



Regulating entities

The Legal Services Act 2007

Implications for the Bar of England and Wales

Third consultation

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Third consultation paper
‘Regulating Entities’

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EXECUTIVE SUMMARY

Purpose and scope

This consultation paper seeks responses to assist the Bar Standards Board (BSB) in establishing whether it should begin to regulate entities in addition to individual barristers.

In order to inform responses to this overarching question, the consultation paper outlines the key regulatory issues that BSB entity regulation would involve and invites preliminary opinions on how these issues should be dealt with.

The paper proposes a number of provisional policy positions that the BSB could adopt if it did decide to regulate entities, to promote discussion. It offers a provisional proposal that it would be in the public interest for the BSB to establish itself as a specialist regulator of entities focused on providing advocacy and ancillary services.

Background

This consultation paper is the third in a series of consultations addressing the implications of the Legal Services Act 2007 ('the Act'). The Act makes it a statutory requirement that, where an entity carries on reserved legal activities (which includes exercising a right of audience or conducting litigation), it must be authorised. For this reason, if barristers wish to participate in entities, those entities (as well as the barristers themselves) must be subject to the rules of an approved regulator.

The Act envisages that individuals can remain regulated by one approved regulator (such as the BSB) whilst joining an entity which is regulated by another (such as the Solicitors Regulation Authority (SRA)). However, in that situation the approved regulator responsible for the entity becomes the primary regulator and the Act provides that its rules will take precedence, in the event of a conflict.

Following changes made to the Barristers' Code of Conduct in April this year, barristers are already able to participate, as managers or owners, in entities regulated by other approved regulators (including the Solicitors Regulation Authority). The BSB has also taken a decision in principle to allow barristers to practise from Barrister Only Entities (BOEs), but there is as yet no available regulator for these types of business. For example, the SRA will only regulate entities in which at least one manager is a solicitor.

This consultation addresses the question as to whether or not the BSB ought to provide a regulatory structure for entities so as to enable barristers to set up BOEs, or to set up other types of entity under BSB regulation, including Legal Disciplinary Practices (LDPs) and Alternative Business Structures (ABSs). While BOEs by definition are those only managed by barristers, LDPs could be managed by a mix of legal professionals and ABSs could also include non-lawyer managers. (See the definitions section for more detail on each.) Unless the BSB provides regulation for BOEs, it will not be possible for barristers to establish them. Providing BSB regulation for LDPs and ABSs would give barristers the option, if they do want to use such entities, of doing so under BSB regulation rather than having to have the entity regulated by another approved regulator.

The BSB's approach to entity regulation

The consultation proposes that **the BSB should define the entities that it is prepared to regulate primarily by the services that they are permitted to provide: namely advocacy and ancillary services.** However, it proposes that non-lawyers should not make up more than a specific percentage (10%-25%) of an entity's management and ownership.

This means that the BSB would be prepared to regulate BOEs, LDPs and ABSs.

The Act establishes a separate statutory regime for ABSs, for which there are specific requirements. If the BSB decides to regulate all three types of entity, the BSB would need to apply to the LSB to become a licensing authority for ABSs and, separately, it would need to set up a regime to regulate BOEs and LDPs and obtain approval for the necessary changes to its regulatory arrangements. However, if the BSB does decide to regulate all three types of entity, it will **endeavour to create an entity regulation regime that would apply fairly and equally across the three different models** with only such differences as are reasonably necessary.

The following summarises the four parts of the consultation paper.

PART 1

Introduction and Background

The BSB does not believe that it would be in the public interest for it to duplicate regulation that will be offered by other regulators. The consultation therefore proposes that should the BSB decide to regulate entities, it should establish itself as **a specialist regulator of entities focused on providing advocacy and related services**, possibly including ancillary litigation services. Part 1 includes consideration of the case for the BSB becoming a specialist entity regulator (page 21).

PART 2

The consultation outlines the following regulatory issues and suggests what approaches the BSB could take to these if it did begin to regulate entities. This is intended to illustrate what entity regulation by the BSB might mean in practice and what implications it could have for consumers, regulated entities, managers and employees of entities, and for the Bar more generally.

Chapter 1 'Permitted Services'

This chapter discusses the services which BSB regulated entities could be permitted to provide and specifically whether the current restrictions on barristers conducting litigation should be relaxed.

In taking any decision about whether it should regulate entities that could provide litigation services, the BSB will need to consider carefully what best promotes the regulatory objectives. It will take into account factors including: the possible advantages of entities being able to provide a more competitive 'one-stop shop' service direct to lay clients; the public interest in strengthening the BSB's position as a specialist regulator of advocacy and

related services; the potential impact on the Bar's independence and specialisation; and the additional regulatory risks and how these risks could be mitigated through education and training (1.31-1.57).

