CBA RESPONSE

to

BSB SECOND CONSULTATION PAPER ON LSA 2007

Introduction to the Second Paper

1. The Bar Standards Board issued a Consultation Paper in February 2008 on the implications for the regulation of the Bar of the Legal Services Act 2007. The CBA responded to that paper in June 2008.

2. The BSB has now issued a Second Consultation Paper. This paper deals with two issues only:

    a. **Firstly**, whether barristers should be allowed to practise as **managers** of Legal Disciplinary Practices (LDPs). The BSB believes paragraph 205 of the Code of Conduct (which forbids barristers from supplying services through or on behalf of any other person except as an employee of solicitors) should be amended to allow barristers to be **employees** of LDPs. The present question is whether it should be further amended to allow barristers to be **managers** of LDPs;

    b. **Secondly**, whether barristers should be allowed to practise as members of **Barrister-Only Partnerships (BOPs)**.

3. This second paper does not address the further issues of whether barristers can practise in **Alternative Business Structures (**ABSs) or whether the BSB should regulate LDPs.

4. The BSB's fundamental premise is that barristers should be free to practise in any form of business organisation they think is suitable unless it is not in the public interest to do so. It thus concludes that they should be allowed to be managers of LDPs.

5. On that same premise, the BSB believes barristers should be allowed to practise in BOPs but its view is that such partnerships should not be allowed to carry on activities other than those carried on by barristers in self-employed practice i.e. advocacy and advice.

6. The Working Group of the General Management Committee of the Bar Council, composed of a broad range of representatives from both the privately- and publicly-funded Bar, has once again produced a very detailed response. The response is critical of certain aspects of the BSB's approach, in particular, the "fundamental premise" referred to in paragraph four above. The Bar Council Working Group is firmly against BOPs but is in favour of chambers being able to use a corporate vehicle for block contracting.

7. As before, we are grateful to the Working Group and we see no need to repeat the points so well made in its response. We concentrate instead in setting out what we believe to be the views that best represent the interests of the Criminal Bar.

The CBA Viewpoint

8. The BSB paper poses 14 questions, some of which comprise subsidiary questions. In order to understand our viewpoint we think it helpful to both the BSB and other readers of our response to set out some of the issues currently facing the publicly-funded Criminal Bar.

9. There are over 12,100 barristers in self-employment and the publicly-funded Bar accounts for more than half of them. The CBA was formed in 1969 and is the largest of all the specialist Bar associations, with a current membership of 3,600 members. The vast majority of its members are in self-employed practice in London and the provinces, engaged in both prosecuting and defending criminal cases at every level from the Magistrates' Courts to the House of Lords.

10. The Criminal Bar is facing a time of almost unprecedented difficulty which might fairly be characterised as a struggle for its very survival. Its traditional role is under attack from many different quarters while at the same time its income is reducing. We identify below what we consider are the more important factors which have brought the Bar to this pass and why we consider that they will require the Criminal Bar to be free to adopt some different business structures in order to compete and survive.

11. We do not greet all these changes with enthusiasm and fear some may prove detrimental to the long-term future of a self-employed referral Bar. We feel we should allow these limited changes only because we can foresee that not to do so might be even worse for the profession.

The Rise of HCAs

12. There has been a dramatic increase in the number of solicitor advocates in the Crown Court, appearing as both juniors and advocates in their own right. Barristers appearing regularly in the Crown Court report that there has never been a time like this when so many cases are being handled by solicitors and there is unanimity as to the cause: the poor rates payable to solicitors under the Litigators' Graduated Fee Scheme.

13. The scheme was introduced a little over 12 months ago. The fixed fee structure of the scheme has made many of the traditional tasks of the litigator uneconomic for firms. At the moment, most of the work done by these HCAs is fairly straightforward, mainly guilty pleas and shorter trials but there can be no doubt that as they gain in experience confidence and ability, they will take a larger and larger share of the Crown Court advocacy.

14. This will have an especially serious effect on the junior bar which has traditionally cut its teeth on this type of work. A pattern is beginning to develop of barristers becoming in-house advocates in order to get work and indeed, solicitors recruiting barristers as their in-house advocates; this pattern will increase.

