



Bar Standards Board Consultation: Amending the definition of employed barrister (non-authorized body).

BACFI Response

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.

Our membership includes not only barristers traditionally employed by organisations but also an increasing number of members who are sole traders or owner/directors of their own personal service companies who have a contract for services for their legal services with their Corporate Clients (definition please see below). These members offer a range of legal services including locum, temporary or interim roles as in-house counsel as well as providing legal consultancy services to their Corporate Clients.

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 Response: Comments to the Consultation by Paragraph Number

Para	BACFI Response
	<p><i>BACFI uses the following terms with the following meaning in its response:</i></p> <p><i>“Corporate Client” – an organisation which is a corporate body and non-authorized to provide legal services but uses in-house barristers for the provision of legal services both internally and to external clients.</i></p> <p><i>“Contracted” – a barrister who is not an employee of their Corporate Client but is retained under a contract for services either directly as a sole trader or through their wholly owned personal services company, or indirectly through an employment agency or authorised body.</i></p> <p><i>“Contractor(s)” – a barrister who is either self-employed as a sole trader or who is a sole owner/director of a personal service company specifically set up to enter into contracts for services directly or indirectly with their Corporate Clients.</i></p>
	Purpose
1	<p><i>BACFI very much welcomes this consultation and in general supports the views of the BSB subject to its comments made in this response paper.</i></p> <p><i>BACFI considers that the very title “employed barrister non-authorized body” is wrong in that many barristers under this definition are not classed as employed</i></p>

	<p><i>and would not want to be classed as “employed” for tax reasons as they are either classed by HMRC as sole traders or are directors/sole owners of their own personal service companies which enter into contracts for services, directly or indirectly, with their Corporate Clients. Many Corporate Clients do not want such Contractor barristers to be classed as employed as it gives them greater flexibility of human resources over that of an employee.</i></p> <p><i>BACFI recommends that any designation is unnecessary as we are “barristers” and a distinction in the capacity under which a barrister is engaged with a Corporate Client is not necessary. This is consistent with the policy of the Legal Service Board who have stated that there should not be unnecessary restrictions placed on employed lawyers unless there is good reason. For example, a chartered accountant or medical doctor is not designated differently just because they are employed or a partner in private practice. We would also refer you to “BACFI response to the Legal Services Board Discussion Paper: “Are regulatory restrictions in practising rules for in-house lawyers justified?” of 24th April 2015</i> http://www.bacfi.org/files/BACFI%20Response%20to%20the%20Legal%20Service%20Board%20Discussion%20Paper%20April%202015.pdf <i>in which we stated:</i></p> <p><i>“As the specialist Bar Association for employed barristers, BACFI is particularly keen to stress the “One Bar” ethos and that employed and self-employed barristers’ regulation be as similar as possible.”</i></p> <p><i>This is also true of the barristers we represent who are not employed but work for Corporate Clients and businesses who are self-employed, contractors and/or consultants.</i></p> <p><i>Further and alternatively, should the BSB insist on such a designation, it should be more accurately described as “barrister (employed, contractor or consultant) non-authorized body”.</i></p>
2	<p><i>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. Our membership includes not only barristers directly employed by organisations but also an increasing number of members who are sole traders or owner/directors of their own personal service companies which have a contract for services for their legal services, directly or indirectly, with their Corporate Clients. These members offer a range of legal services including locum, temporary or interim roles as in-house counsel in their Corporate Clients, as well as providing legal consultancy services.</i></p>
	<p>Background</p>
3	<p><i>BACFI very much supports the initiatives of the LSB to remove unnecessary restrictions and restrictive practices for barristers working as in-house lawyers, whether employed or Contractors. BACFI believes that this initiative will help to open up career opportunities for all barristers, helping to make the Bar more inclusive and diverse by attracting and retaining the best talent from a variety of backgrounds and sections of the communities that we serve. At the moment many barristers are put at a distinct disadvantage to their peers in the other branches of the legal profession, unnecessarily restricting their career opportunities. The Rules of Conduct are unnecessarily complicated and difficult to understand. Corporate clients are increasingly looking at different ways to resource their workforce and the use of contractors over employees gives such Corporate Clients greater flexibility. Employed barristers are finding that to seek better career opportunities</i></p>

