



This is the submission of the Criminal Bar Association of England and Wales ('the CBA') by way of response to the Ministry of Justice Review of Legal Services Regulation, part of the Cabinet Office 'Red Tape Challenge'.

The CBA represents the views and interests of practising members of the criminal Bar in England and Wales.

The CBA's role is to:

- I. assist with consultation undertaken in connection with the criminal law or the legal profession;
- II. provide professional education and training and assist with continuing professional development;
- III. promote and maintain the highest professional standards in the practice of criminal law; and
- IV. promote and represent the professional interests of its members.

The CBA is the largest specialist Bar association ('SBA'), with nearly 5,000 subscribing members; and represents all practitioners in the field of criminal law at the Bar. Most practitioners are in self-employed, private practice, working from sets of Chambers based in major towns and cities throughout the country, though the CBA also represents employed barristers, working for the CPS and other prosecuting authorities, and as in-house defence advocates. The international reputation enjoyed by our Criminal Justice System owes a great deal to the professionalism, commitment and ethical standards of our practitioners. The technical knowledge, skill and quality of advocacy all guarantee the delivery of justice in our courts, ensuring that all persons receive a fair trial and that the adversarial system, which is at the heart of criminal justice in this jurisdiction, is maintained. The CBA has no regulatory function.

The current statutory framework for the regulation of the legal services market was created only six years ago by the Legal Services Act 2007 ('the Act'). The Act was designed to (among

other things, such as to overhaul the complaints system) open up the legal services market to new entrants, and in particular to allow legal services to be delivered by differently constituted business models than the traditional firms of partnerships of solicitors, and individual barristers in independent practice in chambers. For the first time, non-lawyers were to be permitted to own a stake in, and manage, businesses delivering legal services. These are referred to as Alternative Business Structures, or ABSs.

The Act enshrines, in section 1, a number of 'regulatory objectives' and 'professional principles' designed to promote and protect the public interest by ensuring that those delivering legal services – 'authorised persons' in the language of the Act - whether they be individuals, partnerships or corporate bodies, adhere to principles which maintain the integrity of the justice system, and ensure that the interests of the consumer – the client - are promoted.

The structures put in place by, in particular, Schedules 11 and 13 to the Act with regard to the licensing of ABSs are, in the opinion of the CBA, necessarily rigorous. Where non-lawyers, who are not regulated as individuals, have either an ownership stake or a management role in a company (or partnership) delivering legal services, and there is an obvious risk that a conflict may arise between the interests of the lay client, and those of the business delivering the legal service. The danger is particularly acute in the delivery of publicly-funded criminal defence services ('PFCDS'), for two principal reasons. First, the output-based nature of graduated and fixed fee structures for both litigation and advocacy means that there are financial consequences for the firm's remuneration in the client's decision whether (and, if so, at what stage) to plead guilty. We would observe in passing that these pressures are likely to become greater if proposals presently under consideration by the MoJ to 'harmonise' the fees for guilty pleas with trial fees, to 'taper' the fees for trials, and, in the regulatory sphere, to permit 'plea-only advocates' were to come to pass.

The second, and more acute reason for ensuring that licensing structures are robust, is the danger of conflicts of interests where companies offering PFCDS are part of larger corporate structures which have other business interests in the administration of criminal justice, such as providing prison services, prisoner transport services, and offender management and rehabilitation. Those providing criminal defence services (whether publicly funded or not) are dealing with individuals' liberty, and it is essential that the client's interests must not only be given absolute priority over other commercial interests, but be seen to do so, otherwise public confidence in the integrity of the criminal justice system as a whole would be irreparably damaged. Accordingly, it is essential that the licensing framework for ABSs is sufficiently

robust to not merely permit, but require, proper scrutiny by licensing authorities of ownership and management within corporate structures, so as to ensure that not even the appearance of a conflict of interest is permitted to arise.

The Red Tape Challenge Review of Legal Services Regulation is presently styled as an 'evidence gathering' exercise: there are as yet no firm proposals for legislative reform, though that is presaged by the announcement on the website:

<http://www.redtapechallenge.cabinetoffice.gov.uk/moj-review-of-legal-services-regulation/>

The process of legislative reform will, of necessity, require a full consultation exercise to be undertaken, and CBA will, of course, respond substantively to that consultation. For the present, suffice to say that the CBA would be extremely concerned about any proposal which had the effect of 'watering down' either the regulatory objectives and professional principles in section 1, or the rigour of the licensing framework established in Schedules 11 and 13, with regard to ownership and management of ABSs, and opening the door for the sort of conflicts of interest we have identified to arise.

Subject to the above, the CBA would welcome any measures which had the effect of simplifying, or removing unnecessary 'red tape' from, legal services regulation. We would suggest that one matter of structure might benefit from review; the necessity for the oversight regulator role of the Legal Services Board. We would venture to suggest that the LSB has engaged in 'mission creep', and is an unnecessary and expensive white elephant,

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