Bar Council response to the ‘Insurance Requirements for Single Person Entities’ consultation paper

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Bar Standard’s Board (BSB) consultation paper entitled Insurance Requirements for Single Person Entities.1

2. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar’s high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

Overview

4. The Bar Council agrees with the BSB’s provisional conclusion that single-person entities should be required to purchase their primary layer of professional indemnity (PI) insurance from the Bar Mutual Indemnity Fund (BMIF).

5. As the BSB correctly recognises in the consultation paper, the choice between permitting single-person entities to seek to obtain their primary layer of PI cover on the open market (Option 1 in the consultation paper) and requiring them to purchase that cover from the BMIF (Option 2 in the consultation paper) is closely tied to the questions of whether the mutual model operates in the public interest and what impact the choice between Options 1 and 2 would have on the mutual model.

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1 Bar Standards Board (2015), Insurance Requirements for Single Person Entities. Available at: https://www.barstandardsboard.org.uk/media/1662760/consultation_paper_on_insurance_requirements_for_single_person_entities_-_.pdf_-_.final.pdf
6. The Bar Council is strongly of the view that the mutual model has operated and continues to operate in the public interest and in the interests of the self-employed Bar. Requiring single-person entities to take out primary layer insurance with the BMIF in the same way as self-employed barristers would ensure that all the same advantages accrue to single-person entities and the consumers of their services.

7. The Bar Council is concerned about the risks to the future of the mutual model if the requirement to insure with the BMIF is not extended to apply to single-person entities. It considers the warnings given by the BMIF about these risks to be realistic and to be a matter of considerable concern to the self-employed Bar (whether practising as self-employed sole traders or as single-person entities) and the consumers of its services.2

8. In the Bar Council’s view, choosing Option 2 will preserve the mutual model in the continuing public interest (whereas the alternative could only undermine the mutual model for the reasons identified by the BMIF).3 It will also end the unprincipled difference which currently exists in the Code of Conduct between the rules relating to professional indemnity insurance which apply to self-employed barristers and the rules which apply to single-person entities. By contrast, the disadvantages of Option 1 greatly outweigh any potential benefits (which anyway appear to be largely theoretical rather than real).

9. This response has been prepared with the assistance of barristers who specialise in insurance matters and have extensive experience of PI insurance disputes.

Question 1: Have we correctly identified the range of factors that should be taken into consideration as potential advantages or disadvantages in making a choice between Option 1 and Option 2 or are there any other relevant factors that we should take into consideration?

10. The Bar Council’s understanding is that the BSB has identified the following as the key considerations in making the choice between Option 1 and Option 2:

   10.1. Whether the mutual model, requiring all self-employed barristers to take out their primary layer of PI insurance with the BMIF, has worked in the public interest, and whether requiring single-person entities likewise to purchase their primary layer of PI cover from the BMIF would or would not work in the public interest.

   10.2. The impact which choosing not to require single-person entitles to purchase their primary layer of cover from the BMIF may have on the sustainability of the mutual model for self-employed barristers, and on the availability and cost

2 Since the present consultation is expressly limited to single-person entities, we say nothing at this stage about the BMIF’s concerns regarding the insurance of multi-person entities providing barrister-like services.

3 See, for example, the BMIF response to the BSB consultation on entity regulation rule changes and insurance (July 2014). Available at: https://www.barstandardsboard.org.uk/media/1614865/140916_-_bmif_-_july_2014_entity_regulation_response.pdf
of professional indemnity insurance for barristers as a whole (whether practising as self-employed sole traders or as single-person entities).

10.3. The appetite of commercial insurers to provide PI insurance to single-person entities, including the terms likely to be available.

10.4. The scope of the BSB’s regulatory objectives and the impact which the choice between Option 1 and Option 2 may have on the ability of the BSB to implement its regulatory objectives.

11. The Bar Council broadly agrees that these are the relevant factors to be taken into consideration in choosing between the two options. To the extent that the Bar Council differs from the BSB, the differences appear to be matters of emphasis and weight rather than fundamental disagreement about the identification of relevant considerations. Where necessary, the Bar Council’s views on the potential advantages and disadvantages of the two options are addressed in the responses to Questions 3 and 4 below.

Question 2: Should we consider any other options, beyond Option 1 and Option 2 and if so what?

12. No.

Question 3: Do you agree that the existing BMIF monopoly, in respect of the primary layer of cover for the self-employed Bar, has operated in the public interest overall? Please provide reasons for your answer.

