



CBA SUMMARY
of
Bar Standards Board Second Consultation Paper
Issued December 2008
Entitled
“IMPLICATIONS FOR THE REGULATION OF THE BAR
IN ENGLAND & WALES”

1. The paper asks whether barristers should be allowed to practise i.e. supply legal services as managers of Legal Disciplinary Practices (LDPs) and in barrister-only partnerships (BOPs) [paragraph 4].
2. The paper does **not** address the issues of whether barristers can practise in Alternative Business Structures (ABSs) [paragraph 5] or whether the BSB should regulate LDPs [paragraph 6].
3. A LDP is defined as:
 - a. a body corporate or unincorporated;
 - b. at least 75% of the managers of which are legally qualified and at least one of whom is a solicitor; and
 - c. at least 75% of whose shares/voting rights are held by legally qualified persons [paragraph 7].
4. The BSB has been advised neither it nor the Bar Council has power to regulate LDPs. Most will be regulated by the SRA [paragraph 9].

5. The BSB states that paragraph 205 of the Code of Conduct (which forbids barristers supplying services through or on behalf of any other person except as an employee of solicitors) prevents barristers being employees or managers of LDPs. The BSBS believes paragraph 205 should be amended to allow barristers to be **employees** of LDPs. The question now is whether it should be further modified to allow barristers to be **managers** [paragraph 10].
6. The BSB's fundamental premise is that barristers should be free to practise in any form of business organisation that is suitable and not against the public interest. Its view is that barristers should not be restricted from being managers of LDPs unless that restriction is in the public interest [paragraph 13].
7. The competition aspects are dealt with in paragraphs 15-19. The response of the Office of Fair Trading to the first consultation paper was that barristers should be allowed to form partnerships and manage LDPs and the BSB should revise the Code of Conduct [paragraph 16].
8. The BSB therefore took advice from Peter Roth QC. His opinion is that the ban on barristers acting as managers is unlawful unless there are sound reasons [paragraph 17]. The BSB, based on his opinion (although aware there are contrary opinions) does not think there are sound reasons for stopping barristers being managers of LDPs [paragraphs 18-19].
9. The argument that the high esteem of the Bar is because of self-employment is discussed. The BSB thinks this reputation stems from the high quality of advice and advocacy rather than the business structure [paragraph 21]. The self-employed Bar is a valuable public resource but it has been largely unaffected by the advent of employed barristers and solicitors' extended rights of audience [paragraph 22].

10. The arguments against allowing barristers to be managers of LDPs are summarised in six bullet points in paragraph 24 and then developed and answered across succeeding paragraphs as follows :

- The LSA 2007 silent about barristers being managers of LDPs [paragraphs 25-26];
- Loss of independence [paragraphs 27-30];
- Reduced choice of counsel [paragraphs 31-37];
- Cannot apply cab rank rule to managers of LDPs [paragraphs 38-42];
- Refusal to act for certain clients [paragraphs 43-45];
- Handling client money [paragraphs 46-48].

11. In short, the BSB believes all these objections can met.

12. The BSB sees no objection to a barrister being both a shareholder in a LDP and an employee of it. If such a barrister/shareholder in fact practises elsewhere, there would have to be safeguards to avoid conflicts [paragraph 49].

13. The BSB is minded to forbid a barrister who is a manager of an LDP from being an independent practitioner, partly because of conflicts of interest and problems of confidentiality, partly because the barrister might conduct different parts of their practice through different entities to transfer risk [paragraph 50].

14. The BSB proposes to allow barristers to be managers of LDPs regulated by the SRA [paragraph 51].

15. There will have to be amendments to the code especially to paragraph 205. The problem is that s.52 LSA 2007 provides that in any conflict between an individual regulator [BSB] and business entity regulator [SRA] the latter prevails. The SRA considers that a barrister/manager in a SRA regulated LDP

would be bound by SRA rules that apply to all SRA regulated firms. The SRA is dis-applying its rules to solicitors who are managers of firms regulated by other approved regulators [paragraph 52].

16. The BSB agrees in principle but considers there are fundamental standards & duties of barristers that must apply to managers or employees of LDPs as there cannot be different classes of barristers [paragraph 53].