The Role of the CPS

15. Historically, pupils and junior tenants would undertake a significant amount of work prosecuting in the Magistrates' Court. This provided excellent experience both for interlocutory work and trials. This valuable stream of work for the junior Bar has practically been eradicated, however, as the policy of the Crown Prosecution Service is to use in-house advocates (not all of whom are solicitors or barristers) for almost all of their advocacy in the Magistrates' Court.

16. The situation is little better in the Crown Court as the policy of the Crown Prosecution Service is to undertake a significant proportion of their advocacy in the Crown Court. Most CPS areas presently have targets requiring them to undertake 25% of Crown Court work in-house. It is important to appreciate that this percentage is the value of work and represents in the region of 40% - 45% of the number of cases in the Crown Court. The likelihood is that the CPS will want to increase the percentage of work covered in-house.

17. In order to meet those targets the CPS regularly undertakes most of the PCMHs and the guilty pleas as well as basic Crown Court work. This is having a devastating effect on the young Bar.

18. The fees payable to prosecuting counsel are significantly less than those payable to defence advocates. Coupled with the increasing use of in-house advocates, the prosecuting Bar is being squeezed out of its work. With the reduction of opportunity to gain experience, the ability of the junior Bar to compete with in-house advocates will be correspondingly reduced.

19. The speed at which the erosion of the Bar's traditional prosecution and defence work has taken place has been nothing short of alarming. It is noticeable that the regulatory and operational structures of the CPS and defence solicitors are sufficiently flexible to allow such rapid change.

20. The public interest in moving to a system where state prosecutors conduct most of the criminal cases in the Crown Court has not been debated. Furthermore, there has been no consideration of the unfairness to the Criminal Bar and the threat to its existence of placing it in competition with the entities who supply it with work.

The Spectre of Best Value Tendering and One Case/One Fee

21. It may be that the LSC was surprised at the virulence of the opposition to the imposition of BVT when it consulted last year because there are presently no plans to pilot such a scheme in the very near future. We like to think that this battle is won but we have to assume the LSC may try to return to the fray with another version of the scheme within the sort of time frame envisaged for the implementation of the LSA.

22. As for OCOF (One Case One Fee), whilst it remains the nuclear weapon in the government's armoury, it would devastate the independent Bar. We are wholly dependent on solicitors for our work yet are increasingly in direct competition with them. We already hear many horror stories about solicitors demanding from counsel a proportion of their fees. The situation will be infinitely worse if counsels' fees are paid directly to the solicitor. It is inevitable that solicitors will take the lion's share of the income whatever the steps taken to ring fence the advocacy fees.

23. The prospect of these changes makes it imperative that the Criminal Bar is free to adopt structures that would make it feasible and practicable for barristers to be the fund-holders rather than the solicitors.

Changing the Business Structures

24. The effect of these and other changes is difficult to predict but the Criminal Bar is nothing if not resilient. It has demonstrated a capacity

to adapt and survive the manifold changes of the last decade but its ability to do so may well be hampered by the restrictions imposed on its business structures.

25. There is no appetite for partnership at the established Criminal Bar, any more than there is at the Bar as a whole. There is an argument that the lifting of the restriction could be of some benefit to junior barristers who wish to be self-employed but have to compete with employed HCAs: young people starting out in their profession might be more prepared to share their incomes at a stage when there is likely to be little disparity between them, whereas established tenants might balk at subsidising their less successful colleagues. This was the minority view in our first response in June 2008. However, on further consideration, we are unanimously of the view that partnership is not the answer to the difficulties facing the Criminal Bar.

26. The Criminal Bar has to be able to compete with solicitors on more equal terms. The use of a corporate vehicle through which the work is sourced seems to be a far more attractive option than partnership as it may enable barristers to continue to practise in their traditional sets while presenting a corporate face to the outside world. Such a vehicle might also help to cope with whatever new forms of procuring legal services are dreamed up by the government, whether block contracting, Best Value Tendering or OCOF.

