

Amendments to the Bar Code of Conduct – Legal Disciplinary Practices & Partnerships of Barristers

For approval by the Legal Services Board

In accordance with the requirements set out in the LSB's consultation paper, "Designating new approved regulators and approving rule changes", the BSB wishes to provide the information below to support its application to revise the Code of Conduct.

Any queries about this application should be made to:

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1. The proposed alteration

The BSB formed an Alternative Business Structures Working Group in 2007 to consider the implications of the Legal Services Act 2007, in particular the provisions in relation to LDPs and ABSs, for the ways in which barristers are permitted to practise. The work of that group has been thorough and detailed, including two consultations on various aspects of the possible impacts of the Legal Services Act.

At its meeting in November 2009, the Bar Standards Board considered the reports of the group and took significant decisions in order to open up the legal services market so that consumers have access to even better value, quality, legal services in fulfillment of the Regulatory Objectives of the Legal Services Act.

The decisions made at the November 2009 Board meeting were as follows:

- (a) barristers should be entitled to become managers of LDPs regulated by the SRA (or other approved regulators) without having to requalify as solicitors.
- (b) barristers should be able to be shareholders in LDPs whether or not they are employees or managers of the LDP in question ("LDP shareholders")
- (c) barristers should be permitted to practice in more than one capacity at the same time¹ ("dual capacity")

Following that meeting, the working group has developed guidance for barristers who wish to practise as managers of LDPs, hold shares in LDPs or practise in more than one capacity at the same time. The final versions of the code amendments and the guidance were approved in January 2010. Please see annexes 1 and 2 for the proposed amendments to the code of conduct and the guidance that facilitate these recommendations.

¹ eg as self-employed barrister and as employee or manager of a law firm

2. Details of Existing Regulatory Arrangements

LDPs

At present, *all* barristers are prevented from both practising as managers of Legal Disciplinary Practices (“LDPs”) regulated by the Solicitor’s Regulation Authority (“SRA”) and forming partnerships with other barristers, by rule 205 of the Code of Conduct:

‘A practising barrister must not supply legal services to the public through or on behalf of any person (including a partnership company or other corporate body) except as permitted by paragraph 502.’

However, employed barristers do not require any special permission to be employees of LDPs.

LDP Shareholders

There is currently no restriction in the Code on barristers owning shares in law firms or LDPs. However, there are no conditions or safeguards in the existing code to protect the public interest in relation to possible conflicts of interest arising from such ownership.

Dual Capacity

Rules 401(c) and 502 currently prohibit barristers from practising in a dual capacity:

“401 A self-employed barrister whether or not he is acting for a fee:

(c) must not supply legal services for reward otherwise than in the course of his practice except as permitted by paragraph 806.”

and

“502. An employed barrister may supply legal services only to the persons referred to in paragraph 501 and must not supply legal services to any other person save that whilst acting in the course of his employment:

(a) a barrister employed by a solicitor or other authorised litigator or by an incorporated solicitors’ practice may supply legal services to any client of his employer;

(b) a barrister employed by the Legal Services Commission may supply legal services to members of the public;

(c) a barrister employed by or at a Legal Advice Centre may supply legal services to clients of the Legal Advice Centre;

(d) any employed barrister may supply legal services to members of the public free of charge (to any person).”

3. Nature and effect of the proposed alteration

The proposed amendments to the code of conduct will enable barristers to:

- a) practise as managers of LDPs regulated by the SRA (or another approved regulator) without having to requalify as solicitors
- b) practice in more than one capacity at the same time (“dual capacity”) subject to conditions and safeguards. That is to say, a barrister may practise in the self-employed model from chambers but work part time as an employed barrister for the Government, or for a law firm regulated by the SRA; or may practice part time in the employment of the Serious Fraud Office and part time as a manager of an LDP. The most common example is expected to be that of young barristers who wish to practise self-employed in publicly-funded criminal or family work, but who may need to be employed part-time in complementary work for a law firm or a Government body.

