THE INSTITUTE OF CHARTERED ACCOUNTANTS
IN ENGLAND AND WALES

9 May 2008

Our ref: ICAEW Rep 66/08

Your ref:

Toby Frost
Bar Standards Board
289-293 High Holborn
London
WC1V 7HZ

By email: TFrost@barstandardsboard.org.uk

Dear Mr Frost

IMPLICATIONS FOR THE REGULATON OF THE BAR IN ENGLAND AND WALES

The Institute of Chartered Accountants in England and Wales (the Institute) welcomes the opportunity to comment on the consultation paper *Implications for the regulation of the Bar in England and Wales* published by The Bar Standards Board in February 2008.

The Institute operates under a Royal Charter, working in the public interest. Its regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the Financial Reporting Council. As a world leading professional accountancy body, the Institute provides leadership and practical support to over 130,000 members in more than 140 countries, working with governments, regulators and industry in order to ensure the highest standards are maintained. The Institute is a founding member of the Global Accounting Alliance with over 700,000 members worldwide.

General comments

The Institute supports the concept of a strong and independent Bar and considers that Barristers have a critical part to play in the delivery of legal services to the public and private sectors. However embracing a wider range of operational structures from which such services can be delivered does not need to undermine that concept.

The accountancy profession has operated through a variety of different structures over an extended period. The result has been healthy diversity, increased choice and the development of practices with expertise in niche areas (and thus arguably better quality). There is no empirical evidence that this flexibility has lead to any reduction in ethics or standards.

We urge the Bar Standards Board (BSB) to introduce flexibility and only seek to prohibit structures or introduce or retain restrictions where there is a clear public interest justification for so doing.

We would be happy to more actively support the BSB in its exploration of potential new practice vehicles, business models and regulatory challenges. If we can provide

more advice and support or share our experiences, many of which are transferable to the legal service market, we invite you to contact us further.

Specific comments

Answers to the questions specifically posed in the consultation document are given in Appendix A.

New forms of vehicle for the delivery of services

It is our understanding that the Legal Services Act does not prohibit any forms of legal services practice. Thus it will in theory be permissible for Barristers to use corporate and non corporate entities to deliver services. Furthermore more complicated structures may exist which could be considered, by the independent Bar particularly, to enable individual Barristers to share administrative and functional costs whilst retaining independence and self employed status. Such alternative approaches could address concerns expressed regarding the management of conflicts of interest and the maintenance of all or part of the cab-rank rule.

Principles v rules

The Institute believes that conduct is more effectively controlled and monitored by using principles rather than rules. Our Code of Ethics requires members to consider not only the letter of the requirement but also the spirit. Principles have the flexibility to be applied in any situation. It is difficult, if not impossible, to build in equivalent flexibility into the drafting of rules - with the result that;

- situations fall between the 'gaps', and/or
- an approach of compliance with what is said rather than what is meant is engendered.

We believe a 'principles based' approach will be of considerable use to the BSB, for example in considering the future of the 'cab-rank' rule.

Forms of practice and areas of service which should be licensed by the BSB

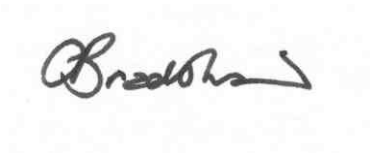
In our view the BSB should not limit the forms of practice it may license or the types of legal service that may be provided by new business structures it seeks to regulate beyond the skills and competence of the Barristers which are seeking to provide them. There are few situations where the introduction of appropriate safeguards cannot address the risks introduced. We are happy to share our experiences of the development of safeguards, particularly there use in conflict management with the BSB.

We also believe that Barristers should be able to look to the BSB to be their regulator for a full range of services and not be forced to either go to another regulator, such as the SRA, or to the LSB.

We urge the BSB not to 'rule out' either forms of practice or areas of activity on the presumption that difficulties will arise. Instead we urge the BSB to be as flexible as possible and to draw on the experiences and skills of other regulators (legal and non-legal) to adapt to the changing face of the Bar. If it does not do so the fear, that the Bar will lose its unique position as the corner stone of the law and its relevance in a modern legal services market, will be realised.

Please contact me should you wish to discuss any of the points raised in this response.