13. Yes.

14. Since the establishment of the BMIF in 1988, the mutual model has ensured that all self-employed barristers who have met the fitness to practise requirements of their regulator have obtained primary layer PI insurance cover from a financially sound, well run insurer whose sole purpose is to serve as a long term, not-for-profit provider of equitably rated comprehensive insurance cover to barristers for the protection of their clients.

15. This model has unquestionably operated in the public interest, and continues to do so. Many of the public interest benefits of the model were identified and discussed in the BMIF’s recent response to the Legal Services Board’s consultation on its Draft Strategic Plan for 2015-2018 and its Draft Business Plan for 2015-2016. The BMIF’s response dated 28 June 2012 to the BSB’s 2012 consultation on “New Handbook and Entity Regulation” also contains relevant material on the subject.

4 Available at:
16. For its part, the Bar Council wishes to emphasise three features of the mutual model which have operated in the public interest: the stability it has provided in the barristers PI insurance market, the assistance it provides to the BSB in promoting its regulatory objectives, and the benefits of the broad scope and generous application of the BMIF’s terms of cover.

**Stability in the barristers PI insurance market**

17. The BMIF has provided unrivalled stability in the PI insurance market for self-employed barristers. For the last 27 years it has guaranteed that a solvent insurer has existed to protect the interests of any client with a valid claim against a self-employed barrister. More generally, it has ensured that consumers of the services of self-employed barristers (in addition to the barristers themselves) have been entirely insulated from the instability which has characterised the solicitors PI insurance market since the demise of the Solicitors Indemnity Fund (SIF) in 2000, and which characterised the market for barristers PI insurance prior to the establishment of the BMIF in 1988.\(^5\)

18. The BSB refers to some of the problems which have beset the solicitors PI market since 2000 in paragraphs 29 and 30 of the consultation paper. The Bar Council agrees with the BSB’s observations in those paragraphs. It is worth looking at some of these problems in greater detail.

19. Since the demise of SIF, the experience of the solicitors PI market has been of significant volatility in the number and identity of participating insurers. This problem exhibited itself early on (in the first year of the open market there were 35 qualifying insurers in the market; by October 2003, the number had contracted to 23) and has continued ever since. The list of participating insurers published by the Law Society or Solicitors Regulation Authority (SRA) annually shows a large number of insurers entering the market and staying for a short period before exiting. Only four insurers who participated in the market at the outset in 2000 remained in the market by October 2014, and only three of those (Travelers, QBE and Zurich, including predecessor entities) had participated every year. Even AIG, which currently writes about 5-6% of the market (by share of premium) decided not to write new business between 2010 and 2013. Other “big names” which have chosen to leave the market are Royal & Sun Alliance and Hiscox. In the current insurance year (2014/2015), the three insurers who have participated in the market throughout wrote only 39% of all business (by share of premium income).

20. The frequent and unpredictable turnover of insurers in the solicitors PI market can cause significant uncertainty at renewal. At best, when an insurer leaves the market solicitors are required to find another insurer willing to cover them, often at comparatively short notice. This problem is magnified when the insurer is a major market participant, as when XL Insurance dramatically reduced its participation to about 2% of the market in 2013, having provided cover to 22% of all solicitors firms in England and Wales the previous year, and 32%\(^5\)

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\(^5\) This is described in the BMIF’s response to the LSB’s consultation on its Draft Strategic Plan and Draft Business Plan. See paragraph 7: [http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/pdf/20150326_Responses/Bar_Mutuals_Response_David_Simpson.pdf](http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/pdf/20150326_Responses/Bar_Mutuals_Response_David_Simpson.pdf)
of firms in the year before that. At worst, firms which are otherwise an acceptable risk from a regulatory point of view are unable to find a replacement insurer and are forced to close, to the obvious detriment of consumers (both the clients of the firm forced to close and, more generally, consumers who are deprived of choice). According to The Lawyer and the Law Society Gazette, in October 2013 around 136 firms had to close because they were unable to obtain PI cover. In October 2014 the number reduced to 54, but this is still a significant number of firms closing because of insurance difficulties (in circumstances where, since the demise of the Assigned Risks Pool, firms only have a 3 month period in which to close).