27. No one has yet worked out in detail how this corporate vehicle would be structured. Neither is it clear whether, and if so by whom, it would be regulated. It is the view of some that such a limited company would not be a LDP, as it would not itself be exercising a right of audience. However, if a corporate vehicle were a LDP, it would assist the Criminal Bar to have the freedom to be managers of it.

28. Regulation of a LDP by the SRA does not present a particular problem for the Criminal Bar any more than it does to the wider Bar as a whole. We suspect we like it as much or as little as everyone else.

29. The ability to handle client money is also less of a problem for the publicly-funded Bar, at least at the present. Almost all serious crime is legally aided and most money issues revolve around paying fees to other counsel and to experts. That may change with the new rules on means testing in the Crown Court which the CBA has predicted may lead to an increase in privately funded criminal work: the contrary argument is that the proposed irrecoverability of costs by the successful private defendant may stifle any such increase. Some block contracting by a corporate entity may also require barristers to be able to handle client money.

30. With these general observations in mind, we turn to the specific questions.

The Questions

1. **Question 1. Do you agree with the Board's approach (paragraphs 12 to 14) and with the proposals in paragraphs 51-54? If not, please explain why not, and also how you consider that the Board can effectively prevent barristers from becoming managers of LDPs.**

    - The Bar Council Working Group is critical of the BSB's approach to its regulatory duties in paragraphs 12 to 14 of its Consultation Paper. In particular, the Working Group says the BSB has elevated competition above its other regulatory objectives. In general, we agree with these criticisms.
    - That said, we agree that barristers should be allowed to be managers of LDPs. Broadly speaking, we consider that restricting the management of LDPs to solicitors would place the Bar at a significant competitive disadvantage. We do not consider that it is an answer to that disadvantage that barristers are free to re-qualify as solicitors.
    - So far as the proposals in paragraphs 51-54 of the Consultation Paper are concerned, we agree with the statement in paragraph 53 that:

        > *"The fundamental standards and duties of barristers which currently apply to all practising barristers must continue to apply to barristers who are managers of or employed by SRA regulated LDPs… There cannot be different classes of barrister to whom substantially different duties owed to client and court apply."*

    - The proposed amendments are at Appendix B of the BSB Paper. The BSB has sought to make provision for barristers to practise as managers of LDPs simply by disapplying rule 205 so that it will not apply to barristers practising as managers of LDPs. In principle, we agree with this approach.

    - However, Appendix B contains many consequential amendments to various other provisions of the Code and these are by no means easy to follow. We cannot say therefore that we agree with every proposed amendment and we would welcome the opportunity to respond in more detail at a later date to these proposed amendments.

- We note that there is no specific reference to paragraph 602, the cab rank rule. We have previously expressed the view that the cab rank rule should apply to all advocates, that is solicitors as well as barristers. That remains our view so that it should continue to apply to the barrister manager of a LDP.

- The BSB asks how it could stop barristers becoming managers of LDPs. We do not answer this as we do not wish the BSB to stop barristers becoming managers.

2. **Question 2 Do you consider that there are any restrictions or safeguards that should be attached to any permission to practise as the manager of a LDP, such as a requirement to inform the firm's client of his or her right to access advice or advocacy services from the independent Bar? If so, what are they?**

   We agree that this requirement should be imposed on any permission granted to barristers to act as the manager of a LDP. In the light of the potential conflict between a manager's duty to maximise the profit of a LDP, we also believe that there should be a requirement that the managers of LDPs should act in the best interests of their clients.

3. **Question 3. Do you agree that barristers should be allowed to be shareholders in LDPs, subject to the safeguards described in paragraph 48 [*this should be paragraph 49*] above? Are any additional safeguards required? If so, what are they?**

   We answer Yes to the first question and No to the second.

4. **Q4. Do you agree that barristers should not be allowed to practise both as the manager of a LDP and as an independent practitioner?**

   We do agree because the barrister would otherwise be faced with a conflict of professional duties. If the cab rank rule did not apply to barrister managers of LDPs that would be an additional reason why barristers could not practise as both. We should point out that we do see this restriction applying to the other corporate models referred to at paragraph 73 of the BSB's paper and in paragraphs 5-9 of the Bar Council Working Group response.