Yours sincerely



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Appendix A

Q1. Do you agree with the general approach set out in paragraphs 16-20?

We believe that elements of the cab-rank rule could and should be retained and applied to the work of Barristers. We therefore do not entirely agree with the stated approach. We agree that the rules which prohibit Barristers from supplying legal services through other persons should be relaxed.

Q2. How effective in practice, in your experience, is the "cab-rank" rule in securing for clients the Counsel of their choice? Do you consider that the adverse consequences mentioned above are likely to occur if the rule is abolished? If so, how could they be reduced or avoided?

On anecdotal evidence only we understand that the cab-rank rule can be circumvented if a Barrister does not wish to act and that few or no misconduct cases have been taken for breach of this rule. Furthermore we recognise the benefit which the cab-rank rule provides to Barristers who are obliged to act for parties who are seen as undesirable in the public eye, but who would not wish to be attributed with sympathy for extreme or unpalatable views. A principle which maintains the obligation to act in all but defined circumstances could assist in retaining what is good of the rule but permitting flexibility suitable to a wide range of structures for the delivery of Barrister's services.

Q3. Do you agree that it will not be possible to apply the "cab-rank" rule to Barristers practising in ABS or LDP firms?

For the reasons stated above we consider it will be possible to apply elements of the rule to all firms and independent Barristers.

Q4. Should the "cab-rank" rule, as set out in paragraph 602 of the Code of Conduct, be abolished as regards Barristers who are members of a partnership of Barristers?

See above comments.

Q5. If the "cab-rank" rule is abolished as regards Barristers practising in ABS firms and partnerships, should it also be abolished as regards sole practitioners?

See above comments.

Q6. Should the code of Conduct be revised so as to permit a Barrister to supply legal services to the public whilst acting as a manager of an ABS firm or LDP? If not, what are the arguments that would justify retaining the present restrictions (or something closely akin to them)?

Yes. We support amendments to permit Barristers to supply legal services in this way.

Q7. Should the Code of Conduct be amended to allow Barristers to provide legal services to the public while acting as a manager of an LDP?

Yes. We support amendments to permit Barristers to provide legal services in this way.

Q8. Should the Code of Conduct be revised so as to permit a Barrister to provide legal services to the public while a member of a partnership? If so, in what kinds of partnership?

We support revision of the rules to permit all forms of structure which Barristers wish to adopt. This should include partnerships through to corporate vehicles and should not rule out more complex structures which might provide access to the benefits of being one legal entity without entirely removing the benefits of independent self-employment.

Q9. As regards Barristers who are members of Legal Disciplinary Practices with at least one solicitor member should the restrictions in paragraph 307(f) and paragraph 401(b) be maintained? Or should some or all be removed?

It may be appropriate to point out that receiving payment for fees in advance is not the same as holding clients' money. This distinction may not be clear to individuals and entities who have not previous experience of the area. Any requirements introduced with regards to client money should not impede the receipt of fees in advance for work.

We are of the view that holding clients' money and other matters relating to the management of clients' affairs should not be treated as one category nor a blanket prohibition or permission to hold clients' money considered. New structures which may include LDPs between Barristers and other lawyers or ABS (with or without non-lawyer managers) will not automatically result in the holding of clients' money by Barristers.

It should be possible to identify the reasons for prohibiting Barristers from acting in a number of client facing roles which include the management of clients' affairs. Any rules introduced or retained should consider the risk presented and the appropriate safeguards required to strike a balance between the freedom of the Barrister to offer services and properly protecting the consumer and public interest.

One possible solution to bridge between the current prohibition and the evolution of some Barrister's roles might be to retain the prohibition for LDPs where there are no solicitor (or equivalent professional) managers who have previous experience of holding client monies. The BSB might consider in the interim sub-contracting any oversight/regulation of new forms of practice which wish to hold client money to the SRA or other suitable regulators who have experience and procedures already in place to appropriately monitor the risks of holding client money.

Q10. Is the Board right in its view that, subject to the point mentioned in paragraph 89 above, it should be the prime regulator of the professional conduct in ABS firms of Barristers in England and Wales? If not, who might alternatively or additionally exercise that role?

Yes.

