Representation, Education and Support for Employed Barristers

Response of the Bar Association for Commerce Finance and Industry ("BACFI") to the Bar Standards Board Consultation on Entity Regulation (July-August 2014)

The Bar Association for Commerce, Finance and Industry was founded in 1965 to promote the interests and professional status of barristers employed in commerce, finance and industry. BACFI is a Specialist Bar Association, affiliated to the Bar Council but operating independently to represent employed and unregistered barristers practising principally in the commercial private sector.

BACFI is keen to play its part as a representative organisation in helping shape the development of the Bar of England and Wales, by bringing forward the views of its members. BACFI actively supports the objective of an independent and high quality bar, accessible to all.

BACFI has noted a recent trend towards more self employment amongst formerly employed Barristers. Where commercial firms have closed or downsized their legal departments, they often buy back the services of their former employees on a consultancy basis. In many cases such services are provided through a corporate vehicle. As things stand the only option for such barristers (if they want to hold out) would be to apply to register as an entity. It is suggested that entity regulation is not the most appropriate way of dealing with small organisations likely to involve only one or two barristers.

It has been suggested by the BSB that there could be a relaxation of the rule that employed barristers may only provide services to their employer, thus enabling such barristers to provide services to "private clients" other than lay consumers. We would propose to encourage the BSB to pursue this suggestion as we feel that the entity regulation regime, as well as being inappropriate, will create too much of an administrative burden for such small companies.

For many interim legal roles employment agencies and their ultimate corporate clients will now only "employ" an interim legal counsel if that barrister or solicitor contracts through a personal services company of their own, to comply with (amongst other things) HMRC rules. This is a vehicle of convenience which have the lawyer as the sole shareholder, director and employee. The barrister who enters into such arrangement will usually only act for one corporate client at a time, as an interim or locum for a fixed term contract. In such cases entity regulation is not applicable. These companies are not intended to become some form of law firm. Provided the individual barrister is regulated by the BSB, we fail to understand why there should be any additional hurdles which only serve to put BSB members under a disadvantage in the labour market.

There also needs to be some clarification over public access work and the position of employed barristers. We understand that the Bar council records office is advising employed barristers that they cannot not register for public access work because this was only available to holders of self-employed practice certificates. The Public Access Rules however only require a 'full practising

certificate' (rC120.1). Is it the intention of the BSB to preclude employed barristers with full rights of audience *as employed barristers* from doing public access work?

Question 1: BACFI agrees that explicit consent is a proportionate foundation for the BSB's regulatory jurisdiction.

Questions 2 & 3: The proposed criteria for, and broad types of enforcement action proposed seem appropriate. However, we have some concerns about the need for access to premises without warrant, given that many barristers may manage and operate entities from residential property.

rC22 .4 provides for blanket consent to be given allowing access and control of clients files. We suggest that this automatic form of consent should be limited to legal aid or publicly funded clients - which according to the Consultation (par.21) is where the idea came from. In the case of private clients there should be a requirement for the BSB to obtain consent directly when the need arises.

We are also not convinced that the power of intervention is necessary as widely as is proposed; given that no client money will be handled. Comparison with solicitors is not appropriate to this extent. We would suggest that the only proportionate intervention criterion should be confined to reasonable suspicion of dishonesty by a manager. If a Receiver is appointed, then he/she will have access to client files and the capacity to "intervene" in the sense of running off the business and dealing with clients. Without consideration of the likely terms of the licence, failure to comply cannot simply be included as a backstop.

Questions 4-10:

The current consultation illustrates the risks of over-burdening regulation where one or two man service companies are concerned. Simple but adequate Professional Negligence Insurance is readily obtainable from smaller underwriters allied to commercial service companies (such as Brookson, Orange and Gold etc.) that provide payroll and accountancy "umbrella" services to one/two man companies. Former in house barristers operating in the same field and in the same way as employed in house lawyers are treated as more akin to interim managers and technical consultants, thus enabling the "private client" barrister to avoid the restricted field of insurers prepared to underwrite (considerably more expensively) the public client risks of the self employed Bar and solicitors' firms.

We believe that a minimum level of insurance is appropriate alongside the overriding requirement to hold "reasonable" insurance. Given the small size of some entities and the high cost of professional indemnity insurance we do not think that the current minimum level of £500,000 should be changed. However, we do not believe there should be a cap on the overall level. We do not believe over-insurance presents any risk to clients so entities should be free to take as much insurance as they wish provided they do not fall below the minimum level of £500,000.

We are not opposed in principle to the idea of imposing a multiple of turnover requirement, but believe that in practice this could present difficulties given possible fluctuations in revenues. The requirement to hold "reasonable" insurance must include a consideration of turnover. In fact it would be possible to define "reasonable insurance" in such a way as to specify that turnover should be taken into account in the calculation. This would clarify the intent without creating a straightjacket.

We agree that the proposed aggregation clause is appropriate.

We agree with the proposed approach in relation to run off cover and successor practices.

In relation to avoidance for misrepresentation and non-disclosure we are not convinced that insurers will agree to such a provision, and if they did, it would be at a significant price. A small

entity does not have the ability to negotiate terms that is available to a larger organisation and we believe this is a step too far and will make insurance prohibitively expensive or even impossible to get for some smaller entities.

We agree that the minimum terms should apply to all clients.

BACFI Professional Issues Sub-committee
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