

SCREENING FORM:
Change to the Code of Conduct to facilitate the Legal Services Act 2007

Date of Screening	October 2009
Assessor Name & Job Title	Simon Garrod, Head of Professional Practice
Policy/Function to be Assessed	<p>The following decisions are likely to be made at the 19th November meeting of the BSB Board:</p> <ol style="list-style-type: none"> 1. To permit barristers to be managers of (Legal Disciplinary Practices (LDPs) 2. To permit barristers to be shareholders in LDPs 3. To permit barristers to practice both as managers of LDPs and as independent practitioners 4. To permit Barrister-only Partnerships (BoPs). 5. To permit barristers to practice through other barrister-only companies and limited liability partnerships (LLPs) 6. To consult on whether or not the BSB should apply to become an entity regulator, and if so, in relation to what sort of entities. 7. To defer the decision of whether or not to permit barristers to work in Alternative Business Structures (ABSs) until the effects of the transitional LDP regime can be reviewed and assessed and following further consultation during 2010.
Aim/Purpose of Policy	<p>These changes are designed to assist in facilitating the intentions of the Legal Services Act 2007. One of the Act's main purposes is to liberalise the legal services market for the benefit of consumers in terms of greater access to better, cheaper legal services. The Act contains a number of 'Regulatory Objectives' which all regulators have to consider when setting or amending their professional conduct rules. The objectives are:</p> <ol style="list-style-type: none"> (a) protecting and promoting the public interest; (b) supporting the constitutional principle of the rule of law; (c) improving access to justice; (d) protecting and promoting the interests of consumers; (e) promoting competition in the provision of services; (f) encouraging an independent, strong, diverse and

<p>Background</p>	<p>effective legal profession;</p> <p>(g) increasing public understanding of the citizen's legal rights and duties;</p> <p>(h) promoting and maintaining adherence to the professional principles.</p> <p>The intentions of the Act have been interpreted to mean that if there is no valid reason for maintaining a restriction on the way in which barristers practise (ie that to remove the restriction would harm competition, or permit illegal acts, or not be in the public interest, or be to the detriment of the regulatory objectives of the Act generally) then that restriction should be removed.</p> <p>Ultimately (by 2011) the Act wishes to permit Alternative Business Structures (ABSs, as defined in the Act) to operate in the market. These will be different from current law firm structures in that they will be allowed to be a mixture of different types of lawyers and non-lawyers working together and external ownership of those structures will be permitted for the first time. The premise here is that services can be improved by greater opportunities of investment in legal services, by facilitating better combinations of services for the consumer and by exposing the sheltered legal services world to market pressures that will force it to perform more effectively.</p> <p>Before the full ABS regime comes into force, there is currently a transitional regime in place (introduced by statutory instrument in January 2009). This is a reflection of the Review of the Regulation of Legal Services, conducted by Sir David Clementi, which ultimately led to the Act. Clementi favoured an incremental introduction of changes to the market¹ and suggested that the first permitted new structure should be predominantly mainly lawyer arrangements. Though not given a specific name in the Act, the short-hand applied by the Solicitors' Regulation Authority (SRA) has become the common parlance and such lawyer-only entities have become known as Legal Disciplinary Practices (LDPs).</p> <p>LDPs are a limited form of ABS in that they are (i) lawyer dominated and (ii) have only a limited number of non-lawyers permitted to work within them (up to 25% of managers). The SRA (and the Council for Licensed Conveyancers) were given the powers to regulate LDPs in March 2009. The expectation of many, since the closure of the BSB's second consultation on the Act in February this</p>
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¹ Clementi's Final report paragraph 98: '...it would be a good start to get lawyers working together in LDPs, and to assess the regulatory consequences of that, before proceeding with full-blooded MDPs.' And paragraph 104: 'The proposal of this Review is that attention should focus on the setting up of a new regulatory system for lawyers with the LSB at its centre, and the authorisation of LDPs. This would represent a major step towards MDPs, if at some subsequent juncture the regulatory authorities considered that sufficient safeguards could be put in place.'