The proposed amendments also introduce new safeguards to manage risk and avoid conflicts of interest and duty occurring if barristers have ownership interests in LDPs as well as seeking to avoid conflicts of interest and duty and clarity for the client in relation to dual capacity.

4. Why we wish to make the alterations

The proposed code amendments facilitate and promote the regulatory objectives enshrined in the Act. See section 5 below.

5. The regulatory objectives

Whilst the various regulatory objectives have to be considered as a whole, the BSB particularly views the objectives of protecting and promoting the public interest, *improving* access to justice, protecting and *promoting* the interest of consumers, *promoting* competition in the provision of legal services, and encouraging an independent, strong, diverse and effective legal profession as being more effectively and appropriately achieved by amending rule 205² and permitting barristers to practise as managers of LDPs.

Those barristers who wish to practise as managers within entities regulated by other approved regulators will then be free to do so without leaving the profession. That flexibility in the career paths available to barristers over the course of their working lives is, in principle, apt to promote (in particular) competition in relation to advocacy and related services, wider consumer choice for such services, improved access to justice and diversity within the profession.

Amongst the responses received to the second consultation paper was one from a barrister who for family reasons left self-employed practice for employment with a firm and is awaiting the outcome of this process in order to know whether she can take up a position as a manager in that firm, whilst remaining a barrister. Permitting this enables such women to be

² Rule 205 currently prevents a barrister from supplying legal services to the public through or on behalf of any other person.

given positions within their firms that are concomitant with their experience and seniority. Allowing freedom of movement without requiring requalification avoids putting unnecessary barriers in the way of those who may wish, for similar reasons, to move between self-employed practice and alternative models at given points in their careers.

Protecting and promoting the public interest

Safeguarding the public interest has been one of the primary concerns of the BSB as it seeks to facilitate the objectives of the Act. Promoting the public interest has also been a priority and it is the Board's belief that permitting barristers to work in different business arrangements will enhance the access to those services by consumers and that this is very much in the public interest. These new business arrangements also have the capacity to make the market for the provision of legal services more competitive which, in turn, could be reflected in more competitive pricing in that market and lower prices for consumers.

Introducing safeguards in the code and detailed guidance for barrister shareholders of LDPs will protect the public from possible conflicts of interest that arise from such ownership.

The Board is mindful that there cannot be any evidence that these benefits will unfold as envisaged, however, (as found in its own difficulties in conducting research to support its own decision-making process) and has therefore sought to incorporate measures which will ensure that the interests of users of such services remain paramount and suffer no detriment in allowing a more permissive regulatory regime.

Supporting the constitutional principles of the rule of law

The proposed Code amendments do not have any adverse impact on this regulatory objective. Both the Code changes themselves and the accompanying guidance seek to maintain the high standards of professional conduct traditionally associated with the Bar which seek to protect and support the constitutional principles of the rule of law.

Improving access to justice

The proposed Code amendments have the capacity to improve access to justice because they enable a greater diversity of routes for consumers to gain access to barristers' services and for those services to be offered in combination with other complimentary legal services and lawyers.

Permitting barristers to practise in different business structures *as barristers*, is more compatible with the regulatory objectives than the current prohibition i.e. It cannot be a sufficient answer to a consumer who wishes to access the services of a barrister in a particular way that he can access the services of a solicitor instead.

We agree with the comments made by the LSB in its press release following our November decisions:

"The LSB welcomes the decisions taken by the Bar Standards Board. These changes will allow barristers to make an important contribution to the development of the legal services market, widening access to justice and promoting consumer choice."

Protecting and promoting the interests of consumers

The proposed Code amendments have the protection and promotion of the interests of the consumer at their heart. The BSB has considered this aspect of its reforms long and hard and only when convinced that the consumer will suffer no detriment, have the reforms been agreed. These changes will enable consumers to have access legal services through a greater diversity of providers, in a more competitive market which should ensure competitive pricing thus enhancing value for money for consumers. The Code amendments seek to permit barristers to deliver their services in new ways in this new market whilst at the same time obliging them to maintain the high professional standards of work.

