PABA RESPONSE TO BSB CONSULTATION

ON ENTITY REGULATION

January 2011

1. We are the only specialist Bar Association dealing specifically with Public Access work. Our members are directly affected by the proposed reforms.

2. Given the above, could the BSB please place us on their list of consultees, since we have thus far been excluded from this Consultation and all the others that were germane to our work.

3. In the limited time now left, we offer some short views.

4. We support all forms of new and better ways of practising. We are open-minded about the new business structures. We support all and any reforms that will liberate Barristers, including BME Barristers and rid the Bar for good of any vestiges of a Club-like or "closed shop" mentality.

5. We support the expansion of work functions so as to enable the Bar to conduct litigation, if, but only if, this can be done without increases in PC fees and if but only if, BMIF support the move and do not charge hugely increased insurance premiums for the conduct of such work.

6. The conduct of litigation is a grandiose phrase for a few simple tasks that the Bar can easily add on to the list of services that it can already offer the public: issue of process, serving process and documents, instructing experts – and not much more than that. In fact, any person can perform these functions without a solicitor, so why should a Barrister be denied the freedom to do so ? The functions specific to a litigator are few in number and simple of performance. The only such functions so confined by statute are:-

    - *signing* a claim form, or acknowledgment of service, or application notice or appeal notice on behalf of the litigant lay client.

    and, which is really part of the same thing ,

    - providing a service as an *address for service*, and receiving and dealing with notices from the court or formal documents served by the opposing party.

7. By contrast the following activities are not confined to a litigator, and can quite lawfully be performed by anybody:-

    - Delivering to a court office a claim form, appeal notice, application or the like, provided it has been signed by the party himself
    - Typing or printing out an appeal notice, statement of case or other formal court document
    - provided no fee is charged, drafting the words on a claim form, appeal notice or the like
    - Service of a claim form or other documents
    - Taking a statement from a prospective witness.
    - Correspondence about the course of the litigation with the opposing party

8. We are against the handling of client money by Barristers, unless this is done through a central agency or custodian. There must be rules that oblige the custodian to release funds promptly on request. The interest earned on such a large fund could be used to fund the costs arising from the reforms in question, or the LSB levy, or the (divisive) Bar Council pension deficit.

9. Accordingly, we are against any creation of accounts rules for the Bar, as custodianship makes such rules unnecessary.

10. We regard powers of intervention as being misconceived: if the Bar does not handle client money, then such powers would not be necessary. In any event, they could only properly be created by Parliament, as in the case of Solicitors, the intervention regime being set out in a schedule to the Solicitors Act 1974.

11. The experience of the Solicitors' profession is that Intervention is totally destructive of practices, careers and solvency, can be authorised without due cause and can be a disproportionate regulatory power. If the BSB still insists on arrogating to itself extreme powers to freeze accounts and remove practice papers and the like without notice, there will have to be provision for due process, for a statutory right of appeal to the High Court and confirmation that BMIF will fund such appeals.

12. We regard the Bar Public Access scheme, initiated in July 2004, as a success story and no reforms must be so seductive as to jeopardise that scheme. It is a simple and inexpensive mode of practice, that historically requires little regulation – PA work with its direct exposure to some particularly awkward clients, surprisingly generates only a tiny proportion of all complaints against Barristers. In particular, if entites require a vastly enlarged bureaucracy, those who wish to practise in the traditional way, or to offer a Public Access service without being part of an entity, should not be prejudiced in any way, whether in terms of the burden of regulation, or in terms of cost. There is no reason why a Barrister not handling client money, or doing so through a stakeholder or custodian, should have to be subject to the Bar equivalent of the Solicitors Accounts Rules, with all their complexity, expense and reliance on a draconian regime based on the doctrine of strict liability, as well as vicarious liability for the administrative failings of others. In short, there is no reason why any new rules created for entities in relation to, inter alia, direct access work, should complicate or spoil the simplicity of the Public Access scheme as it now stands.

13. We believe that it is important to grasp the fact that the Bar is no longer a referral profession, but a consultancy profession. Expansion of the rules is therefore perfectly possible without damaging what the modern Bar now is or now does. The Bar will offer consultation services in advocacy and the law, whether it does that through entities or not and whether directly or through solicitors. We do not think, on balance, that conducting litigation will lead to fusion for this reason: the Barrister brand is a powerful and enduring one. Just because Tesco offer insurance services, does not make people think of them other than as a supermarket. Others have suggested that there be a rule that all Barristers must predominantly conduct advocacy and advise on the law. This is far too authoritarian and proscriptive. Lawyers should be free to do what they do best at any one time and to offer what the public regards as the most valuable type of service that they can, as individuals, offer. If some Barristers wish to hanker for an era when the Bar enjoyed exclusivity in the higher courts funded by a bottomless pit of legal aid for almost every type of work, they can do that, without inflicting their narrow-mindedness on those who wish to adapt their talents in order to survive.

14. We see the new reforms as indirectly solving a perennial problem for the Bar, namely with regard to the lack of Pupillages. More entities should mean more opportunity and therefore more places for recruits. A profession that turns away talent, is one that people inevitably come to dislike: a rejected Barrister is a disaffected Barrister. Such a disaffected Barrister, when propelled grudgingly into employment, or the GLS, or the Solicitors' profession, will be a source of ill-will for the Bar in future, perhaps poisoning broader attitudes towards the Bar within those sectors. There is also a sense in which the

Pupillage system perpetuates a damaging sense of self-congratulatory elitism. If there are more Barrister entities of all kinds offering more opportunity to a more diverse range of people, the Bar may be able to absorb a wider pool of talent.

15. We hope that new entities will enable Barristers to employ Barristers: this will encourage entrepreneurial Barristers to start BOEs. They will not do so, if their recruits have to be self-employed, as they are now and free to take work away with them at will. The notion of clients being in the ownership of a business or firm, which is so well known to commercial, employment and competition lawyers and indeed practised in most other professions, should be expanded to the Bar, with protection afforded to entrepreneurs in the form of employment contracts and restrictive covenants. The Bar Code of Conduct should permit the creator(s) of a BOE or other ABS, to protect the business to the full extent that the law permits. BOE entrepreneurs should be able to bill out staff. The junior Bar will enjoy a new period of stability of income. It could become the norm for young Barristers to start as Pupils and then as salaried employees of BOEs, before moving into self-employed practice, or setting up their own BOEs.

16. We hope that the changes will enable the Criminal Bar to thrive and the Family Bar to recover from the legal aid cuts. We support the Immigration Bar and hope to see BOE immigration entities emerging in due course in order to improve the quality of services in an important market. We hope that the Family Bar's historic reluctance to embrace direct access work, will now change, enabling a new generation of LIP wives to be properly represented in divorce cases.

17. In summary, we like the BSB's ideas, but dislike the BSB's tendency to look to create draconian new powers for itself and to do so irrespective of cost. It would enjoy more support from the rank and file Bar if its enlightened policy-making arm had a keener sense of 2 things that most Barristers deplore: (1) the heightened risk of being subject to the disciplinary process; (2) the lack of restraint in spending our money and asking for more from us all, year on year.

18. As our name suggests, we are anxious that the Public Access scheme, which has been really successful since 2004, should not be dragged by entity regulation into a more complex and costly regime that, as it stands, the Public Access scheme does not need or warrant.

PABA
14th January 2011