	<i>they need flexibility to become Contractors, and because of the current Rules of Conduct, they are unable to do so without difficulty, which puts them at an uncompetitive disadvantage to solicitors, legal executives and other professions.</i>
4	<i>Noted.</i>
5	<i>BACFI fully endorses this statement for the reasons set out above. Many former employed barristers who may have been made redundant have found their problems compounded by the current Rules of Conduct which prevents them taking locum work as a Contractor. This is preventing barristers from developing their careers and seeking gainful employment.</i>
	Issue
6	<i>BACFI fully agrees with this paragraph. Many organisations in the private sector are also “employing” lawyers through agencies or contracts for services. These barristers are contracted usually for doing such things as: standing-in for an employed lawyer who is temporally absent e.g. maternity cover; to provide additional legal resource, or; to support a project. There are also different types of agencies, both non-authorized and authorized to provide either lawyers and/or legal services, who provide Corporate Clients with these contractor lawyers. These include recruitment agencies, para-legal firms, legal process outsourcing companies (LPOs) e.g. Axiom, Unitedlex and lawyers on demand services provided by major law firms e.g. Lawyers on Demand, Vario by Pinsent Masons. Increasingly in-house legal departments are looking at alternative operating models to drive value for money for their organisation and are outsourcing their legal services to such alternative legal service providers. The current Rules of Conduct prevent many barristers from taking up the great new career opportunities that these alternative legal service providers can offer. A barrister, who was formerly employed, may find unfairly that although they are doing exactly the same type of legal work as they did as an employed barrister, they are prevented from holding themselves out as a fully qualified lawyer because they cannot hold themselves out as a practising barrister. Most employment agencies, Corporate Clients and other alternative legal service providers will not actually take on a barrister who does not have a practising certificate. It can also raise suspicion from people who are not barristers and do not understand the Rules of Conduct, as to why this “former barrister” of many years standing is now no longer registered, thus having a negative impact on that person’s professional reputation. This could mean that the former employed barrister either has to accept work as an unqualified lawyer or as a business consultant at a lower rate of pay or not be able to take the work at all.</i>
7	<i>BACFI does fully support this proposal but is concerned that there are still different rules depending on whether the Contractor barrister is contracted with a non-authorized body or an authorized body. Many Contractor barristers will want to be registered with employment agencies that are non-authorized bodies and with authorized bodies (on demand law firms) that are both providing the same Corporate Clients with locum and interim lawyers. BACFI would recommend that the same rules should apply whether a Contractor barrister is contracting through a non-authorized body or an authorized body.</i>
	Current Position
8	<i>BACFI understands and notes this paragraph. As we said in our response to paragraph 7 above, BACFI would recommend that the same rules should apply whether a Contractor barrister is contracting through a non-authorized body or an authorized body. Many Contractor barristers will wish to be contracted through one of the alternative legal service providers who may or may not be an authorized body but provide services to Corporate Clients including supply of locum lawyers to an in-house legal department.</i>
9	<i>BACFI agrees with this paragraph.</i>