21. The turnover of insurers in the market also gives rise to the risk of disputes about which year of cover (and so which insurer) should respond to a claim. This problem results from the “claims made” nature of PI cover. It is now almost invariable for liability insurers in general and PI insurers in particular to indemnify the insured against losses arising from claims made against the insured during the policy period, as opposed to events occurring during the period. This has the advantage for insurers that they are less exposed to unforeseen losses arising long after the period of cover has expired, but it has the potential to pose a serious problem for any insured who becomes aware during the policy period of circumstances which may give rise to a claim in the future. When seeking insurance for the following year, the insured is bound to disclose the existence of the potential claim and, as a result, could find it impossible to obtain insurance at a commercially acceptable premium. To resolve this problem the practice has grown up of including in “claims made” policies a term extending the cover to losses arising from circumstances which may give rise to a claim in the future, provided that the “circumstances” have been notified to insurers during the policy period.

22. However, this solution is a source of disputes where there has been a change of insurer from one year to the next. It is not uncommon in the PI field for an insured who has notified “circumstances” to an insurer on one year of cover to find himself in dispute with insurers for two or more years of cover over whether a claim arises from the notified circumstances or not – and therefore which year of cover should respond to the claim. Such disputes lead to delays in the settlement of claims against the insured while each insurer contends that it is not liable under its policy, to the potential detriment of consumers for whose ultimate protection the PI insurance has been obtained.

23. Insurer insolvency has been another factor causing instability in the solicitors PI market, again to the detriment of consumers. There have been at least three significant examples since 2006. In each case, the problem stemmed from the participation of unrated European Union insurers with little or no previous connection to the professional indemnity market in England & Wales (the SRA having decided not to conduct any vetting, approval or solvency checks on insurers):

23.1. In 2006, Quinn Direct Insurance, an unrated Irish insurer, entered the market. By 2009 it insured around 2,900 firms (or around 30% of all firms in England and Wales). In April 2010 Quinn went into administration in the Irish Republic and exited the market (with a large knock on effect on capacity in 2010).

23.2. In 2009 Lemma Europe Insurance Ltd, an unrated Gibraltarian insurer, entered the market. By September 2011 it had provided cover for 590 firms. In
September 2012 it became insolvent. Not only did this have an impact on claims already notified but (according to the SRA), Lemma’s liquidator obtained a disclaimer preventing further claims being made under Lemma policies (to the detriment of firms and consumers reliant on Lemma run off cover).

23.3. In 2011 Balva, an unrated Latvian insurer then fronted by an Icelandic unrated insurer known as “ERIC” (the European Risk Insurance Company HF), entered the market. In 2012/2013 Balva wrote business in its own right and insured approximately 1500 firms (or nearly 7% of the market). In 2013 Balva’s licence to write new business in the UK was suspended. Balva is in the process of being wound up and in July 2014 the Financial Services Compensation Scheme concluded that it was unable or likely to be unable to pay claims. Firms and consumers are therefore dependent on falling back on FSCS protection, which (assuming they qualify for the protection) is capped at 90% of the value of a claim.6

24. As at the 2014 renewal, there were three unrated insurers participating in the solicitors PI market, providing cover to about 8% of the market by premium share. In May 2014 the SRA carried out a consultation into the reasons why solicitors continued to use unrated insurers given the difficulties referred to above. Perhaps unsurprisingly, the consultation revealed that many firms which did so had difficulty obtaining cover from rated insurers and/or difficulty affording the premiums of rated insurers.

25. Some of the insolvency-related problems in the solicitors PI market might have been avoided if the SRA had introduced a minimum rating requirement or otherwise vetted participating insurers. However, in May 2014 the SRA decided against adopting its own previous proposal to allow only “B” or better-rated insurers to participate in the market, stating that it was concerned about the potential for a disproportionate impact on sole principals and small firms, amongst whom the use of unrated insurers is concentrated, and that requiring a minimum financial rating at this point could cause higher costs for firms, which could outweigh any benefit.7 As a result, unrated insurers continue to write substantial amounts of solicitors PI insurance business, and consumers are likely to be unaware if their solicitors are insured by strong or weak insurers.

26. In some cases, the Financial Services Compensation Scheme serves as a back-stop if professional indemnity insurers are declared in default (i.e. where the FSCS is satisfied that the insurer is unable or likely to be unable to pay claims against it). However, the maximum level of compensation for claims against professional indemnity insurers declared in default on or after 1 January 2010 is 90% of the claim.8 Large companies and partnerships are not eligible for compensation; nor, in some circumstances, are persons (including consumers) whose claim arises under the Third Parties (Rights Against Insurers) Act 1930.9

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6 See further below.
8 See FCA Handbook, COMP 10.2.
9 See FCA Handbook, COMP 4.2 and 4.3.
27. As the BSB correctly recognises in the consultation paper, since the establishment of the BMIF in 1988, the barristers PI market has entirely avoided the problems in the solicitors market outlined above. The contrast is telling. The stability afforded by the BMIF to self-employed barristers and their consumers is entirely a product of the compulsory mutual insurance model. It could not be replicated in an open market, as the solicitors experience demonstrates.

