

BAR STANDARDS BOARD

REGULATING BARRISTERS

Consultation

Amending the definition of employed barrister (non-authorised body)

Purpose

1. This consultation paper seeks views on amending the definition of “employed barrister non-authorised body”¹ to allow barristers to work through agencies or corporate vehicles. The paper discusses how this would be achieved and asks for respondents to consider the potential risks of any such change.
2. This consultation paper will be of interest to the Bar, in particular employed barristers, non-authorised bodies that (directly or indirectly) employ barristers and consumers of legal services. We would also appreciate responses from those who represent consumer interests.

Background

3. Earlier this year the LSB released a discussion document, “Are regulatory restrictions in practising rules for in-house lawyers justified?” As part of the BSB’s response to this, we committed to consulting on the extent to which our rules remain fit for purpose in the context of in-house practice. This is a large programme of work which is taking place as part of the review of the BSB’s Handbook. This project is currently being scoped and further discussion documents and consultations will be released at a later date seeking input on some of the wider issues related to the scope of practice of employed barristers and scope of practice issues more generally.
4. In the course of the wider review, the BSB will have regard to section 15 of the Legal Services Act 2007 (LSA) (More information on section 15 can be found in **Annex A**). Section 15 of the LSA makes provision for the carrying on of reserved legal activities by employers and employees. It details when an employer needs to be authorised to carry on reserved legal activities.
5. In its initial consideration of these issues, the BSB has identified that its current definition of employed practice may be unnecessarily restrictive when combined with other scope of practice rules. Therefore, our proposed first step in aligning our provisions more closely with section 15 is to amend the definition of “employed barrister non-authorised body” to allow barristers to work in different and more modern ways. Many barristers now seek to work through agencies or corporate vehicles, but are currently unable to do so

¹ A “non-authorised body” is a body that is not authorised to provide reserved legal services by any approved regulator.

without seeking a waiver due to the current construction of the scope of practice rules for employed barristers.

Issue

6. The problem we have identified is that the scope of practice rules are currently preventing barristers from obtaining employment through agencies or by contracting with an employer through a corporate vehicle set up by them. For example, if an employed barrister wished to work for a non-authorised body (for example, a local authority, a large corporate body or a charity) it may no longer be possible for them always to be employed directly by that non-authorised body, as it is now common practice for such bodies to procure “in-house” services through agencies. Barristers may also wish to provide consultancy services through companies wholly owned and directed by them (although the company itself would not be held out as providing legal services) with a contract for services in place between the company and the end user of legal services.
7. The purpose of the proposal to change the definition of “employed barrister non-authorised body” is to ensure that the BSB is not putting unnecessary restrictions on the way in which employed barristers can practise. Amending the definition will regularise the current position of employed barristers in such a way that the definition of employed practice more closely matches those employers for whom authorisation is not required under the LSA 2007. This goes some way towards removing restrictions on in-house practice that are not required by the Act. Such restrictions should be justified with evidence of risk to the regulatory objectives and the BSB is not aware of any evidence that this change would adversely affect those objectives.

Current Position

8. Employed barristers work in a variety of bodies, some of which are authorised to provide reserved legal activities under the LSA 2007 (“authorised bodies”). Employed barristers hold practising certificates that enable them to provide reserved legal activities; however, the type of body in which they are employed dictates who they can supply those services to. Currently barristers practising in an authorised body are permitted to supply legal services to clients of the authorised body, by virtue of Rules S32 and S36². These permit employed barristers to provide services to:
 - The authorised body;
 - Any employee, director or company secretary of the authorised body in a matter arising out of or relating to that person’s employment;
 - Any client of the authorised body;
 - If providing legal services at a Legal Advice Centre, clients of the Legal Advice Centre; or
 - If supplying legal services free of charge, members of the public.

² rS32 applies to bodies authorised by the BSB and rS36 applies to bodies authorised by another approved regulator

9. Employed barristers in a non-authorised body³ (for example, in-house counsel, barristers employed in central or local government or professional services/consultancy firms) are currently not able (without seeking a waiver) to supply legal services to clients of their employer by virtue of Rule S39, which limits those to whom services can be provided to:
- The employer;
 - Any employee, director or company secretary of the employer in a matter arising out of or relating to that persons' employment;
 - If the employer is a public authority (including the Crown or a Government department or agency or a local authority), another public authority on behalf of which of the employer has made arrangements under statute or otherwise to supply any legal services or to perform any of that other public authority's functions as agent or otherwise;
 - If employed by or in a Government department or agency, any Minister or Officer of the Crown;
 - If employed by a trade association, any individual member of the association;
 - If performing the functions of a Justices' clerk, the relevant Justices;
 - If employed in the service of the Legal Aid Agency, members of the public;
 - If employed by a Legal Advice Centre, clients of the Legal Advice Centre;
 - If supplying legal services free of charge, members of the public; or
 - If the employer is a foreign lawyer and the legal services consist of foreign work, any client of the employer
10. As can be seen from the construction of rS39 an employed barrister wishing to work in a non-authorised body is broadly only able to supply legal services (whether reserved or unreserved) to their employer and not to clients of their employer.
11. The BSB has already agreed that its policy position is to allow barristers to work through agencies or corporate vehicles, but the current rules do not reflect this. This means that barristers wishing to work in these ways have to apply for individual waivers. The BSB has already issued waivers from the scope of practice rules to allow employed barristers to work in different ways. For example, a waiver has been issued to allow an employed barrister who has significant experience of working with local authorities to provide