17. The proposed amendments to the Code are in Appendix B [paragraph 54].

18. At this point in the paper, the BSB poses six questions:

- a. Do we agree with the Board's approach in paragraphs 12-14 and its proposals in paragraphs 51-54? If not, why not? How could the BSB stop barristers becoming managers of LDPs?
- b. Are there restrictions that should apply to practising as a manager such as telling a client he can get advice from the independent Bar?
- c. Do we agree barristers should be allowed to be shareholders in LDPs subject to safeguards in paragraph 48 and should there be additional safeguards?
- d. Do we agree barristers should not be allowed to be both managers of LDPs and in independent practice?
- e. Should paragraph 601 of Code be strengthened? If so, how?
- f. Do we agree with the amendments to the Code in Appendix B?

19. Part 2 of the paper deals with BOPs [paragraphs 55-70].

20. The BSB believes barristers should be allowed to practise in BOPs for the same reasons as they should be allowed to practise as managers of LDPs i.e. they should be free to adopt any lawful business model unless against public interest. The BSB considers it is unlawful to restrict competition by

preventing partnership unless there were evidence or logic showing it was not in the public interest [paragraph 56].

21. The BSB deals with some general objections such as conflicting out, the loss of choice if partnerships became widespread etc and considers that responses to the first consultation paper suggest there is no widespread interest in partnerships [paragraph 57].

22. The BSB considers partnership might appeal to small groups of young or provincial barristers or to enable sets to employ associate barristers [paragraph 58].

23. The BSB is aware that the criminal and other publicly-funded Bar have a significant interest in block contracting, that there are difficulties in making a living at the self-employed bar, that the difficulties are likely to increase rather than decrease and that partnership could help [paragraph 59].

24. The board considers four specific questions that require consideration at paragraph 60 and answers them at paragraphs 61-70;

- The cab rank rule should apply to BOPs [paragraph 61-64];
- Practice in more than one capacity may be possible and the BSB would like our views [paragraph 65];
- Large BOPs in one area might restrict the appointment of recorders & deputy judges but BOPs should not be banned for this reason [paragraph 68];
- The regulation of BOPs would include systems for conflict checks and confidentiality; possible appointment of a managing partner; client information that dealing with a partnership not an individual and so on [paragraphs 67 & 68]. There are bound to be increased regulatory costs [paragraph 69] and the BSB does not have the expertise to regulate the conduct of litigation, so BOPs would have to be limited to advocacy and advice [paragraph 70].

25. The BSB has only considered partnerships under the 1890 Act: since the BSB cannot regulate incorporated bodies, it does not consider other forms of incorporated entity so it could not allow barristers to operate in any incorporated organisation other than a LDP regulated by the SRA [paragraph 71] or an LLP [paragraph 72].
26. The BSB is aware of other forms of business model designed to deal with block contracting. It will wait for detailed proposals but its position will be the same: any lawful organisation will be permitted provided an appropriate regulatory regime is in place and there is no good reason to suppose it is detrimental to the public interest [paragraph 73].
27. The provisional conclusions of the BSB are that barristers should be allowed to practice in BOPs under the 1890 Act and they should be subject to the cab rank rule. The BSB does not think it feasible to regulate LLPs or limited companies under its existing powers [paragraph 74].
28. The BSB recognises that its arguments of principle apply to business organisations other than partnerships and will consider those when detailed proposals are put forward. Whether they are permitted will depend on whether the BSB could devise an appropriate regulatory regime at that time [paragraph 75].
29. There are then questions 7 -14 as follows:
- a. Should barristers be permitted to practise in BOP partnerships?
 - b. If yes should BOPs be restricted to advice and advocacy?
 - c. Are you likely to join a BOP for any reason?
 - d. Are you more likely to do so if barristers were permitted to become managers of LDPs?
 - e. Are you more likely to practise through LLPs or limited companies if this were possible?

- f. Do you agree BOPs should be subject to the cab rank rule?
- g. If BOPs are allowed, what safeguards need to be put in place to ensure consumers understand they are engaging a firm?
- h. Should barristers be allowed to practise as both members of a partnership and as sole practitioners? [paragraph 65]
- i. Do you agree with the list of additional regulatory measures in paragraph in paragraph 68? What else need to be addressed?
- j. Should the Bar Council take steps to enable BSB to regulate LLPs and limited companies?
- k. Are there any further provisions you think necessary or desirable?

30. There are three appendices:

- a. Appendix A sets out excerpts from the Code paragraphs 205, 401, 601, 602 and 606;
- b. Appendix B sets out the lengthy and detailed proposed Code amendments to enable barrister to be employees and managers of LDPs, with some prefatory comments;
- c. Appendix C sets out the list of consultees.

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11 March 2009