

Bar Standards Board

**The Legal Services Act 2007: Implications for the regulation of the Bar in
England and Wales**



A response by the Association of Personal Injury Lawyers

May 2008

The Association of Personal Injury Lawyers (APIL) was formed by claimant lawyers with a view to representing the interests of personal injury victims. APIL currently has around 5,000 members in the UK and abroad. Membership comprises solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants.

The aims of the association are:

- To promote full and just compensation for all types of personal injury;
- To promote and develop expertise in the practice of personal injury law;
- To promote wider redress for personal injury in the legal system;
- To campaign for improvements in personal injury law;
- To promote safety and alert the public to hazards wherever they arise;
- To provide a communication network for members.

APIL's executive committee would like to acknowledge the assistance of the following members in preparing this response:

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Executive Summary

- Although the Board suggests that barristers should not be prevented from entering into partnerships with other barristers, LDPs with other lawyers and ABSs with non-lawyers, APIL has serious concerns about the proposals to permit barristers to enter into them.
- The proposed arrangements will enable barristers to come together in a single firm or association in a way which will give rise to conflicts of interest which would have the effect of restricting the work a partnership LDP or ABS could take on. The consequences for the injured victim would be fewer barristers available, giving rise to serious access to justice issues. This scenario becomes more likely in specialist areas of personal injury law and in regions outside of London.
- Barristers in partnerships, LDPs, or ABSs, will not be able to provide an independent advisory service to clients to the extent that they currently do under the present self-employed framework. Every claimant has the right to the best available independent legal advice and we oppose any measures that potentially undermine the quality of legal services.
- Barristers in partnerships, LDPs and ABSs will be exposed to internal risk management that could determine which cases a barrister accepts in accordance with profit, the financial health of the association and commercial pressures. This concern extends to ABS firms where the introduction of outside capital will bring external financial considerations in the formulation of policy. The proposals will allow barristers to depart from the current framework in which they work free from external influences. We are not confident that

clients' best interests and access to justice can be adequately maintained in such a commercially driven environment.

- Outside ownership of legal services in ABSs will allow the legal services market to be dominated by big name brands. This will fundamentally transform the provision of legal services as a profession into the provision of legal services as an industry, with a greater emphasis on costs and profit. We note with great concern that the current fiduciary relationship of trust between the client and the solicitor or barrister may be put at risk in such an environment. It may be difficult to uphold the client's best interests if this were to occur.

Introduction

APIL welcomes the opportunity to put forward its comments in relation to the Bar Standards Board's consultation looking at the implications of the Legal Services Act 2007 for the regulation of the Bar in England and Wales. We do, however, have serious concerns that the proposals in the paper will give rise to considerable access to justice issues and will undermine the quality of legal services provided by barristers to injured people. This response specifically addresses personal injury work, and not the work of the Bar generally. APIL acknowledges that different considerations may apply in other specialist areas.

The proposals in this consultation paper may impinge upon both the independence of the Bar and quality of the service it provides to injured people. It is the self-employed nature of the current framework in which barristers practice that encourages independence and quality, as well as maintaining access to justice, by allowing barristers to practice free from other interests and external considerations. The proposals in this paper to permit barristers to practice in partnerships, LDPs and ultimately ABSs, will remove the self-employed status of those barristers who choose to work in this way. In such cases we do not feel confident that independence and access to justice will be maintained at the same levels as under the present framework. We feel that the interests of the claimant are best served when barristers remain independent enabling the delivery of a high quality of legal service and ensuring access to justice by way of an independent referral service (barristers are not instructed directly by claimants).

Our concerns are outlined in five points below.

1. Reducing the number of barristers available for instruction

Under the present regime, barristers are free and, by the 'cab rank rule', obliged to accept instructions from a claimant even if the opposite side instructs another barrister from within the same set. They are able to do this because a claimant instructs a barrister as an individual. This would change dramatically under the new proposals. Claimants would instruct practices. Barristers who have entered into a partnership or who work within the same LDP or ABS will be prevented from acting against each other in the same case because it would generate a conflict of interest. There may also be a conflict in a situation where a barrister who has acted for a particular client (such as a particular insurer) in the past will preclude other barristers within the partnership, LDP or ABS from working against that client.