This chapter proposes that **barrister managers and employees of BSB regulated entities should be permitted to conduct litigation, to the extent that litigation is ancillary to advocacy, and the restrictions should also be removed for self-employed barristers.** However, restrictions on managing clients' affairs should remain, helping to preserve the distinction between the roles of barrister and solicitor.

The consultation also discusses other reserved legal activities and asks whether the BSB should regulate entities which provide conveyancing or probate services that are ancillary to the primary provision of advocacy services. The consultation proposes that entities should be permitted to administer oaths, which is a reserved activity presenting a low risk (1.73 - 1.80).

Entities that meet the proposed criteria for BSB regulation (in terms of their core services and their composition) will be permitted also to supply non-reserved legal services of the type that barristers currently provide, such as providing legal advice.

The consultation asks whether there is considered to be a need for entities amongst those sectors of the Bar whose services are typically primarily if not exclusively advisory and non-contentious in nature, rather than advocacy and litigation related, and if so whether it is envisaged that those entities would be supplying services primarily on a referral basis or directly to the public (1.88 - 1.89).

The BSB does not believe that it is currently in the public interest for it to regulate multi-disciplinary practices (MDPs) that could provide non-legal services alongside legal services (1.2 – 1.5).

Chapter 2 'Payment Options and Client Money'

If restrictions on conducting litigation are relaxed, then the question arises as to what arrangements an entity needs to have for handling the payments that need to be made by or to a client in the course of litigation and how these are to be regulated. Three types of payments are considered: the entity's own fees; disbursements (including court fees and experts' fees); and court awards and settlements (2.8 - 2.19).

The consultation proposes that the general prohibition on holding client money should continue to apply to any BSB regulated entities. This is predicated on it being possible to find alternatives which allow the necessary payments to be made whilst avoiding the need for the entity to hold client money.

A regulatory regime to oversee client money handling would be associated with significant risks and high costs, which are likely to be prohibitive. Such a regime is already available via the SRA for those who need it. Entities would be likely to provide services direct to lay clients, on contractual terms. The entity can specify that its fees and any disbursements are to be paid in arrears or on the basis of a fixed sum paid in advance, or (in the case of disbursements) paid directly by the client, thereby avoiding the need to hold money on

account of fees and disbursements (which would otherwise have to be treated as client money). The BSB is currently considering a possible option for managing court awards and settlements through the use of 'custodian' or third party arrangements (2.56-2.62). The consultation asks whether it is considered feasible to allow entities to conduct litigation without being allowed to hold client money.

Chapter 3 'Accepting Instructions'

This chapter discusses the basis on which BSB regulated entities should accept instructions, including how the non-discrimination and 'cab-rank' principles could be applied to entities.

Participation in entities would increase the incidence of multiple client conflicts as barristers, managers or employees of entities could be conflicted out of appearing against other members of the same entity, or in cases where another member of the entity had previously represented a different party to the dispute. The consultation therefore proposes that **entities would be required to have in place appropriate systems to identify and manage conflicts of interest** (3.7 – 3.9).

Self-employed barristers are bound by the cab-rank rule and a non-discrimination requirement. These promote access to justice by helping to ensure that all members of the public are able to secure representation at hearings in courts and tribunals.

The statutory non discrimination requirement in relation to acceptance of instructions will continue to apply to all advocates in any entities the BSB decides to regulate. The consultation proposes that, in addition, **the cab-rank rule should apply to BSB regulated entities in a comparable manner to the way it applies to self-employed barristers.** This would mean that it would only apply to instructions from professional clients for named advocates (3.16 – 3.27). The Chapter also explores the possibility of creating a further exception to the cab-rank rule to prevent clients from abusing it, since such abuse tends to undermine access to justice, which the cab-rank rule is designed to protect (3.28 – 3.30).

Chapter 4 'Interventions'

There would be a need for powers and procedures to oversee BSB regulated entities which are in financial or other difficulties. The BSB would be required to establish an interventions regime if it became a licensing body for ABSs, and the consultation discusses whether an interventions scheme is also required for LDPs and BOEs.

There are a number of risks which an interventions scheme would help counter. These include risks arising from: dishonesty, insolvency, maladministration, abandonment of practices, and failure to renew or replace a licence or other authorisation (4.11- 4.20).