<p>Impact Assessment accompanying the Bill</p>	<p>year, has been that the BSB will change its rules to allow barristers to work in these structures at least.</p> <p>Much of the expectation and drive to change, is now coming from the Legal Services Board. The Legal Services Board is the overarching regulator of all ‘approved regulators’ (under the Act) in the legal services market. It is keen to drive through the implementation of ABSs as soon as possible² (by mid-2011) in contrast to the incremental approach advocated by Clementi.</p> <p>The MoJ was obliged to carry out a Regulatory Impact Assessment (RIA) to accompany the Legal Services Bill. This eighty-six page document expends only two and a half pages on Diversity Impact, although references to positive diversity impact are made throughout the document. Yet:</p> <ol style="list-style-type: none"> 1. No data is presented in relation to disability. 2. There is no specific consideration of impact on the Bar. 3. There is no acknowledgement of the potential negative impact on BME practitioners from the closure of small legal firms. 4. There is no mitigation suggested of the anticipated effects or monitoring of outcomes. 5. It is a Regulatory objective of the Act to “encourage a diverse legal profession” – The RIA on LSA suggests that the creation of ABS will increase diversity and improve career progression for women and BME practitioners. There is no evidence base for this assertion. 6. There is no evidence provided from any source to support the assertion that ABSs would be positively beneficial which contradicts the LSB view that ABSs would be beneficial to women and BME practitioners and clients. There is no evidence base for this assertion. <p>In summarising its general conclusions in relation to diversity impact, the RIA states:</p> <p><i>‘We did not identify any disproportionate impact on consumers or providers of legal services with disabilities or any other group’.</i></p>
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² Paragraph 3.2 of its ABS discussion paper ‘Wider Access, Better Value, Strong Protection’: ‘we are keen to realise the potential benefits to consumers from a market which includes ABS as soon as is practicably possible’.

<p>Position of the LSB</p>	<p>However, no supporting evidence is offered to support this assertion. In fact, there is a real paucity of evidence anywhere to assess the impact of the proposed changes.</p> <p>The LSB has itself said:³</p> <p><i>We cannot predict precisely how the market will develop so we are keen to receive input from market participants. But we anticipate greater flexibility in service delivery,</i></p> <p>and</p> <p><i>There is a lack of clarity and consensus about the nature of the risks associated with opening the market to ABS. So this paper seeks views and evidence about the risks to the regulatory objectives from different types of ABS. It is important to ask which risks are unique to a more open market, and which are already a feature of the legal services sector today. Our initial assessment is that many risks fall into the latter category.</i></p> <p>This lack of assessment applies generally to predicting likely outcomes of the changes and specifically in relation to Equality Impact Assessment.</p>
<p>Position of the BSB</p>	<p>It will be the MoJ's expectation that each of the Approved Regulators under the Act will conduct (as they are obliged to do) an Equality Impact Assessment of the changes to their regulatory regimes they intend to implement in fulfilment of the intentions of the Act and only proceed with those changes on the basis of that analysis.</p>
<p>Extant Evidence</p>	<p>As an evidenced-based regulator contemplating once-in-a-generation changes, the BSB has been concerned at the lack of evidence or scenario planning in relation to the implications of the Act. It has commissioned its own very limited research to try and have a snap-shot idea of the effect of it. Although it was acknowledged that this would only be limited and not a true representative sample of the Bar being surveyed, a good cross-section of sizes and types of chambers were visited. Significantly, although there were acknowledged drivers to change business structures identified (such as profit maximisation), no observations were offered to indicate that any of the barristers or their clerks interviewed saw any consequential benefits for consumers.</p> <p>The LSB acknowledges that there could be an impact on diversity through implementation of the changes under the Act⁴:</p>

³ Op cit

⁴ Op cit

	<p><i>Changes in market structure might impact upon the diversity of the profession as a whole and/or rates of progression within it. The LSB and the approved regulators will therefore need to monitor the equality and diversity implications of ABS.</i></p> <p>As stated above, although it is suggested that there could be positive benefits in terms of diversity as a result, there is no evidence to support, either by the LSB or by the RIA that accompanied the Bill. It is just as possible that there could be adverse risks. The BSB is right to identify both the advantages and these risks, in particular in relation to the public interest around general access to justice and protection of the consumer of legal services. The remainder of this Equality Impact Assessment below attempts to do so.</p>
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Do you consider the policy to have an adverse impact on equality?

- Gender equality Yes **No**
- Race equality **Yes** No
- Disability equality **Yes** No

<p>If yes, is there any evidence to support this?</p>	<p>Race</p> <p>Contrary to the conclusions reached by the MOJ, the evidence suggests that there will be a negative impact on BME practitioners should, as predicted, consolidation among providers take place as a result of the introduction of ABSs.</p> <p>One of the acknowledged aims of the reforms derived from the Act is for the commoditisation of services through consolidated providers. Indeed, the Legal Services Commission (LSC) is basing its future procurement strategy on contracting with fewer larger providers and the anticipated changes in the Act will help facilitate that strategy.</p> <p>The RIA itself said⁵ that there:</p> <p><i>'...is a possibility that the anticipated increase in the level of competition facilitated by both LDP and 'licensing' models could pose significant challenges to smaller legal suppliers in some locations.'</i></p> <p>An analysis of data gathered by MDA for the LSC in April 2006 found that among self employed barristers, BME</p>
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⁵ Op cit paragraph 9.9

barristers, and particularly BME men, are disproportionately represented among sole practitioners. Table 1 shows sole practitioners by ethnic group and gender compared to self employed practitioners in general.