Promoting competition in the provision of services

The BSB's consultations have identified interest from members of the profession for providing their services differently and in different business forms. Much of this interest is generated by perceived commercial advantages. It seems clear that there will be a greater variety of business vehicles in the legal services market following the Act and that competition in that market will therefore be promoted and enhanced by the increased competition between multifarious providers.

Encouraging an independent, strong, diverse and effective legal profession;

The BSB is concerned that the current operation of paragraph 205 may prevent or deter the emergence of a variety of professional structures by which barristers may choose to offer their services. Allowing barristers to offer their services in different, innovative ways in response to changing client requirements can serve to promote competition in the supply of barristers' services and the supply of legal services more generally. As such, paragraph 205 of the Code restricts competition and the BSB is not persuaded that the restriction is otherwise justified by reference to others of the regulatory objectives.

During the course of its deliberations, the Board was mindful of the challenges facing the publicly-funded Bar and that the circumstances of practice at that (significant) part of the Bar have radically changed over a few years. There is a real shortage of work that can be obtained through traditional channels, particularly for young practitioners. And yet, at the same time, there is a recognised public need for specialist advocates to train in pupillage at the Bar and be available as a public resource in future years.

These changes are therefore intended to enable barristers practising in these areas to practise in different ways, such as combining self-employed practice and secondment/employment in a firm, and in different business models such as in an LDP or in a traditional law firm. The regulatory objectives seemed to the Board strongly to be supported by the ability of barristers to practise in a dual capacity, as needed in order to earn a living and learn the requisite skills without having to abandon a career that enabled them to specialise in advocacy.

Additionally, the Disability Sub-Group of the Equality and Diversity Committee of the Bar Council stated that if the prohibition continued, the Board should ensure that there was a mechanism available for disabled barristers to request a waiver, to ensure that there is

adequate flexibility in work practices for disabled practitioners. These new arrangements offer that flexibility for disabled practitioners.

Please see annex 3, the provisional equality and diversity impact assessment accompanying the recommendations, for further information on how the recommendations link to this regulatory objective.

Increasing public understanding of the citizen's legal rights and duties

In particular, the guidance accompanying the proposed Code changes seek to ensure barristers' continuing duties to the client; to ensure that there is clarity for the client in relation to the capacity in which the barrister is acting in connection with his/her employment status, and interest in any firms for whom he/she has a relationship. Barristers will be obliged to act transparently and offer explanation to clients throughout the process of acting for them. That these requirements will be offered through an increasing variety of outlets should serve, over time, to demystify legal services as a greater number of users become aware of and comfortable with buying such services.

Promoting and maintaining adherence to the professional principles

The proposed Code amendments and accompanying guidance intend to enhance rather than erode the high standards of professional conduct associated with the Bar. They oblige barristers to maintain their independence, act in the clients' best interests in whatever capacity they are acting and in whatever business arrangement they are in. As an additional safeguard, for example, barrister shareholders and barristers practising in a dual capacity are obliged to keep records of referrals they might make to LDPs with which they have a relationship so that this may be checked by the regulator to ensure no conflict of interest has adversely affected the referral.

6. The better regulation principles

Proportionality

The BSB carefully considered all of the options for achieving policy objectives before developing the attached code amendments and guidance. The code amendments in relation to LDPs place barristers in the same position as other lawyers in relation to practising as a manager of an LDP. In addition, certain parts of the code of conduct are disapplied for barristers who practise as managers or employees of LDPs. The safeguards introduced for barristers who wish to be shareholders of LDPs are proportionate in relation to the risks (created by the potential conflicts of interest arising from such ownership).

Accountability

The BSB has issued two consultation papers on the proposed changes and all those affected were consulted before decisions were taken. The BSB carried out a number of road shows in connection with the first consultation paper. The code amendments and guidance attached to this application represent the result of that process and take into account the wide range of responses that we received from a range of different respondents.