Q11. Do you foresee any serious problems arising if there is a divergence between the rules of different regulators? If so, what might they be?

We do not foresee serious problems as a result of a divergence between the rules of different regulators. However the best way to avoid such serious problems will be to work with other regulators in developing the BSB's rules in order to minimise any conflict as between regulators both legal and non-legal.

Q12. Should the Board seek to become a licensed regulator of ABS firms? If so, should it confine that role to firms wholly or mainly engaged in the provision of advocacy services, or advocacy services and legal advice, as the arguments may suggest would be appropriate?

The BSB should seek to become a licensing authority for new forms of practice in which Barristers might become involved. We urge the BSB to introduce the maximum flexibility and not to restrict the sorts of structure or services offered unnecessarily.

Q13. Do you consider that the Solicitors' Regulation Authority should be the business regulator for all LDP with solicitor and Barrister members? Or should the Board seek power to regulate LDPs? If so should powers be confined to regulation of LDPs undertaking the type of work currently undertaken by the self-employed Bar? Within what timescale should the power be available to be exercised by the Board?

We would wish to see the BSB as a possible regulator for LDPs. See also comments above.

Q14. Do you agree that partnerships of Barristers to supply legal services should be permitted?

Yes.

Q15. If partnerships of Barristers to supply legal services should be permitted, should the activities of such partnerships be restricted to providing the types of service provided by sole practitioners, that is, essentially advisory and advocacy services? If not, what additional types of services should be permitted?

As stated above restrictions should be minimal and dependent on the competence and training/skills of the individual participants. Please also see comments above regarding arrangements with other regulators to address the BSB's inexperience and lack of existing mechanisms for regulating such services.

Q16. Would it be sufficient to rely on the rules of professional conduct to regulate such partnerships, subject only to possible additional rules to strengthen the requirements related to governance of the partnership? If not, what alternative or additional rules would be needed?

We believe that the professional conduct rules, amended to reflect new structures or situations such as conflict management and new service offerings, would be sufficient.

Q17. What measures, if any, do you consider would be appropriate to strengthen the requirements related to governance of the partnership?

Good governance of any structure supported by appropriate monitoring and sanctions for non-compliance, including the less formal operation of chambers should be encouraged. We see this as an important step for the independent Bar as well as any new practice vehicles. We see this as a vitally important consideration for the BSB's success as a regulator of Barristers going forward.

Q18. Is there a need for rules relating to the employment of staff by partnerships of Barristers?

It is important that employment within any new forms of practice vehicle should be appropriately covered by the BSB's rules. Any such rules introduced however should be accompanied by guidance and support to achieve compliance. We believe that the rules applied to new forms of structures should also be considered in terms of the accountability of "employees" of independent Barristers.

Q19. Should the rules about the persons with whom Barristers can share the administration of their practices be relaxed?

Yes.

Q20. Should associations short of ABSs or partnerships be considered as described in paragraph 104 above?

Maximum flexibility should be introduced. Therefore we caution the BSB against introducing arbitrary cut offs (such as no-more than 25% non-Barristers). Rules should address the real risks which are present. See also our comments on assuming difficulties regarding client money etc.

Q21. Is there any demand from Barristers or consumers for such associations?

Anecdotally we are aware that some Barristers and consumers of Barrister's services would welcome more flexibility, particularly in the management of "block contracts" and accessing multiple expert services under one roof (so called MDPs).

Q22. Are the considerations set out in paragraph 105 the ones that the Board should consider? Are there others?

Broadly we believe so. However we would draw your attention to our response to the SRA consultation's, particularly those dealing with information provision (see particularly ICAEW Rep 52/08) and the determination of fit and proper or character and suitability of non-lawyers (ICAEW Rep 42/08). We urge you to make provision to use the pre-existing and established mechanisms of other equivalent professions and not be put off by the apparent differences in words used in their requirements. It is essential that due recognition of the established status of such professions is utilised and that the BSB maximises other regulator's experiences outside the legal market as well as within.

Q23. Is the Board's approach set out in paragraph 109-120 in respect of "prohibited work" correct?