Table 1: Self Employed Practitioners by Ethnicity and Gender

	White Male	BME Male	White Female	BME Female
Sole Practitioners	62.5%	19.2%	12.5%	5.8%
All Practitioners	64.5%	7.2%	23.9%	4.4%

A report prepared by MDA for the LSC in April 2006 in relation to 'Research on ethnic diversity amongst suppliers of legal aid services' (conducted to support the LSC's moves towards price competitive tendering) concluded that there could be an adverse impact on BME suppliers:

The report concludes that in an over supplied market where more than a third of the suppliers are small businesses; it is highly likely that the reduction in the number of suppliers receiving contracts will have a disproportionate and adverse impact on this group. Given that BME firms are significantly over-represented in the small firm category, they are therefore more likely to lose out in the competition for contracts.

Analysis of the QAA data shows that BME barristers are over twice as likely to be working as sole practitioners than their White colleagues. Consolidation in the profession towards larger business units is therefore likely to have a disproportionately negative impact on male BME barristers and push some practitioners to seek employed practice.

However BME practitioners are likely to face additional barriers to gaining employment compared to their White colleagues. Research from the Department for Work and Pensions⁶ found that for every nine applications sent by a White applicant, an equally good applicant with an ethnic minority name had to send sixteen to obtain a positive response.

The MDA report also concluded that this negative impact would carry over and disadvantage consumers in the following way:

⁶ DWP research report 607: A test of racial discrimination in recruitment practice

Data on the ethnic origin of civil legal aid clients showed that there is a clear relationship between the ethnicity of the client and that of the solicitor. BME clients are far more likely to have a solicitor from a BME managed firm, and White clients are far less likely to seek the services of a BME firm.

The risk remains that similar impact could follow from the consequences of these reforms and, whilst there is a risk, the BSB as a responsible regulator has a duty to mitigate that risk.

Gender

Preliminary analysis suggests that the potential increase in paid employment opportunities that may result from changes to business structures would have a positive impact on female practitioners.

In relation to the creation of LDPs, the RIA suggested that:

...the increased flexibility provided by LDPs would improve the representation of women and their retention at the Bar.

And in relation to ABSs:

By facilitating a greater number of new suppliers in the legal services market, the ABS licensing model could also provide more opportunities than under the LDP model for under-represented groups to enter into and to progress within the legal professions. This could help to further increase diversity in the legal professions.

More generally, it said:

The Department has completed a Diversity Impact Assessment including a Racial Equality Impact Assessment and based on the following findings, has concluded that there would be a significant impact...female legal service providers, which the Department has identified to be largely positive.

An analysis of data gathered by MDA for the LSC in April 2006 found that among self employed barristers women are under represented among sole practitioners. Table 2 shows sole practitioners by gender compared to self employed practitioners in general.

Table 2: Self Employed Practitioners by Gender

	Male	Female
Sole Practitioners	81.7%	18.3%
All Practitioners	71.7%	28.3%

As will be noted from the above women are less likely to be working as sole practitioners than as self employed barristers in general. There is also an under representation of women in self employed practice generally compared to pupillage. For example, in 2007-2008 48.8% of pupils were female.

This data is suggestive that women may experience difficulties remaining in self-employed practice compared to their male colleagues. This is further supported by the Bar Council research into those barristers changing practice status and leaving the Bar⁷. The 2008 Survey found that about half the respondents in the exit surveys were women, although women make up only a third of practising barristers. Thirty percent of female barristers changing status did so for childcare reasons compared to only 2% of male barristers.

The RIA suggests that the move away from traditional partner structures towards a more flexible, corporate style structure will provide women with 'more high responsibility opportunities where they can progress while maintaining a successful work-life balance'. This is no direct evidence provided for this in the RIA. However, compared to self employment, where those 'corporate style structures' expand paid employment opportunities women are likely to benefit from greater job security and access to maternity pay, equal pay and flexible working legislation.

Disability

An analysis of the LSC data indicates that among self employed barristers disabled barristers are disproportionately represented among sole practitioners. Table 3 shows sole practitioners by disability compared to self employed practitioners in general.

Table 3: Self Employed Practitioners by Disability

⁷ Survey of Barristers Changing Practice Status 2008

	Disabled	Non Disabled
Sole Practitioners	15.0%	85.0%
All Practitioners	7.2%	92.8%

Disabled barristers are therefore significantly more likely to be working as sole practitioners. This may be due to the high flexibility that such work provides and the potential to work from home. Consolidation in the profession towards corporate style business units is therefore likely to have a disproportionately negative impact on disabled barristers through increased competition and push some to seek employed practice.

However a question then arises as to whether disabled barristers may benefit from the potentially greater supports available in paid employment. Organisations have a legal duty to make reasonable adjustments for disabled employees to remove barriers related to their disability. This is considered in the later policy analysis and the submission received from the Bar Council's Disability Sub Group.

