

Consultation response

BSB: Regulating Entities

Overview

1. **Overall, the Panel supports the BSB's proposal to be a specialist advocacy regulator. However, this decision may have wider implications for the BSB's approach to regulation which should be considered.**
2. **The Panel supports permitting barristers to conduct litigation. However, accreditation and practical experience must be required before authorisation is granted due to the significant consumer detriment that can result from poorly conducted litigation.**
3. **The BSB must ensure that barristers have the skills to deal directly with lay clients, as this will be a new experience for some advocates. Client care should infuse its regulatory arrangements – in the training of advocates, code of practice and in monitoring compliance.**
4. **The extension of the cab-rank rule to entities is important for ensuring access to justice for unpopular clients. However, increasing direct access to advocates may mean the BSB should consider whether the rule could also apply to lay client instructions.**

The proposals

5. The BSB is proposing that it become a specialist regulator of entities which focus on advocacy and related services, including ancillary litigation services.
 - BSB regulated entities would be subject to ownership and management restrictions:
 - No external ownership (i.e. all owners would need to be managers)
 - Non-lawyers comprising no more than 10-25% of ownership and management; and
 - The majority of managers would need to practice as advocates in higher courts.
 - The BSB would not regulate multi-disciplinary practices
 - Barrister managers and employees would be permitted to conduct litigation
 - Restrictions on self-employed barristers conducting litigation would be lifted
 - Entities would not be permitted to hold client money but could manage funds through a third-party 'custodian' (e.g. a single client account managed externally from the entity).
 - Entities would have to develop appropriate systems to identify and manage conflicts of interest

- The statutory non-discrimination rule for acceptance of instructions would apply to all advocates in any entity
- The cab-rank rule would apply to entities in the same way as for self-employed barristers (that is, for instructions from professional clients for named advocates only)
- BSB would introduce an interventions scheme (still to be developed)
- Entity-wide professional indemnity insurance would be required, subject to minimum terms and conditions.

The Panel's response

6. Given the breadth of issues being considered, the Panel has limited its comments to those areas likely to have a direct impact on consumers.

Implications for the regulatory framework

7. The consultation paper considers in detail the practical implications of regulating entities. Before commenting on these proposals, the Panel briefly discusses the possible implications of this move for the BSB's overall regulatory framework.
8. The BSB has previously agreed to permit barristers to work in entities regulated by other approved regulators and to work in Barrister Only Entities (BOEs). The Panel was not constituted when these decisions were consulted on, but we welcome them as positive steps towards opening up the market to extend choice for consumers. The starting point should be to give barristers freedom to choose the business models that make them most attractive to

potential clients subject to suitable safeguards to protect consumers.

9. In this context, the Panel supports the BSB's proposal to become a specialist advocacy regulator. Ideally, we would prefer the BSB to be the only regulator of advocacy services as we are sceptical that regulatory competition benefits consumers. Whilst it is designed to facilitate an efficient regulatory regime and so minimise costs that are passed on to clients, practitioners are likely to be attracted to the lowest cost option, which may provide insufficient consumer protection. This might lead to a race to the bottom.
10. However, regulatory competition is a fact of legal services regulation. With this in mind, the BSB faces a balancing act in terms of its regulatory jurisdiction. Certainly it should only regulate those business structures for which it has the expertise and resources. Nonetheless, if the BSB is too restrictive in the business structures that it is prepared to regulate, advocates may be tempted towards other regulatory regimes. Through its continued reluctance to regulate MDPs the BSB is arguably being unduly cautious.
11. Regulating entities has implications for the BSB's style of regulation. The existing regime is based on a detailed set of rules and requirements. Whilst this may work satisfactorily for regulating individual practitioners, an outcomes-based approach is better suited for regulating entities as management systems need more freedom to cater for a diverse set of business arrangements. In a changing market, and one in which advocates will have greater contact with lay clients, entities require the flexibility to innovate and develop more

consumer focused services and deliver these through a range of different business models. A prescriptive, rules-based approach is reactive and could restrict innovation that benefits consumers, whereas an outcomes-based approach would enable the BSB to future-proof its regulatory requirements and still afford consumers sufficient protection. The Panel has set out the wider advantages of outcomes-based regulation in its responses to SRA consultations on the issue¹.