³ An employed barrister (non-authorised body) means a practising barrister who is employed:

- (a) other than by an authorised body;
 - (b) either:
 - (i) under a contract of employment ; or
 - (ii) under a written contract for services which is for a determinate period (subject to any provision for earlier termination on notice); or
 - (iii) by virtue of an office under the Crown or in the institutions of the European Union; and
- who supplies legal services as a barrister in the course of their employment ;

reserved legal services to a local authority through an agency. In this particular circumstance, the barrister sourced the work through the agency and would be paid by that agency, although the legal services are being provided directly to the local authority.

12. Granting waivers is not a viable long term solution to this issue. Depending on the barrister's circumstances, they may also need a waiver from the 'three year rule', which requires a barrister to work with a 'qualified person' in order to provide services to the public.⁴ The waiver process may therefore be burdensome and lengthy for the barrister concerned. In the absence of a waiver, the barrister would have to work in an unregistered capacity, without a practising certificate whilst waiting for the waiver to be granted. Individuals who wish to work through agencies or corporate vehicles may find that assignments can come up at any time and they are required to be available immediately. The end user requiring the legal services may also then experience delays or be forced to search elsewhere for these services. Expanding the definition of employed barrister (non-authorised body) could potentially resolve these issues.

Amending the definition of "employed barrister non-authorised body"

14. Restrictions that are placed on the practice of employed barristers should be based on risks which are well evidenced. The LSA 2007 was introduced to open up the legal services market to meet consumers' needs more effectively. The current rule is preventing new ways of working and so limiting innovation in the market and constraining choice for consumers, and it also goes beyond the requirements of section 15 of the Act. The need to remove unjustified burdens is also consistent with the regulatory objectives, including enhancing the strength, diversity and effectiveness of the legal profession, promoting competition and increasing consumer choice. The BSB is therefore proposing to widen the definition of "employed barrister non-authorised body" to cover different employment arrangements (including working through an agency or corporate vehicle).
15. As discussed above, the scope of practice rules currently place restrictions on employed barristers by allowing them to supply legal services only to those listed in rS39 – in most cases the employer only. The BSB is proposing to adopt a broader definition of employed barrister (non-authorised body) to ensure different, more modern employment arrangements are captured. The proposed definition is:

"An employed barrister (non-authorised body) means a practising barrister who is employed:

- (a) Other than by an authorised body; and
- (b) Either:
 - (i) under a contract for *employment*
 - (ii) engaged under a contract of service by a firm or its wholly owned service company; or
 - (iii) engaged under a contract for services, made between a firm or organisation and:
 - 1) that employed barrister;
 - 2) an employment agency; or

⁴ rS20 requires a barrister to work with a qualified person if they have not been entitled to exercise full rights of audience for three years

- 3) a company which is not held out to the public as providing legal services and is wholly owned and directed by that employed barrister; or
- (iv) by virtue of an office under the Crown or in the institutions of the European Union; and

who supplies *legal services* as a *barrister* in the course of their *employment*.

16. This more flexible definition would allow the following types of arrangements:

- A barrister engaged under a contract for services or a contract of service by a regulated entity or its wholly owned service company. The barrister is "employed" by the entity or company.
- A barrister engaged by an employment agency which has a contract for services with a third party. The barrister is "employed" by the third party.
- A barrister who has established a limited liability company which is wholly owned and directed by the barrister which itself is not held out as providing legal services and has a contract for services with a third party. The barrister is "employed" by the third party.

Question 1: Should the definition of employed barrister (non-authorised body) be broadened to include different employment arrangements? Please give your reasons.

Question 2: Are you content with the proposed definition set out at paragraph 15?

Question 3: Are there any risks associated with broadening the definition of employed barrister (non-authorised body) that the BSB should consider?

Responding to this consultation

17. Responses to this consultation should be sent to the Regulatory Policy Department at the BSB at: regulatorypolicy@barstandardsboard.org.uk.