Consistency

Permitting barristers to practise as managers of LDPs will ensure that the BSB is consistent with the other approved regulators, for example solicitors and other lawyers are currently

permitted to practise as managers of LDPs. The proposals made in this application facilitate the Legal Services Act 2007.

Transparency

Two consultation papers were issued before the proposals were developed, to ensure that stakeholders' views and expertise were taken into account. Guidance has been developed to accompany the code amendments to ensure that those regulated are made aware of their obligations and to provide examples of best practice. The guidance and the code amendments attached to this application will be posted on the BSB website and sent to all of the other approved regulators.

Targeting

The amendments to the code of conduct will be systematically reviewed to ensure that they are still necessary and effective.

7. Desired outcome

The desired outcome of this application is that the proposed amendments are accepted by the LSB and put into effect as early as possible. The proposals facilitate the Legal Services Act 2007 and promote the regulatory objectives enshrined in the Act. A review of the code amendments will be carried out two years after they are introduced in order to assess whether the desired outcome has been achieved.

8. Other regulators

The BSB has issued 2 consultation papers on the proposed changes and all of the other approved regulators were invited to provide comments. The responses that we received from other regulators have been carefully considered and taken into account in the final version of the code changes and the guidance. In addition, numerous discussions have taken place with the SRA in relation to the code amendments,

The BSB will be publishing the code amendments and guidance on its website and will also be circulating the two documents to the other approved regulators at the same time the application is submitted to the LSB.

9. Date of implementation

We would like to implement the amendments to the code of conduct as soon as possible. We have attended meetings with the LSB to discuss the proposed code amendments prior to submitting this application and also consulted other approved regulators. We therefore do not anticipate that there will be many objections to our proposals from other regulators. Should we receive any, we will amend our application as appropriate. We hope that the actions that we have taken will expedite the approval process, as previously indicated by the LSB.

10. Consultation Processes Undertaken

The BSB has issued two consultation papers in relation to the proposed amendments. The consultations were sent to the profession, consumer groups, minority legal groups and other regulators. The code amendments and guidance attached to this application represent the

result of that process and take into account the wide range of responses that we received from a range of different respondents.

The consultation papers and the responses are published on our website:

First consultation paper:

[Consultation letter - Legal Services Act 2007 - Regulation implications](#)

[Consultation paper - Legal Services Act 2007 - Regulation implications](#)

[Legal Services Act Responses](#)

[Legal Services Act 2007 - Summary of responses](#)

[Legal Services Act 2007 - Summary of responses - Appendix A](#)

[Legal Services Act 2007 - Summary of responses - Appendix B](#)

[Legal Services Act 2007 - Summary of responses - Appendix C](#)

[Legal Services Act 2007 - Summary of responses - Appendix D](#)

Second consultation paper:

[Consultation Letter - Legal Services Act 2007 - Legal Disciplinary Practices and Partnerships of Barristers](#)

[Consultation Paper - Legal Services Act 2007 - Legal Disciplinary Practices and Partnerships of Barristers](#)

[Peter Roth QC - advice](#)

[Questions for Peter Roth QC](#)

[Peter Roth QC - supplementary advice](#)

[Responses - Legal Disciplinary Practices and Partnerships](#)

[Summary of Responses](#)

[Annex A - Summary of responses](#)

[Annex B - Summary of responses](#)

[Annex C - Summary of responses](#)

[Annex D - Summary of responses](#)

11. Other explanatory material

The Board considered the recommendations of the ABS working group at its meeting in November. The full report that was sent to the board can be found at:

<http://www.barstandardsboard.org.uk/assets/documents/BSB%20Paper%20103%20191109.pdf>

Minutes of the Board meeting can be found at: [Minutes 17/12/09](#)

The Board also considered various issues in relation to this application at its December 2009 and January 2010 meetings, the minutes can be found at: [Minutes 17/12/09](#) and <http://www.barstandardsboard.org.uk/about/ourboard/Meetingdates2010/>

Please see annex 3 for the provisional equality and diversity impact assessment.