12. Finally, regulating entities throws up a series of different challenges to those to which the BSB is accustomed when regulating individuals. The BSB must understand organisations as well as the practice of advocacy. It is important that the BSB builds up the knowledge and skills required for this task, so that there can be confidence about the organisation's ability to protect consumers. This expertise should be found at executive and board levels.

Litigation services

Risks to consumers from poorly conducted litigation

13. The Panel supports barristers being permitted to conduct litigation. The option of a one-stop-shop advocacy and litigation service should have benefits for consumers by delivering greater choice and driving competition.
14. However, if barristers are to conduct litigation, the BSB must introduce robust quality assurance measures, as poorly conducted litigation can have a major impact on case outcomes. Furthermore, litigation involves strict processes and

procedures which, if conducted incorrectly, can have major repercussions for consumers, including cases dismissed due to missed time limits, and unnecessary expenses for clients due to inefficient systems. Most barristers will have to learn from scratch the processes and procedures, whilst the BSB will need ways of verifying their competence.

Direct contact with lay clients

15. A key outcome of the proposed changes is that barristers will need to become '*accustomed to receiving instructions from – and dealing directly with – lay clients*'. In conducting litigation, barristers will be taking on new roles and responsibilities with clients. These include providing advice about the merits of litigation, negotiating settlements (instead of simply acting as the advocate and advisor when the case reaches court), and developing ongoing relationships with clients.
16. The Panel's work on quality assurance² found that consumers want their lawyers to be empathetic, to explain the legal process, to be efficient and professional, and to tailor their knowledge proactively to the specific situation. The BSB must ensure that individuals and entities meet consumer expectations around client care, in addition to providing technically sound advice and advocacy. This requires the BSB to incorporate greater emphasis on client care in its regulatory regime, with client care becoming central to the code of conduct and to BSB compliance monitoring. The inclusion of lay client care skills in training or accreditation is welcome³.

17. The Panel raised these issues in relation to the Quality Assurance for Advocates (QAA) scheme for criminal advocates⁴ but it applies across all advocacy areas.
18. QAA will be mandatory for criminal advocates and may be extended to other practice areas. Whilst a mandatory scheme ensures that advocates can only offer services to clients for the level of complexity they are authorised to provide, this is not true outside of this regime where clients can exercise a wider degree of choice. Solicitors, as professional clients of advocates, should have the required knowledge and experience to identify an appropriate advocate, and therefore filter the market for their lay clients. However, if direct access for barristers increases, the BSB will need to explore mechanisms, such as consumer education and quality assurance, which can help to match clients with suitably qualified advocates.

Authorisation and accreditation

19. The Panel is pleased that the BSB has recognised the quality issues involved in allowing barristers to conduct litigation. In particular, paragraph 1.40 notes that '*many barristers will not have any training in the skills required to conduct litigation*'.
20. On this basis, the Panel strongly supports the BSB requiring both accreditation and practical experience before litigation authorisation is granted to any barrister. In practice, this means that entities are licensed by activity (i.e. they must be pre-approved to conduct litigation). Furthermore, an individual barrister would need to be authorised by the BSB before being able to conduct litigation, or be working within an entity under the supervision of an authorised and experienced litigation barrister. The Panel suggests that any entity seeking to conduct litigation must have at least one manager who is authorised to conduct litigation, has a strong record of experience, and who can take responsibility for delivering services that meet the required standards.
21. In the case of self-employed barristers, this may require an alternative accreditation path with supervised practice hours, that must be fulfilled before authorisation to litigate is given. Litigation services are not just about skills but also case management. Should self-employed barristers choose to become single-person entities offering litigation, there is a risk of insufficient administrative support for the complex procedures. The Panel strongly agrees that the BSB would need to satisfy itself that suitable arrangements were in place before any authorisation⁵, and encourages it to ensure that risks associated with small entities are fully considered.
22. Notwithstanding the above, barristers should have the option of not providing litigation services, particularly in the context of the public access scheme. The option of clients being able to act as the litigant themselves, with barristers then providing solely advocacy, could reduce costs. If clients no longer wanted to act as litigants, then it is likely self-employed barristers will just choose not to offer this option. However, if there is demand, there is no reason why such a service should not be available.