It would become impossible within partnership, LDP or ABS, APIL suggests, for more than one side of a case to be undertaken in one barrister's practice. As this field of work becomes increasingly specialist, and continues to become concentrated in few sets of existing chambers, client choice would be reduced. Any sets who become partnerships, LDPs or ABSs and who undertake any insurance work, would or might become prevented from undertaking claimant work, thereby denying client choice and claimant access to a significant portion of the specialist pool of legal service providers.

We note that the Bar Standards Board says in the consultation paper; "access to justice is the principal reason for prohibiting barristers from entering into partnerships". It goes on:

The main issue turns on the fact that a barrister in partnership could not act against another member of the partnership, because there would be a conflict of interest. In specialist fields this could give rise to serious problems of access

to justice: it would even be possible to 'conflict out' the entire market by asking barristers in all of a small number of partnerships for an opinion.

APIL agrees with both observations.

We note that it would be possible for defendants in personal injury actions, who are mostly insurers, to monopolise the market, or in personal injury, to instruct a particularly specialised group of barristers or the most experienced, but that it would be nearly impossible for an individual claimant or claimant representative groups, such as trade unions, to do this. This would greatly extend the inequality of arms which currently remains an issue in personal injury actions.

The following two scenarios illustrate the extent of the problem of bringing barristers together in a single entity. First, it is imperative that victims of personal injury are advised and represented by barristers who have experience of, and expertise in, the field of personal injury law. Personal injury law has developed into a specialist field in its own right and practice in this area requires particular skills, such as the ability to digest and understand complicated medical and other expert information. Certain types of particularly complex and difficult personal injury claims, such as vibration white finger and other industrial diseases, may require a barrister with specialist knowledge of the particular injury. Such specialist barristers within personal injury already congregate in a few specialist sets of increasing size. Recommendations in this consultation paper will make access even more difficult if these legal service providers were to operate as partnerships, LDPs or ABSs.

Second, outside London the number of barristers who specialise in personal injury, and the number of these that specialise in discreet and complex areas of personal injury are even fewer. There are fewer personal injury barristers practising in the regions outside of London, despite the fact that the population of the capital is less

than one tenth of that for England and Wales.¹ The access to justice considerations outlined above can only become more pronounced for claimants outside London.

Finally, this necessity for access to the best standard of legal services is confounded by the inequality of arms which is often already evident between the claimant and defendant. Claims are predominantly pursued against insurance companies, who are experienced litigators and able to afford the best legal advice and representation. To equalise the position between the parties, it is extremely important that the personal injury victim has full and proper access to the same specialist barristers or their practice colleagues, commonly used by insurers.

While we respect the Bar Standards Board's intentions in its statement that "since Parliament has legislated to permit [legal services being provided through ABS firms] it would be wrong for its rules to prohibit barristers from being involved in such firms," we do not feel that the Board places sufficient emphasis on the risks to access to justice when promoting the commercial interests of barristers. APIL strongly asserts that access to justice should be a paramount consideration of the Board above and beyond creating business opportunities at the Bar.

2. Barristers provide an independent advisory service

APIL has consistently emphasised the claimant's need for high quality independent legal advice throughout the claims process. The ability of barristers to provide personal injury claimants with high quality, objective legal advice lies largely in the self-employed nature of the Bar that enables barristers to work independently in an environment protected from external commercial pressures and influences.

¹ Information obtained from the Personal Injury Bar Association.

The individual accountability which is conferred by this arrangement encourages barristers to work to their best ability when acting for a client. Removing this would have significant implications for the quality of legal services provided for by barristers.

The proposal to permit barristers to enter into partnerships, LDPs and ultimately ABSs will fundamentally alter the manner in which barristers operate. It will place barristers in an environment in which the business interests and profits of the partnership or association are more influential. Such interests may in reality supersede a barrister's duty to act in his client's best interest and the quality of service provided may be undermined. For example, there may be incentives or pressures to push smaller value work down to the most junior levels irrespective of complexity or importance of the matter to the client.

It will be claimants who ultimately lose out from the proposals in the consultation paper. Barristers involved in partnerships or associations will not provide as good a legal service as they currently do under the present self-employed framework.

3. Internal risk management in partnerships, LDPs and ABSs

APIL foresees that the decision to accept instructions in partnerships, LDPs and ABSs will be made by some form of risk assessment committee rather than by the individual barrister. This could give rise to a cost-benefit analysis policy which dictates that profits alone or more substantially will determine if a case is accepted or rejected. Such a practice will be in tension with the principle that every client is entitled to the best quality of legal service available. This may favour the more wealthy parties in situations of costs inequality in which actions taken against firms or companies can and will be defended more rigorously than those pursued by impecunious claimants. The current arrangement for the way barristers practice protects them from the commercial pressures of the business interests of the partnership or the LDP, leaving

the barrister free to accept a case upon its individual merit and based upon his or her individual judgment.