Promoting regulatory objectives

28. The mutual model has consistently served to promote the regulatory objectives of the BSB (and, before it, the Bar Council). We emphasise three points in particular.

29. First, the mutual model assists in promoting competition and choice in the provision of legal services. Under the mutual model, every self-employed barrister deemed fit to practise by the BSB has an absolute right to insurance cover from the BMIF, regardless of background, experience or practice area. All premiums are calculated by reference to published, objective criteria: there is no possibility of any subjective or improper considerations being applied which might distort the costs of PI insurance for some practitioners. Consequently, no practitioner is prevented from offering legal services by reason of an inability to obtain PI cover alone, and no practitioner is competitively disadvantaged through paying an unfair premium. The result is the largest possible pool of self-employed barristers competing to supply services to the public, without any distortion in the market created by unequal access to insurance cover.

30. Second, the mutual model promotes access to justice. One unsurprising lesson which emerges from the solicitors PI market in recent years is that commercial insurers are most attracted to the larger, premium-rich risks. Smaller firms, and those providing socially useful legal services which are unattractive to the commercial market, can struggle to find cover and may be forced to shut down for the lack of it, despite being otherwise acceptable from a regulatory perspective. These smaller and socially useful firms are also more likely to provide legal services to the more disadvantaged and vulnerable members of society. If they are forced to close, there is a corresponding restriction on access to justice for a segment of society which has a particular need for professional advice and representation. By contrast, because the BMIF is required to provide PI insurance cover to every BSB-approved barrister, irrespective of his or her practice area, the problem of “cherry-picking” cannot arise. Under the mutual model, there is no possibility of unavailability of insurance impeding access to justice.

31. Third, the mutual model protects and promotes the interests of consumers. The first and second points made above are both facets of this. Likewise, the unparalleled stability which the mutual model has brought to the barristers PI insurance market has this effect. So too do the matters we turn to next relating to the scope and application of BMIF cover.

Scope and application of BMIF cover

32. The generous scope of the insurance cover provided by the BMIF, and the BMIF’s approach to the application of its terms of cover (applying a presumption in favour of
providing compensation for meritorious claims) have also operated and continue to operate in the public interest.

33. Unusually, the BMIF’s terms of cover include an express discretion on the part of the BMIF to provide an indemnity in respect even of matters which fall outside the scope of the cover or which fall within a policy exclusion. The inclusion of this power in the BMIF’s terms, and the willingness it indicates on the part of the BMIF to forgo technical defences and/or to look sympathetically on meritorious claims, goes well beyond what is usually offered by commercial providers of PI insurance. It is notable that there is no equivalent in the BSB’s Minimum Terms of Entity Cover included at Annex A of the consultation paper. The Bar Council has no information on the extent to which the discretion is exercised by the BMIF, but the BMIF has reported that the power “is not infrequently exercised” (see paragraph 14 of the BMIF’s recent response to the LSB’s consultation on its Draft Strategic Plan and Draft Business Plan).

34. The run-off cover provided by the BMIF is another example of the generosity of the cover. The BMIF provides cover to retired self-employed barristers and to the personal representatives of deceased self-employed barristers in perpetuity. By contrast, standard run-off cover on the commercial market is usually time-limited (usually to 6 years). This is an important difference. As the BMIF has pointed out, it is in the nature of claims for professional negligence that they can be brought long after the work was undertaken. According to the BMIF, it “often indemnifies claims against long retired barristers or the estates of barristers who are long dead” (see page 2 of the BMIF’s response dated 28 June 2012 to the BSB’s 2012 consultation on “New Handbook and Entity Regulation”).

35. The public interest is also served by the responsiveness of the mutual model. Since the BMIF is owned and controlled by its insureds, it is also attuned to changes in their insurance requirements and can respond quickly to these changes, ensuring that the terms of cover meet their up-to-date needs (and therefore the needs of consumers).