18. Responses should be received no later than close of business Tuesday, 15 December 2015.

Confidentiality

19. We may publish a list of respondents to the consultation in addition to individual responses. Please state clearly if you do not wish your name and/or response to be published. It is our policy to comply with the spirit of Freedom of Information legislation.

Annex on s15 LSA 2007

The Legal Services Act 2007 (LSA) is an [Act](#) of the [Parliament of the United Kingdom](#) that reformed the way in which legal services are regulated in England and Wales. The Act aims to encourage more [competition](#) in the market for legal services and to provide a new route for [consumer complaints](#). The Legal Services Act sets out the regulatory objectives and requires all approved regulators (including the Bar Standards Board) to act in way that is compatible with these objectives. The regulatory objectives as set out in Part 1 of the LSA are:

- Protecting and promoting public interest;
- Supporting the constitutional principles of the rule of law;
- Improving access to justice;
- Protecting and promoting the interests of consumers;
- Promoting competition in the provision of services;
- Encouraging an independent, strong, diverse and effective legal profession;
- Increasing public understanding of the citizen's legal rights and duties;
- Promoting and maintaining adherence to the professional principles.

This consultation focuses on restrictions on in house practice which is dealt with in section 15 of the LSA. The section reads:

15 Carrying on of a reserved legal activity: employers and employees etc

(1) This section applies for the interpretation of references in this Act to a person carrying on an activity which is a reserved legal activity.

(2) References to a person carrying on an activity which is a reserved legal activity include a person ("E") who—

(a) is an employee of a person ("P"), and

(b) carries on the activity in E's capacity as such an employee.

(3) For the purposes of subsection (2), it is irrelevant whether P is entitled to carry on the activity.

(4) P does not carry on an activity ("the relevant activity") which is a reserved legal activity by virtue of E carrying it on in E's capacity as an employee of P, unless the provision of relevant services to the public or a section of the public (with or without a view to profit) is part of P's business.

(5) Relevant services are services which consist of or include the carrying on of the relevant activity by employees of P in their capacity as employees of P.

(6) Where P is an independent trade union, persons provided with relevant services do not constitute the public or a section of the public where—

(a) the persons are provided with the relevant services by virtue of their membership or former membership of P or of another person's membership or former membership of P, and

(b) the services are excepted membership services.

(7) Subject to subsection (8), “excepted membership services” means relevant services which relate to or have a connection with—

(a) relevant activities of a member, or former member, of the independent trade union;

(b) any other activities carried on for the purposes of or in connection with, or arising from, such relevant activities;

(c) any event which has occurred (or is alleged to have occurred) in the course of or in connection with such relevant activities or activities within paragraph (b);

(d) activities carried on by a person for the purposes of or in connection with, or arising from, the person's membership of the independent trade union;

and such other relevant services as the Lord Chancellor may by order specify.

(8) The Lord Chancellor may by order make provision about the circumstances in which relevant services do or do not relate to, or have a connection with, the matters mentioned in paragraphs (a) to (d) of subsection (7).

(9) Subject to that, the Lord Chancellor may by order make provision about—

(a) what does or does not constitute a section of the public;

(b) the circumstances in which the provision of relevant services to the public or a section of the public does or does not form part of P's business.

(10) The Lord Chancellor may make an order under subsection (7), (8) or (9) only on the recommendation of the Board.

(11) If P is a body, references to an employee of P include references to a manager of P.

(12) In subsection (7), “relevant activities”, in relation to a person who is or was a member of an independent trade union, means any employment (including self-employment), trade, occupation or other activity to which the person's membership of the trade union relates or related.

Section 15 of the LSA 2007 makes provision for the carrying on of reserved legal activities by employers and employees. It details when an employer needs to be authorised to carry on reserved legal activities. Reserved legal activities are:

- a) The exercise of a right of audience;
- b) The conduct of litigation;
- c) Reserved instrument activities;
- d) Probate activities;
- e) Notarial activities; and
- f) The administration of oaths.

An employer does not require authorisation by an approved regulator merely because they employ a person to carry out reserved legal activities. However, it remains a requirement for an individual wishing to provide reserved legal activities direct to their employer to be authorised to do so.

Section 15 (4) does require an employer to be authorised by an approved regulator when employee(s) provide reserved legal services to the public, or a section of the public, as part of its business.

The purpose of the authorisation requirements is to protect the public (as consumers of legal services) where a body (through its employees) provides relevant legal services to them, while acknowledging that there is no need for similar protection where a body simply employs in-house lawyers for its own internal purposes.

Section 21 of the Act allows each regulator to establish its own arrangements to regulate the provision of legal services by those individuals and organisations it authorises. The BSB places specific rules, further to section 15, for practising barristers working as employees of non-authorised bodies.