10	<i>BACFI agreed with this paragraph.</i>
11/1 2	<i>BACFI fully agrees with paragraph. Many of our members have had to wait for nearly 2 years to get the necessary waivers and this has caused them unnecessary distress and prevented them from taking up opportunities. This is particularly unfair where the former employed barrister is doing legal work no different from that which he/she previously did when employed. What happens to the employed barrister who is made redundant by their employer, and their former employer wants to retain them as a consultant doing the same work under a contract for services? They could be prevented from taking this new role if it is a requirement of the role to hold a current practising certificate. Many barristers, whilst waiting for a waiver, are put in a limbo world of not being able to hold out as a qualified lawyer and not being able to accept work if a practising certificate is required. This also creates significant difficulty in finding professional indemnity insurance. As has been said above, it can also raise suspicion amongst people who are not barristers and do not understand the Rules of Conduct, as to why this “former barrister” of many years standing is now no longer registered, thus having negative impact on that person’s professional reputation. The current waiver process creates unnecessary delay, bureaucracy, uncertainty and stress.</i>
	Amending the definition of “employed barrister non-authorized body”
14	<i>As we stated in paragraph 1 above, BACFI recommends that the any designation is unnecessary as we are “barristers” and a distinction in the capacity under which a barrister is engaged with a Corporate Client is not necessary. We consider that the very title “employed barrister non-authorized body” is unhelpful in that many barristers falling under this definition are not classed as employed and would not want to be classed as “employed” for tax reasons. Such barristers are either classed by HMRC as sole traders or directors/sole owners of their own personal service companies which enter into a contract for services with their Corporate Clients. Many Corporate Clients do not wish such barristers to be classed as employed, to give them the greater flexibility of a contractor rather than an employee. BACFI recommends that the designation should be “barrister (employed, contractor or consultant) non-authorized body”. BACFI wonders whether the profession actually needs to make a distinction at all between the various capacities in which a barrister delivers legal services . Whether a barrister works traditionally in chambers, is employed or is a contractor, he/she remains a barrister. No distinction is made between a chartered or certified accountant in private practice and those in employment. Why should the Bar continue to make such a distinction?</i>
15	<i>BACFI agrees with the proposed new rule; but there must be parity between a Contractor barrister contracted through a non-authorized body and one contracted through an authorized body.</i>
Que stion 1	<i>BACFI has set out in its response above on the different “employment arrangements”. BACFI considers that the use of the word “employment” is misleading and may cause tax problems for some barristers who are sole traders or operate through their own personal service companies. Rather we should say there are “different contracting arrangements” for barristers. Some of the different contracting arrangements which are currently used are as follows:</i> <i>Contractor Barristers are usually organised as either:</i> <ul style="list-style-type: none">• <i>Sole trader (as registered with HMRC), being a barrister who is not operating through or employed by a company and is classed as “self-employed”; or;</i>

	<ul style="list-style-type: none"> • <i>An employee of an umbrella service company owned by an employment agency; or;</i> • <i>Sole owner and director of their own personal service company;</i> <p><i>Contractor Barristers may either contract directly with Corporate Clients or contract through an employment agency (which includes authorised bodies that may also be registered as Employment Agencies) which in turn contract with the Corporate Client for the supply of locum lawyers.</i></p> <p><i>In the latter case the Barrister either:</i></p> <ul style="list-style-type: none"> • <i>Becomes an employee of the employment agency umbrella service for the duration of the contract, in which case the barrister is taken on PAYE by the agency but does not become an employee of the Corporate Client; or</i> • <i>the Barrister’s personal service company enters into a consultancy contract (contract for services) with the agency for a fixed term contract. This latter option is the preferred model because it brings tax advantages for the barrister as he is taxed as a director of a corporation and also for the Corporate Client because the Contractor barrister does not become an employee and the Agency Worker Regulations do not apply.</i> <p><i>A Barrister may also contract directly with a Corporate Client through his/her personal service company, which enters into the contract for services with the Corporate Client.</i></p> <p><i>These different contracting arrangements are used by both contractors (in most professions and roles) and Corporate Clients because they give the end-user Corporate Client flexibility in human resources and reduces the obligations imposed by contracts of employment and Agency Workers Regulations. The contractor enjoys flexibility in career options and tax advantages as either self-employed or a director of their own personal service company. This flexible resourcing model, using contractors, is widespread in all professions and roles including accountants, project managers, legal executives and solicitors. BACFI cannot understand why the Bar wants to be different.</i></p>
<p><i>Que stion 2</i></p>	<p><i>BACFI is content with the definition but suggests that the designation of “employed barrister non-authorised body” is not required, however, if the BSB considers such a separate designation is required it should be changed to that of “barrister (employed, contractor or consultant) non-authorised body”. The `Rules of Conduct should recognise parity between a Contractor barrister contracted through a non-authorised body and one contracted through an authorised body.</i></p>
<p><i>Que stion 3</i></p>	<p><i>BACFI does not consider that the proposed changes create any additional risks. In fact they may lessen the current risks posed by the many unregistered barristers who operate as Contractors. These will be required to become registered and therefore, better regulated by the BSB.</i></p> <p><i>Corporate clients will be protected by having their legal work done by a registered barrister who will be able to obtain professional indemnity insurance for the provision of legal services, further protecting those Corporate Clients.</i></p>