Question 4: Do you agree (a) with the BSB’s provisional conclusion that Option 2 should be preferred and (b) with the BSB’s reasons for arriving at that conclusion? If you disagree, please provide reasons for your answer.

36. The Bar Council agrees that Option 2 should be preferred.

37. There is (at least) substantial common ground between the BSB’s reasons for arriving at its provisional conclusion that single person entities should be required to purchase their primary layer of professional indemnity insurance from the BMIF, and the Bar Council’s reasons for agreeing with that conclusion. In case there are differences (of emphasis if nothing else) we set out below a summary of the Bar Council’s reasons.

38. The starting point is that the mutual model has successfully operated in the interests of self-employed barristers and their consumers for over 27 years, in stark contrast to the examples provided by the market for solicitors PI insurance since 2000 and the market for barristers PI insurance prior to 1988: see the response to Question 3 above.
39. BSB-regulated single-person entities will be offering essentially the same services as those provided by self-employed barristers. There is no principled justification for having different rules under the Code of Conduct for single-person entities and self-employed barristers. The difference merely risks distorting what should be a level playing-field.

40. Requiring single-person entities to take out their primary layer of cover with the BMIF in the same way as self-employed barristers (in return for the BMIF’s corresponding commitment to provide all BSB-approved single-person entities with cover) will ensure that all the advantages of the mutual model accrue to single-person entities, whilst preserving the mutual model in the continuing public interest.

41. The alternative course (Option 1 in the consultation paper) presents serious risks to the mutual model. The risks have been identified and explained by the BMIF in a number of publications since at least 2012. The Bar Council believes these warnings deserve to be given considerable weight. It regards them as realistic and a matter of considerable concern to the self-employed Bar (whether sole traders or single-person entities) and the consumers of its services.

42. The “in principle” arguments in favour of Option 1, which the BSB identifies in paragraph 32 (in particular) of the consultation paper are highly questionable. One potential difference between the Bar Council’s and the BSB’s reasons for preferring Option 2 relates to the weight to be attributed to those arguments. The Bar Council agrees with the BSB’s reasons for rejecting the arguments which are set out on pages 7-8 of the consultation paper (in the paragraphs immediately following paragraph 32). However, there are further reasons for rejecting the arguments in paragraphs 32(i) and 32(ii).

43. As to paragraph 32(i), the BMIF has identified the flaws in the assertion that under a mutual insurance scheme low risk entities may end up paying higher premiums than they would on the open market. In addition, paragraph 32(i) also ignores other factors which serve to lower the BMIF’s premium prices including, in particular, that the BMIF is a not for profit organisation which does not seek to generate profits for shareholders. Whilst the initial effects of predatory pricing by commercial insurers seeking to win attractive business could mean that some single-person entities may initially be able to obtain cheaper insurance on the open market, it is highly doubtful whether such competitive rates would remain available for long.

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11 See BMIF’s response dated 20 December 2010 to the BSB’s Third Consultation Paper on Entity Regulation, paragraph 11
44. As to paragraph 32(ii), the evidence does not support the assertion that 8 out of 26 insurers would be prepared to provide cover to single-person entities. The BSB’s summary of the evidence in paragraphs 25-27 on pages 5-6 of the consultation paper shows:

44.1. That 2 or 3 of the 8 insurers referred to had no interest in insuring single-person entities (i.e. were only interested in multi-person entities)

44.2. Some at least of the insurers were doubtful about co-existing with the BMIF, and

44.3. Overall, the indication was that the commercial insurers would only be or would be more interested in larger premium accounts (and, therefore, the Bar Council assumes, would not be willing to insure single-person entities generally).

45. As the BSB correctly recognises in paragraph 27 of the consultation paper, the evidence it has obtained from the commercial market supports the BMIF’s view (with which the Bar Council agrees) that to the extent that commercial providers may be interested in providing cover for single-person entities at all, they will “cherry-pick” the most attractive, premium-rich accounts. Quite apart from the fact that this outcome risks undermining the mutual model altogether (for the reasons identified by the BMIF), it demonstrates that the open market solution for single-person entities (i.e. Option 1) is only a partial solution. Some insurer of last resort would have to be found for less commercially attractive (but often socially valuable) practitioners, but (as the BSB again correctly recognises, in paragraph 23 of the consultation paper) it is neither reasonable nor realistic to expect the BMIF to perform that role.

46. By contrast, these problems would be avoided, and the benefits of the mutual model would be preserved, if all single-person entities are required to purchase their primary layer of PI insurance from the BMIF.

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