The consultation considers ways in which the numbers of interventions (and the cost) could be minimised, including effective monitoring, guidance, and assistance to any entities experiencing difficulties (4.2 - 4.24). It also considers how the BSB could acquire powers to intervene, which would need a statutory basis (4.25 - 4.29), and which aspects of an interventions scheme would be associated with the highest costs (4.30 - 4.34).

The BSB would need to introduce an interventions scheme to oversee entities in financial or other difficulties.

Chapter 5 'Insurance and Compensation'

All practising barristers are required by the Code of Conduct to be insured against professional negligence claims. This chapter summarises the additional cover that would be required for BSB regulated entities and the options for obtaining this. The consultation proposes that **consumer protection would be best achieved through comprehensive insurance cover for the entity as a whole, subject to meeting minimum terms established by the BSB.** It compares the advantages and disadvantages of extending the Bar Mutual Indemnity Fund (BMIF) to entities with those associated with allowing entities to obtain insurance from commercial providers on the open market (subject to minimum terms set by the BSB).

The BSB does not believe that insurance is likely to be a significant barrier to setting up entities.

Chapter 6 'Non-Barristers'

This chapter discusses the extent to which the BSB should have regulatory control over managers (the BSB proposes that all owners would be managers) and employees within an entity. Under current chambers set ups, employees such as clerks are regulated by the BSB only indirectly, via the barristers who supervise their work. However, entities are likely to include a more complex array of non-barrister employees and managers who may require more direct regulation. The consultation proposes the following:

If the BSB decides to regulate entities, it would need to create a new set of rules to regulate entities as 'authorised persons', subject to disciplinary procedures;

All managers of entities would be subject to conduct rules, and entities would be required to have in place specific management roles which would attract specific duties. These duties would have to be reflected in any terms governing the relationship between the manager and the entity (such as partnership deeds);

All employees of entities would have to comply with certain basic duties and these duties would be reflected in contracts of employment;

The BSB should have the power to prohibit a person who has shown themselves to be unsuitable from working for a self-employed barrister or an entity regulated by the BSB.

Chapter 7 'Costs'

The ongoing feasibility of providing a regulatory structure for entities will turn on the overall costs, the take-up of business opportunities by the Bar and the funding which this generates. The distribution of costs is set out in this chapter, although it is not possible to provide detailed costs at this stage.

The consultation proposes that the set up costs for the regulation of entities should be borne by the whole profession, by way of a small increase in the Practising Certificate Fee (PCF), and running costs should be covered by fees charged to entities.

PART 3

Part 3 of the consultation summarises the services that BSB regulated entities would be permitted to provide and in light of this discusses proposals for permissible owners, managers and employees (Chapter 8). It goes on to illustrate what entity regulation would mean in practice for entities (Chapter 9).

Chapter 8 'Potential characteristics of a BSB regulated entity'

The BSB proposes to define the entities that it is prepared to regulate primarily by the services that they are permitted to provide. This chapter discusses the case for allowing other authorised persons (such as solicitors, legal executives and licensed conveyancers) and potentially non-lawyers to own and manage BSB regulated entities. The chapter proposes the following:

All owners would also need to be active managers of an entity. The BSB does not propose to regulate entities with external owners who are not also managers (8.14).

To reinforce the requirement that all entities would be providing primarily advocacy and advice services, **the BSB would require that a majority of an entity's managers are permitted to practise as advocates in the higher courts** (8.21 – 8.22).

Non-lawyer management should be limited to either 25% or 10% in line with either the current transitional arrangements for SRA regulated LDPs, or the threshold for "low risk" ABSs under the Act. This reflects the fact that the BSB would have less regulatory control over non-lawyers, who might not be separately regulated by any other regulator as individuals (8.27 – 8.32).

The BSB should not set a specific limit on the number or proportion of non-advocate employees in BSB regulated entities but should use the authorisation process to ensure that all entities are within its experience and competence to regulate effectively. The BSB considers that its regulatory approach and experience is best suited to entities with a relatively high proportion of managers, the majority of whom are individually regulated as advocates, and that it should not regulate entities with large numbers of non-advocate employees and relatively few managers (8.33 – 8.41).

The proposals regarding ownership mean that the BSB would be prepared to regulate all three technical structures that are available to it; BOEs, LDPs and ABSs (with a limited proportion of non-lawyer owners).

Chapter 9 'Regulation of entities in practice'

This chapter sets out the practical implications of entity regulation for the BSB and the entities that it might regulate. This includes consideration of the information that will need to be submitted for authorisation, administration requirements, the application of the Code of Conduct in the entity context and how the BSB would be likely to monitor entities.

