fair chance of representation by the barrister or the entity of their choice. Similarly, the Cab-rank Rule will be preserved in like-for-like scenarios, reflecting the application of the Rule to self-employed practice. This will help to maintain the nature of the Bar as an independent profession, whose services are open to all.

Protecting and promoting the interests of consumers

The Board believes that its proposals will help protect and promote the interests of consumers of legal services by creating a greater range of options to obtain different types of legal services across the market. For individual consumers, and those seeking smaller-scale advocacy and litigation services, there will be increased opportunities to instruct barristers on a direct access basis. At the other end of the market, entities will provide a means for lawyers to contract more effectively for the provision of large-scale services, for example block tendering for combined advocacy and litigation on behalf of a local authority.

These new ways to provide services will still be subject to substantively the same regulatory regime as is applied where consumers make use of the self-employed Bar. This will help to maintain quality of services, at a lower regulatory and insurance cost to be passed on to consumers.

The entities which the Board proposes to regulate will be different from those regulated by other approved regulators, which will help to promote choice for consumers who might wish to employ lower risk services. For example, BSB regulated entities will not involve external ownership and they will not be able to hold client money, helping to avoid the associated risks.

Promoting competition in the provision of services

The Board believes that by regulating entities it will provide barristers with a more attractive option to form entities. The evidence obtained from surveying and consulting with the profession suggests a significant demand for entities (albeit from a minority) and a high level of demand for the BSB as the entity regulator of choice. If the BSB does not offer an alternative, barristers might be less likely to set up entities if it means moving to another regulator, such as the SRA, in order to do so.

Given that the BSB does not regard it as being against the public interest, or likely to undermine one of the other regulatory objectives (such as the diversity of the profession) for barristers to form entities, there is no justification for maintaining a disincentive based solely on barristers' natural reluctance to have to switch to another regulator as their entity

regulator (and therefore, their primary regulator). On the contrary, there is every reason to act to remove that disincentive and supply the option of BSB regulation if (as is the case) that can be achieved without disproportionate cost. This flexibility as to modes of practice, whilst remaining under the BSB's regulatory aegis, will benefit the Bar and the public.

The proposals should also help to facilitate the Bar's ability to compete with SRA-regulated firms, and other legal services businesses, by offering a 'one stop shop' service to clients, as well as increased ability to tender for block contract work.

The proposals do not only apply to barristers, but Higher Court Advocates who are owners and managers of entities could also opt for BSB regulation in order to mark themselves out as competing on quality and price. Competition should therefore be enhanced across the legal professions.

Encouraging an independent, strong, diverse and effective legal profession

The Board believes that its proposals will help to introduce greater flexibility into the ways in which barristers, and other legal professionals, are able to practice, helping the Bar and the legal profession as a whole to prosper. Evidence of the interim regulatory regime for LDPs suggests that some barristers might choose to use entities for specific types of services, in conjunction with their self-employed practices – the BSB's recent relaxation of the prohibition on dual practice would allow this.

Approximately 20% of practising barristers already work in employed practice and many find that this is attractive for reasons such as financial security, predictability and flexible working. Employment options within a BSB regulated entity might be attractive for similar reasons and could help to provide greater employment and career development opportunities. This in turn might help a wider number of barristers to remain in the profession for longer and could be particularly attractive to barristers with caring or other personal commitments.

Similarly, BSB regulated entities might provide further opportunities for younger and more junior members of the Bar. They could help to increase the number of pupillages and other training opportunities, as well as making the route to qualification more flexible.

On balance, the Board believes that its proposals are likely to complement, rather than replace the traditional self-employed/ referral based model of practice. They would result in further business opportunities and more career paths, without requiring the need to switch regulator to achieve those choices. As discussed in the main report, the changes would be facilitative only and those barristers who wish to remain self-employed/referral based could do so.

Promoting and maintaining adherence to the professional principles

The Board believes that its proposals will help to promote and maintain adherence to the professional principles and strong ethics which are existing characteristics of the Bar. By

providing its own entity regulation regime, the BSB will help to keep barristers under its own regulatory supervision, and will also expand its supervision to other professionals. This will help to maintain the influence of the Code of Conduct over the quality of services provided by the Bar as well as extending the BSB's influence to entities, Higher Court Advocates and non-lawyers.

The proposals do not include the BSB regulating higher-risk entities where the risk to professional principles is likely to be greater. This offers the Bar, and other legal professionals, an alternative to participating in higher-risk entities.

Increasing public understanding of the citizen's legal rights and duties

The Board believes that its proposals are in general likely to have a neutral impact on public understanding of the citizen's legal rights and duties. It might be the case that in time, increased direct access to the Bar will make the legal advice more accessible and less removed from members of the public, acting to improve understanding.

Supporting the constitutional principle of the rule of law

The Board believes that its proposals are likely to have a neutral effect on the principle of the rule of law.

Protecting and promoting the public interest

On balance, in light of the above considerations and the arguments discussed in the main body of the report, the Board believes that its proposals protect and promote the public interest.

The proposed changes will facilitate benefits in respect of a number of the regulatory objectives whilst avoiding the further fragmentation of regulation of advocacy services that would follow if those benefits could only be realised by barristers moving to firms regulated by other regulators and/or opting for to be regulated by others. In the Board's view, this is in the public interest.

Annex 2

Individual barristers

Bompas QC, G

Coyle, A

Ferguson, F

Hamilton, P

McCarthy, W

Sharma, N

Sherry, M

Smith, A

Sowler, R

Spencer QC, T

Chambers

12 College Place

2-3 Gray's Inn Square

3 Paper Buildings

3 Raymond Buildings

Alexander Chambers

Chambers of Andrew Mitchell QC

Charter Chambers

Citadel Chambers

Fountain Court

Northern Intellectual Property Chambers

QEB Hollis Whiteman

Ropewalk Chambers

Tom Latymer Chambers

Bar associations

Chancery Bar Association (ChBA)

Family Law Bar Association (FLBA)

Lincoln's Inn

Public Access Bar Association (PABA)

South Eastern Circuit

Technology and Construction Bar Association

The Bar Association for Commerce Finance and Industry (BACFI)

Bar Council and Bar Standards Board

Access to the Bar Committee

BSB Complaints Committee

BSB Education and Training Committee

Employed Barristers' Committee (EBC)

The General Council of the Bar

Young Barristers' Committee (YBC)

Public bodies

Office of Fair Trading (OFT)

Crown Prosecution Service (CPS)

Office Immigration Services Commissioner (OISC)

Judicial Appointments Commission (JAC)

Legal Services Consumer Panel

Other

Association of Partnership Practitioners

Bar Mutual Indemnity Fund (BMIF)

Free Representation Unit (FRU)

ILEX Professional Standards

Institute of Barristers' Clerks (IBC)

K & L Gates LLP

Legal Practice Management Association (LPMA)

The Law Society of England and Wales

For further information, please consult the Bar Standards Board's website:

www.barstandardsboard.org.uk