

## **Bar Standards Board**

### **Response to LSB discussion paper: Are regulatory restrictions in practising rules for in-house lawyers justified?**

The following is the BSB's response to the above discussion paper's questions for regulators. As noted in the answers below, this is an ongoing area of work for the BSB and we would be happy to discuss these issues further with the LSB as our thinking develops.

#### **Question 1: What is the rationale to support your current approach to regulating in-house practice?**

The current rules predate the Legal Services Act 2007 and broadly replicate the requirements that were present in the BSB's old Code of Conduct. When the BSB submitted its new Handbook to the LSB for approval in 2013 it noted that it had yet to consider whether to relax the prohibition that prevents employed barristers working for a non-authorised employer from supplying unreserved legal services to clients of their employer<sup>1</sup>.

#### **Question 2: If you have specific regulatory arrangements, how have you assured yourself that there is compelling evidence to support those arrangements?**

The BSB has not yet assured itself that there are compelling reasons to support the retention of the existing arrangements in their current form. The work identified below will give such assurance or lead to an amendment of the rules. In the meantime, should the current rules impact negatively on the availability of legal services in the market, the BSB will consider granting waivers from those rules.

#### **Question 3: Having reflected on your specific regulatory arrangements, are there any areas that you intend to remove or review?**

The BSB has identified that its rules restricting the scope of practice of in-house lawyers need to be reviewed. The two key rules restricting what these lawyers can do are:

- rS39: scope of practice as an employed barrister (non-authorised body). The effect of this rule is that employed barristers in non-authorised bodies may not provide legal services (whether reserved or unreserved) to anyone other than their employer (with a number of specific exceptions);
- rS20 and rS21: requirement to work with a 'qualified person' when under three years' standing if exercising a right of audience, conducting litigation or providing services to the public. This may additionally act as a barrier to some employed barristers, who may never have reached three years' standing due to the nature of their practice, particularly if the nature of their practice means that they are unlikely to be working with a qualified person.

The BSB has agreed to consult on the extent to which these rules remain fit for purpose in the context of in-house practice. This consultation will launch before the Summer break. The focus of the consultation will be on removing restrictions that go beyond those in s15 of

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<sup>1</sup> See para 2.44 at

[http://www.legalservicesboard.org.uk/Projects/statutory\\_decision\\_making/pdf/bsb\\_new\\_handbook\\_application.pdf](http://www.legalservicesboard.org.uk/Projects/statutory_decision_making/pdf/bsb_new_handbook_application.pdf)

the Act unless specific risks are identified that justify retaining them. In making such proposals the BSB will have regard to the intention behind s15 and will consider the extent to which the concept of “employment” in our Handbook matches the intended meaning in s15. If necessary, we will consider amending the Handbook definition of “employed barrister”.

In the meantime, the BSB has already begun to grant individual waivers to practitioners affected by these restrictions, where the rules are frustrating the delivery of legal services that present no obvious regulatory risk. Such waivers may be granted where a barrister is providing legal services as an employee of a company that subsequently contracts with third parties (examples of which may be employment agencies or consultancy firms providing legal services). In considering such waiver applications, the BSB will have regard to the experience of the applicant, the type of services being provided and the type of client to whom they will be provided – waivers will be granted in situations that appear to be low risk (for example, where the services are non-reserved, the barrister is experienced at providing that type of service and the clients are ordinarily of a type that cannot complain to the Ombudsman).

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