Part 4

Having set out the key issues involved in entity regulation and discussed how these could be addressed, Part 4 reaches conclusions on this basis before returning to the overarching question of whether the BSB should begin to regulate entities.

The BSB welcomes responses which identify any further regulatory issues which might need to be addressed if it decides to regulate entities.

PART 1: INTRODUCTION AND BACKGROUND

Introduction

This consultation paper by the BSB considers the implications for barristers, consumers and the public, of a possible decision by the BSB to regulate entities. It also considers what type of entity the BSB might be prepared to regulate and the regulatory issues it would have to address in doing so by reference to the regulatory objectives set out in the Act.

The paper is issued following two earlier consultations on the implications of the Act for the regulation of the Bar of England and Wales, published by the BSB in February 2008 and August 2009. This consultation builds on the results of these previous consultations, as well as taking account of views and evidence gathered by both the BSB and the Bar Council about the demand from barristers to participate in entities. This evidence includes a recent survey on BSB regulation of new business structures commissioned from YouGov in April 2010¹.

The three types of entity that the BSB is contemplating regulating are:

- Barrister Only Entities (BOEs),
- Legal Disciplinary Practices (LDPs), and
- Alternative Business Structures (ABSs).

These structures are defined in the Background section.

Regulatory issues

The BSB has identified a number of key regulatory issues which arise in relation to entity regulation. These issues are addressed in Part 2, in the following chapters:

Chapter 1 'Permitted Services' – The services which BSB regulated entities could be permitted to provide and specifically whether restrictions on barristers conducting litigation should be relaxed;

Chapter 2 'Payment Options and Client Money' – The arrangements for clients to pay for the costs of litigation if restrictions are relaxed, and whether BSB regulated entities would be permitted to hold client money;

Chapter 3 'Accepting Instructions' – The basis on which BSB regulated entities should accept instructions, including how the non-discrimination and cab-rank principles can be applied;

¹ <http://www.barstandardsboard.org.uk/assets/documents/BSB%20business%20structures%20survey%2012-07-10.pdf>

Chapter 4 'Interventions' – The need for powers and procedures to oversee entities in financial or other difficulties, and whether an interventions scheme is required;

Chapter 5 'Insurance and Compensation' – A summary of different options for insuring BSB regulated entities;

Chapter 6 'Non-Barristers' – The extent to which the BSB should have regulatory control over owners, managers and employees within an entity;

Chapter 7 'Costs' – The ongoing cost and feasibility of providing a regulatory structure for entities will turn on the take-up of business opportunities by the Bar and the funding which this generates. The distribution of these costs is set out in this chapter, although it is not possible to provide detailed costs at this stage.

In Part 3 the consultation discusses the role that the BSB could play in regulating entities (Chapter 8) and what this would mean in practice for entities (Chapter 9).

Having set out the key issues involved in entity regulation and discussed how these could be addressed, Part 4 reaches conclusions on this basis before returning to the overarching question of whether the BSB should begin to regulate entities.

The BSB welcomes responses which identify any further regulatory issues which might need to be addressed if it decides to regulate entities.

Regulatory Objectives

Throughout the consultation paper reference is made to the regulatory objectives which the BSB is bound to promote.

The regulatory objectives are set out in section 1 of the Act:

- protecting and promoting the public interest;
- supporting the constitutional principle of the rule of law;
- improving access to justice;
- protecting and promoting the interests of consumers;
- promoting competition in the provision of services (by authorised persons²);
- encouraging an independent, strong, diverse and effective legal profession;
- increasing public understanding of the citizen's legal rights and duties;
- promoting and maintaining adherence to the professional principles.

Equality and diversity impact

² A person authorised to carry on reserved legal activities within the Act.

The Bar BSB is committed to promoting equality and diversity throughout the Bar and within its own organisation. It endeavours to ensure that its processes and procedures are fair, objective, transparent and free from unlawful discrimination. It is also keen to identify ways in which access to and progression within the Bar can be widened such that everyone who has the ability to succeed is able to do so regardless of race, gender, disability, religion or belief, sexual orientation, age or socio-economic background.

In addition to the questions outlined in the consultation, the BSB would welcome contributions on any areas of the consultation paper which you consider might have implications for equality. For example, are any of the proposals likely to have a greater positive or negative effect on some groups compared to others? The BSB would particularly welcome feedback on whether there are likely to be any negative consequences for any group arising from the proposed changes and how these could be mitigated, or if there are opportunities to promote greater equality and diversity in the areas mentioned above.