A barrister is currently bound by the “cab-rank rule” to accept instructions without external considerations or personal prejudices playing any part and we are concerned that the Board considers that the rule should not apply in partnerships, and not be enforceable in LDPs and ABSs. Someone who has been injured during the course of a burglary, for example, cannot be denied legal representation because of the barrister’s own opinion of the activity the claimant was involved in at the time of the injury. The “cab rank” rule ensures that in practice a client will always find a barrister who is required to accept his instructions and finding a barrister without the rule could prove to be more problematic in more difficult, lower value or less certain cases. If the “cab-rank” rule is not enforced under the Board’s proposals this will further erode the present safeguards which help ensure a client has access to a suitably qualified and experienced barrister. In the absence of a formal requirement to accept cases, the sort of commercially driven cost-benefit analysis outlined above may in practice become increasingly manifest. This will create serious access to justice issues for many personal injury claimants.

4. Non-lawyer involvement in ABSs

The consultation paper suggests relaxing the rule which prevents barristers from entering into arrangements with other professionals, such as accountants or solicitors, even on a self-employed basis. The Bar Standards Board considers this rule could be relaxed to allow barristers to share office facilities with non-barristers, and “if regulatory difficulties can be resolved,” barristers could be permitted to practice in associations with non-barristers and non-lawyers. The sort of regulatory hurdles the Board foresees are, among other things, concerned with governing conflicts between the professions within an ABS. We feel that the Board’s suggestion that administrative arrangements to manage conflicts and confidentiality can allay public concerns will

not work in practice. In reality, it will be close to impossible to achieve the same sort of independence the Bar currently enjoys in either partnerships, LDPs, ABS's, or any other associations. It is unrealistic to assume that barristers will not in some way be influenced by the considerations of either the overall financial health of their association or by the interests of their colleagues. We expand on these concerns below.

5. External pressure on legal services

APIL opposes non-legal control over the provision of legal services. The provision of legal services is not simply a business transaction but is a necessary protection mechanism for some of the most fundamental civil rights conferred on citizens. The type of risk management outlined above which gives rise to serious access to justice issues will only become increasingly manifest if ABSs are introduced in the future. Injured claimants are not a commodity to be bought sold and serviced like cars or houses.

If, as we envisage, some kind of risk management committee is established within an ABS which is open to non-lawyers, essentially it will be a board of directors, some of whom may have no legal training or experience, who will decide if instructions are accepted. An understanding of legal issues and the principles of justice enshrined in our civil law jurisdiction is absolutely essential in appreciating the worth and value of a claimant's case. The introduction of outside capital will bring with it external considerations in the formulation of policy which may come into tension with clients' best interests. When such a conflict arises, we are not confident that clients' best interests will prevail in a stark commercial setting and the independence of barristers to act freely and impartially for clients will be impinged.

APIL has serious concerns about self-interested corporate ownership and company shareholders driving the service provision of the Bar and the affect this will have on the delivery of independent legal advice.

Allowing outside ownership of legal service providers will enable already established companies to move in to the legal services market. Big name brands have already started to offer legal services: as their employees can not act for clients directly, they are using their name to attract customers, then passing the work to firms of solicitors who are on their panels. It is not known how many other household names will endeavour to move into the legal services market. Equally, insurers are already exploiting both sides of personal injury work for commercial advantage by providing legal services to non-policy holders as a means of settling claims direct with them. This is illustrated in examples of third party capture cases, where the defendant's insurer deals with the claimant directly, and where defendant drivers' insurers provide before the event insurance to cover injured passengers, in some cases controlling which solicitor the injured victim may instruct.

We feel that the proposals in the consultation paper are evidence of a transformation in the provision of legal services where too much of an emphasis may be placed on cost considerations rather than quality of service. The implications this will have for claimants will be that some will receive inadequate legal advice and may fail to obtain full and proper redress for their injury. Some may not be able to gain access to legal services at all, for commercial reasons unrelated to the merits of their claim. We believe that in the specific case of the provision of legal services to injured people, the public interest is served by the Bar remaining a truly independent referral service, subject to the 'cab rank rule,' operating to traditional professional standards rather than becoming a more business driven and oriented service industry.