5. **Question 4: Do you think it would be desirable to strengthen the provisions at paragraph 601 of the code of conduct? If so, in what way? (Paragraph 45?)**

No.

6. **Do you agree with the amendments to the code proposed in Appendix B?**

   We have already stated that these proposed amendments are complex and we do not feel able to express a settled view.

7. **Question 7. (a) Do you agree that barristers should be permitted to practise in barrister-only partnerships? (b) If so, should these be restricted to the provision of advocacy and advice services?**

   - In paragraphs 10-13 of our first response dated June 2008, the unanimous view was that we doubted that partnership would be of any real benefit to the Bar or to the public for reasons which we summarised in those paragraphs. The majority of us opposed partnerships of barristers on principle for that reason although a minority expressed the view that some barristers, particularly junior barristers, **might** see advantages of such an arrangement and should be entitled to have it if they chose.

   - **Now that the issues surrounding BOPs have been much more extensively canvassed and considered, we are unanimously of the view that BOPs should not be permitted**. We unanimously agree that barrister-only partnerships are not the right solution to the problems that currently face the publicly-funded Criminal Bar: indeed we are somewhat at a loss to understand why the BSB has focused on this particular business structure in the light of the considerable problems it brings.

   - We are firmly of the view that the sort of corporate structures mentioned above are much more likely to prove useful to the Bar and the wider public.

8. **Question 8.Are you likely to consider joining or establishing a partnership of barristers for any reason? Or you more or less likely to do so if barristers are permitted to become managers of LDPs? Would you be more or less likely to practice through limited liability partnerships or limited companies if this were to become possible?**

   Since this response is issued on behalf of the CBA, it would seem inappropriate to answer questions which are plainly addressed to

individual practitioners. These questions would be more appropriately dealt with in a professionally designed market research programme to ensure that the response was representative of the profession as a whole.

9. **Question 9. Do you agree that barristers who are members of a barrister-only partnership should be subject to the cab-rank rule?**

   We previously expressed in paragraphs 7-9 our first response that the cab rank rule should be retained and that so far from supporting any relaxation of it, we would support an extension of it. This remains our view. We oppose barrister-only partnerships but believe that non-barrister advocates should be subject to the same rule and for the same reason, namely, that it is in the public interest.

10. **Question10. If barrister-only partnerships were permitted, what restrictions or safeguards would the Board need to put in place to ensure that consumers understand that they are engaging a firm of barristers to act for them, rather than a single, independent barrister?**

    The sort of additional adapted rules in the Code of Conduct that would be needed for a BOP are set out in paragraph 68 of the BSB's Second Consultation Paper. Whilst we are inclined to the view that the matters set out therein would be sensible requirements for any such partnerships, these additional requirements reinforce our view that barrister-only partnerships are neither attractive to the Bar nor in the public interest. These comprehensive changes are by and large antithetical to barristers' traditional working methods and would, in our view, have a tendency to compromise some of the essential features of independent advocates.

11. **Question 11. Should barristers be permitted to practise both as members of a partnership and as sole practitioners? If so, what safeguards would be appropriate (paragraph 65)?**

    We do not think that barristers should be permitted to practise both as members of a partnership and as sole practitioners since conflicts of duties would be bound to arise. We do not understand why the BSB appears to be taking a more permissive approach to barrister-only partnerships than to barristers-managed LDPs as set out in Question 4 above.

12. **Question 12. Do you agree with the list in paragraph 68 above of additional regulatory matters that would need to be addressed? Are there other matters that would need to be addressed?**

    The answer to the first question is "Yes"; and to the second "No".

13. **Question 13. Should the Bar Council take steps to enable the Board to regulate entities such as LLPs and limited companies?**

    This question needs exploring further particularly in the context of possible agency companies established by Chambers to facilitate block contracting.

14. **Question 14. Are there any further provisions that you think necessary or desirable?**

    None that we can think of.

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