Costs of litigation services

23. The Panel welcomes the competition with solicitors from barristers offering litigation. This could reduce costs and make services more efficient for consumers through packaged delivery. The Panel notes the BSB's concern around increased overheads but is not convinced that allowing barristers to conduct litigation would increase the overall costs to consumers, thus reducing access to justice.
24. Whilst barristers providing litigation may have increased overheads, the packaged costs of combining litigation and advocacy services should be no more than if the client had to pay solicitors for litigation services (with the associated overheads) plus advocacy from a self-employed barrister. The change will enable barristers to compete with solicitor advocates, who already offer packaged services.

Client money

25. The Panel notes that satisfactory systems operate for the payment of fees and disbursements through the Public Access Scheme. Experience suggests that lay clients are more reliable in making payments than professional clients and barristers are able to pursue clients who do not pay. Staged payments on completion of milestones already help barristers to manage risk where there are large fees. Therefore, the Panel sees no need to provide additional arrangements for payments to barristers in relation to litigation, by enabling them to hold client money. Both payment in arrears and staged payments should be permitted to enable client choice.

26. The Panel accepts that the risk of non payment by clients is greater in relation to handling settlements and court awards. Furthermore, there are risks to the client of the barrister misappropriating funds in a successful claim. The proposed approach of using a third party is supported as it removes the fraud issues that have faced solicitors in relation to client funds.
27. The Panel supports the BSB investigating this option further. The main concern is that the 'custodian' must be independent and able to be fully scrutinised by the BSB. Furthermore, clients should expect service standards around payment, particularly around timeliness, as delay could lead to financial detriment, such as loss of interest. As the client's contractual relationship would be with the barrister entity, clients should be able to seek redress from the Legal Ombudsman.

Managing conflicts of interest

28. The Panel supports the BSB's analysis that regulating entities should not reduce access to justice due to the commercial incentives. This debate was resolved in a previous consultation and the Panel does not wish to expand on this point.
29. The Panel welcomes the emphasis on requiring firms to have appropriate systems to manage conflicts and to consider whether any conflicts arise before accepting instructions. However, it is unclear from the brief discussion of the issue how the BSB intends this regime to operate in practice and, in particular, how it intends to monitor compliance. The Panel would welcome further development of the BSB's thinking in this area.

30. There is an opportunity to learn from the SRA. An outcomes-based approach, supported by guidance, is more likely to protect consumers than detailed prescriptive rules which cannot foresee every potential conflict. However, increased freedom for entities to interpret which course of action would be in the best interests of clients should be accompanied by tough sanctions for those who abuse this position of trust.

Cab-rank rule

31. The Panel welcomes the proposal to extend the cab-rank rule to entities. The rule is vital to ensuring access to justice for unpopular clients and to upholding the rule of law. The survey evidence shows that 63% of barristers stated that maintenance of the rule was important or very important. Rather than seeing this as significant support for the rule, the Panel is alarmed that more than one-third of barristers gave an alternative response.
32. The consultation proposes that the cab-rank rule apply to entities in the same way as to self-employed barristers, that is, for instructions from professional clients for named advocates only. This approach made sense in the context of minimal direct access to barristers. However, with increasing direct access via entities, this would mean that an advocate would be obliged to take a case for a specific client who approaches them through a solicitor but would not be so obliged if the same client approached them directly. The Panel is concerned this could inhibit consumer choice; the BSB may need to give further consideration to this matter.

Insurance

33. The development of appropriate consumer protection through professional indemnity insurance is increasingly difficult in the legal services market. In looking to develop new PII arrangements for entities, the BSB should consider the challenges facing the SRA, including which clients are covered by mandatory insurance.

December 2010

¹ Legal Services Consumer Panel, *Consultation response – Solicitors Regulation Authority: Achieving the right outcomes*, February 2010.

² Legal Services Consumer Panel (2010) *Quality in Legal Services*, <http://www.legalservicesconsumerpanel.org.uk/ourwork/QualityAssurance.html>

³ Para 1.56

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http://www.legalservicesconsumerpanel.org.uk/publications/consultation_responses/documents/2010-11-12_JAG_QAAScheme.pdf

⁵ Para 1.69