

the barrister

Bar Standards Board (BSB) entity regulation in practice

BSB entity clearly creates opportunities for barristers to practise in new and innovative ways, but there are many issues which need to be considered before going down this route

By Scott Leonard, Partner in the Corporate & Commercial Team at Russell-Cooke LLP.

One of the many issues occupying minds at the Bar at present is the question of entity regulation. Take-up has been relatively modest to date. As at 8th April, the BSB had received 90 expressions of interest and approved 15 applications, all but one of which were for single-person entities. However there seems to be no doubt that increasing numbers of barristers will look to take advantage of this new flexibility.

Much of the focus to date has been on whether individual barristers will embrace entity regulation. But in order to do so, not only must they become authorised by the BSB, but their Chambers must also be willing and able to accommodate entities.

That being the case, it is essential that Chambers consider the extent to which they are prepared to accommodate entities and, assuming that they are willing to do so, take the steps necessary to facilitate this.

Will Chambers permit the use of entities?

It seems likely that most Chambers will wish to accommodate single member entities. Their use will not fundamentally alter the traditional Chambers model,

members are simply choosing to conduct their existing practice through a different legal structure. In fact it is possible that Chambers who are not prepared to accommodate single-member entities may risk losing, or at least fail to attract, members as a result.

Multi-person entities raise more issues and may well be a more controversial topic within Chambers. These might involve two or more existing members of Chambers, a member of Chambers and their spouse, or entities where at least some of the owners or managers are members of other Chambers.

The involvement of anyone who is not a member of Chambers in an entity practising through Chambers raises a whole host of potential issues, with Chambers potentially having to deal with, or be associated directly or indirectly with, people with whom it has no connection and who are not BSB-regulated themselves. However, with one of the drivers cited for incorporation being the potential tax savings of practising through a limited company, and with those savings potentially increasing if lower earning spouses are introduced as shareholders, there may well be pressure within Chambers to allow at least spouses to be involved in the regulated entity, even if that is the limit of external participation (although under the current regulatory regime

the spouse would need to be another lawyer).

The constitution

Assuming that a Chambers does decide to accommodate the use of entities, it is essential that its constitutional arrangements are updated to reflect this. The content and structure of Chambers' constitutions varies widely, but the following issues are amongst those that will need to be considered:

1. Who will be the member of Chambers?

Logically, the limited company through which a barrister practices should become the member of Chambers for the purposes of the constitution. This will be the entity providing legal services and discharging the contributions to Chambers' expenses from the income it generates. However, I am aware from discussions with Chambers that there can be some resistance to this proposal, which at least presentationally may be seen to represent a more significant departure from the traditional Chambers model.

2. Personal guarantees

If the BSB-regulated entity is the member of Chambers for the purposes of the constitution then guarantees

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will be required from the owners and managers of the entity in respect of the entity's financial and other obligations under the constitution.

3. Dealings with Chambers

Chambers may wish to retain control over who it is required to deal with on behalf of an entity. The constitution may therefore specify that only individuals who have been approved by Chambers may be owners or managers of entities practising through Chambers and limit who can attend Chambers meetings on behalf of the entity.

4. Other changes

Other minor, but nonetheless important, changes will be required. For example, the events triggering the right to expel members will need to be extended to include events relevant to a company. The provisions relating to the appointment of elected positions within Chambers will need to reflect the fact that it will be individuals appointed to these positions, although they themselves may carry their practice on through an entity.

It would be prudent for Chambers to consider these matters and make the necessary constitutional changes at an early stage, possibly before any members have expressed a desire

to practise through an entity. The timescale for implementing the changes could be many months, involving, as it will, internal consultation, drafting and agreeing the proposed amendments to the constitution, and calling a general meeting of members to approve them.

Other matters

There are also a variety of other practical matters which need to be considered, both by Chambers and barristers proposing to practise through an entity:

1. Practice management software

Chambers is likely to need to update its practice management software to accommodate the use of entities. Amongst other things, this will need the ability to generate invoices on behalf of the entities providing the services (as opposed to traditional fee notes).

2. Dealings with third parties

It is essential that all communications with third parties make it clear that the third party is dealing with the entity rather than the barrister through which it acts. Opinions will need to be signed "for and on behalf of X Ltd" or similar, and other communications should be signed off in a similar form. Email signatures will need to be updated accordingly.

All business letters, order forms, invoices and websites must state the full company name, registered number and place of registration of the entity.

In addition to this, existing client engagements and contracts with third parties will need to be novated from the barrister to the entity.

3. Contractual terms

Contractual terms will need to be updated to reflect the fact that an entity is providing the legal services rather than the barrister. Neither the COMBAR terms nor the Bar Council standard contractual terms have yet been updated to accommodate their use by entities. Although they do not require substantive amendment, some changes are needed.

4. Insurance

At present, the obligation on self-employed barristers to put in place professional indemnity insurance with Bar Mutual has not been extended to BSB-regulated entities. Entities are therefore able to obtain cover from commercial insurers, in addition to Bar Mutual.

Bar Mutual has taken the view that for the 2015 renewal it will provide primary layer PI insurance to all single-person entities on the same basis as if the individual behind the entity were seeking cover as a self-employed barrister. It will look at multi-person entities on a case-by-case basis.

Bar Mutual is lobbying for a change to the Handbook so that all BSB-regulated single member entities and multi-person entities offering barrister-like services will be obliged to place their primary level of PI insurance with Bar Mutual.

Clearly this issue is in a state of flux and will need to be carefully monitored.

5. Chambers leases

Leases to Chambers are likely to prohibit the tenant from permitting any third party to share occupation of the premises with it, subject to an exception for members of Chambers. However, the drafting of this exception may not extend to BSB-regulated entities and landlord's consent and/or a variation to the lease may be required if entities are to be permitted to practise from the premises.

Conclusion

BSB entity regulation clearly creates opportunities for barristers to practise in new and innovative ways, but there are many issues which need to be considered before going down this route, not only by barristers themselves but also at a

Chambers level. Whilst the use of single-member entities is likely to be relatively uncontroversial, accommodating the use of multi-person entities raises a number of issues and is likely to be more challenging. Given this, it may be that a two-stage approach is adopted by many, with single-person entities permitted initially, with consideration being given to broadening this at a later stage.



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