It is noted that the original RIA offered no evidence to support the assertion that there would be no negative impact on disability.

If no, are your reasons for this?

POLICY ANALYSIS

<p>What are the (potential) barriers to equality arising from this policy?</p> <p>What evidence supports the existence of such barriers?</p>	<p>Race</p> <p>In relation to race, barriers to equality could be largely those described above, namely:</p> <ol style="list-style-type: none"> 1. The potentially negative impact that increased competition will have on BME male practitioners who are disproportionately represented among sole practitioners. Where BME practitioners are pushed by these changes to seek paid employment they may experience similar discrimination in accessing paid jobs to that found elsewhere. 2. By extension this could have a negative impact on BME clients, whom research has shown tend to gravitate to BME suppliers (as above).
	<p>Gender</p> <p>In relation to gender there is reason to believe that the consequences of the proposed changes are potentially likely to be positive as follows:</p> <ol style="list-style-type: none"> 1. Women are currently under represented in self employment as barristers. There is evidence that a greater proportion of women than men leave the profession and that this is due significantly to childcare needs. 2. As corporate style organisations emerge as a result of the changes this may lead to an increase in opportunities for paid employment. This offers greater financial and legal support for maternity and childcare which is likely to enable a greater proportion of women to remain in the profession than is currently the case.
	<p>Disability</p> <p>A detailed submission was received by the Bar Council's Disability Sub Group in response to the second Legal Services Act consultation. The Group highlighted the fact that the BSB is obliged under the Disability Discrimination Act 1995 section 49A in carrying out its functions to have due regard to</p> <ol style="list-style-type: none"> (a) the need to eliminate unlawful disability

- discrimination and harassment;
- (b) to promote equality of opportunity between disabled persons and other persons;
- (c) to take steps to take account of disabled persons' disabilities even where that involves treating disabled persons more favourably than other persons;
- (d) the need to promote positive attitudes to disabled persons;
- (e) the need to encourage participation by disabled persons in public life.

It also emphasised that that in developing a policy on the implications of the development of new working structures the position of disabled practitioners and future practitioners is being taken into account. As stated above, disabled practitioners are significantly more likely to be working as sole practitioners and therefore experience be subject to greater competition as a result of the proposed changes.

However on the positive side, the Sub Group suggested that the comparative economic stability of the proposed forms of LDP will place disabled practitioners in a less precarious position to that currently experienced by disabled barristers practicing at the independent bar.

However, the disability sub-group believed that an impact assessment, seeking the views of potential clients of proposed LDPs would reveal a different picture: Because a single independent barrister practices in a different way to a collective of barristers with a manager, who has a duty to the collective to maximize financial security and return barristers working in this way may be less willing to give pro bono advice or grant access in difficult circumstances.

The Sub Group also suggested that many disabled clients are economically disadvantaged, so that consideration needs to be given to the extent that permitting barristers to work in the more collectively oriented versions of the LDP will militate against the interests of the disabled public. If barristers in new forms of practice can effectively avoid the obligations of the cab-rank rule, diminishing the numbers of independent barristers available to take on such cases will work against the interests of disabled clients because they will be less likely to find representation due to the economic pressures brought to bear on those barristers adopting a role within an LDP. The subgroup suggested that the cab -rank principle and independence are of paramount importance for the effective representation of disabled people.

Action Planning

Recommendations and actions required to reduce/remove barrier	Person Responsible	Deadline
<p>Race:</p> <ol style="list-style-type: none"> 1. Monitor relative changes in the incidence of chambers, LDPs etc. 2. Analyse the evidence and consult widely on the policy of progressing to the next incremental stage. 	Head of Professional Practice	During 2010
<p>Disability:</p> <ol style="list-style-type: none"> 1. Monitor and review the actual impact of the transitional SRA-regulated LDP regime before deciding whether or not to permit barristers to work in the ABS environment. 2. Analyse the evidence and consult widely on the policy of progressing to the next incremental stage. 	Head of Professional Practice	During 2010
<p>Gender:</p> <ol style="list-style-type: none"> 1. Monitor and review the actual impact on women as they move into LDPs before deciding whether or not to permit barristers to practise within the full ABS environment. 2. Analyse the evidence and consult widely on the policy of progressing to the next incremental stage. 	Head of Professional Practice	During 2010
<p>Generally:</p> <ol style="list-style-type: none"> 1. Work with the LSB to implement equality impact assessments in relation to the implementation of the Act in the same way as those bodies listed by the Government Equalities Office in developing their policies in relation to the same. 2. Research/monitor the likely incidence and take-up of new business structures. 3. Analyse the evidence in relation to take-up of new business structures and consult widely on the policy of progressing to the next incremental stage. 	Head of Professional Practice	During 2010

4. Consider re-visiting the ERC research for the QAA Scheme		During 2010
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