See other comments regarding the services Barristers may wish to provide.
In respect of client money we refer you to the Institute's Client Money Regulations (www.icaew.com/membershandbook). Not all accountancy practices hold clients' money and there is no reason to assume that all new forms of practice for Barristers will axiomatically hold client money.

Q24. Are there further considerations that the Board should consider?

We urge you to consider examples of management of firms from other professions. The accounting profession has a long history of regulating a variety of different practice vehicles and could provide a useful insight into a variety of possible structures and the impact of moving into new service areas.

Q25. Are there other safeguards (e.g monitoring) that need to be imposed if the rules are relaxed?

We would recommend the BSB considers the value of monitoring and who should bear the cost. For example a large proportion of the Institute's members are not practitioners, and do not bear the cost of the Institute Practice Assurance scheme. The BSB should therefore give some thought to how costs arising should be assigned.

The BSB should also consider whether there would be different supervision requirements arising from new practice vehicles under other, perhaps less obvious, legislation such as the Money Laundering Regulations 2007 which arise for Barristers as a result of offering services other than as individuals.

Q26. Is the approach to handling clients' money outlined in paragraphs 118 to 120 correct?

See also above comments. There is nothing to stop Barristers whose practices in due course develop to provide services where it would be efficient and in the interests of clients for client money to be handled. However we agree appropriate safeguards should be introduced.

If the BSB retains the restriction for all but those working in ABS and LPDs with "appropriate protection" it should give thought as to what it considers that protection to be. Not all professions are required to operate a compensation fund where client money is held. For example our firms are required to hold professional indemnity insurance compliant with our regulations.

Q27. If it is, are further amendments needed to the Code to give it effect?

No comment.

Q28. Is there likely to be a need under the new regulatory regime to set up a fund to compensate clients who have sustained financial loss as a result of the misconduct or incompetence or a Barrister? In what circumstances might such compensation be appropriate?

See above comments.

Q29. If such a fund were set up, how should it be financed?

See above comments.

Q30. Do you consider that there is a likelihood that types of business organisation involving Barristers will emerge that are not considered in this paper? If so, what might they be? And what regulatory issues would they raise?

We consider that Barristers may in future become involved in firms whose primary function may not be the provision of reserved legal services. We also believe it is possible that true MDPs of different specialist areas may come together in due course to provide a full range of services where expert opinion is required. We would refer you to other organisations who have experience of businesses already offering a range of different experts "under one roof" and benefiting from sharing "back office" and administrative overheads. For example the Academy of Experts, the Institute of Experts and our own Forensic Special Interest Group may be able to provide additional insight on possible combinations of professionals who could/would together in this field.

Clearly, it is vital that Barristers are strongly and appropriately regulated by a body that understands their functions and ways of working – which is also true of other professionals that may in the future practice in partnership with Barristers. Though this is likely to introduce a need for a range of new and varying regulatory rules and competencies, we do not consider this to be unrealistic or unmanageable, provided that appropriate partnerships are formed with the regulators of other professionals within a LDP.

Q31. Should the Board seek power to regulate LDPs consisting of Barristers and non-lawyers? Or should Barristers continue to be forbidden to supply legal services in such partnerships until the regulatory regime for ABS firms is in force? If the Board should seek such power, by when should that power be available to the Board?

We would strongly support the BSB in becoming a regulator of LDPs with non-lawyers if there is any delay in bring Part 5 into force. However if the initial timetable is observed it would appear to be unnecessary for the BSB to do so and it should perhaps focus more on bringing in appropriate changes to rules to ensure that Barristers who join with lawyers and non-lawyers can seek an ABS licence from the BSB in due course. We would not support a restriction which prevented Barristers from taking advantage of the interim measures of the LDP with non-lawyers even if that means that practices where the majority of lawyers are not solicitors are regulated by the SRA. However in the long run we would wish to see the BSB taking its place as a regulator of ABSs and would urge the BSB to implement changes to accommodate ABS as close to Part 5 coming into force as possible or in advance.

If the BSB is to retain the unique position of the Bar it should avoid allowing other legal regulators to expand to fill the regulatory gap that would exist if Barristers could not look to the BSB as their regulator. The BSB knows Barristers and their work and should remain the regulator that Barristers can go to for all their work (both now and in the future as their roles become shaped and redefined in some areas).