In considering the equality and diversity impact, the BSB is mindful that some of the proposals set out in this paper may have an impact on sole practitioners and smaller chambers, where BME practitioners are overrepresented.

How to respond

The decisions that the BSB may take following this consultation have the potential fundamentally to change how barristers provide services, and how they are regulated. The BSB therefore urges all recipients of the consultation to respond as fully as possible.

A list of those to whom this consultation is to be sent is included at page 105. Responses are, however, welcome from all. The BSB may wish to refer to responses in its report of the consultation, however names of individuals will not be cited. **If you do not wish your response to be identified in the report, or published on the website, you should make this clear in your reply.**

Responses should be sent to entityregulation@barstandardsboard.org.uk by the closing date of **23 December 2010**. Alternatively, you can post responses to:

Chris Nichols
Bar Standards Board
289-293 High Holborn
London WC1V 7HZ

Background

Barristers have traditionally been either self-employed or employed by law firms, businesses or in the public sector. The BSB has therefore focused on regulating barristers as individuals in these capacities.

The Act has created opportunities for barristers and other legal professionals to provide their services in new ways. In light of this, the BSB has already had to make a number of decisions as to the extent to which barristers should be permitted to participate in new working structures. This has been the subject of two prior consultations (see below) and will be discussed further in another consultation next year.

This consultation concerns the role that the BSB should take in regulating barristers in these new capacities and whether it should begin to regulate entities and facilitate its own new structures from which barristers would be able to practise.

The Legal Services Act 2007

The Act is the culmination of a process of policy and legislative reform undertaken by the Labour Government of 1997-2010 which reviewed the legal services market in England and Wales. It puts into effect many of the recommendations in Sir David Clementi's *Report of the Review of the Regulatory Framework for Legal Services in England and Wales* (2004) ('the Clementi Report'). These recommendations included proposals for permitting new business structures for lawyers, with the aim of creating greater competition in the legal services market. The full text of the Clementi Report is available here:

<http://webarchive.nationalarchives.gov.uk/+http://www.legal-services-review.org.uk/content/report/index.htm>

What the Act permits

Part 5 of the Act creates a licensing regime for ABSs. It provides the opportunity for approved regulators, such as the General Council of the Bar (acting through the BSB), to apply to become 'licensing authorities'. Licensing authorities would in turn then have the power to license ABSs, which could be owned and managed by authorised persons (regulated legal professionals) and a minimum of one non-lawyer manager and co-owner. They would be permitted to provide regulated reserved legal activities alongside non-legal services. It is anticipated that the ABS regime will be brought into force in October 2011.

The Act also currently permits a regulatory regime for another type of entity – LDPs, which allow different categories of lawyers to co-own and manage a business that can provide only legal services. LDPs are currently available if regulated by the SRA or the Council for Licensed Conveyancers (CLC). At present, SRA regulated LDPs can include up to 25% non-lawyer managers. These entities have been available since 31st March 2009. Once the ABS regime comes into effect, those LDPs with non-lawyer managers will need to be regulated as ABSs.

Previous policy development

The BSB, and the Bar Council before it, has been closely involved in the policy development around the Act. The Bar Council responded to the Office of Fair Trading (OFT) report *Competition in Professions* (2001) and the Clementi Report. Its responses are available at: <http://www.barcouncil.org.uk/consultations/pastresponsesstoexternalconsultations/>

The BSB has also consulted on the implications of the Act, publishing two consultations: *The Legal Services Act 2007: Implications for the regulation of the Bar of England and Wales* (February 2008); and *Legal Disciplinary Practices and Partnerships of Barristers* (August 2009). These are available at: <http://www.barstandardsboard.org.uk/consultations/closedconsultations/>

Following these consultations, in November 2009 the BSB decided that it would promote the regulatory objectives to allow barristers to practise in LDPs regulated by other approved regulators and in principle to be able to form BOEs.

In addition, the BSB decided that it should consult on whether or not it should itself become a regulator of entities, and if so of what sorts of entity. The BSB has been advised on the development of the current consultation and its policy development in general, by an expert working group on entity regulation, composed of both barristers and lay members.

New Ways of Working

Barrister participation in entities

The relevant rule changes made in order to permit barristers to participate as managers in LDPs regulated by other approved regulators came into effect in April this year. As SRA regulated LDPs are permitted to have non-lawyer owners or managers they will have to be regulated as ABSs when the full ABS regime comes into effect. However, the BSB has not yet decided whether barristers should be able to manage “full” ABSs regulated by other regulators, once the ABS regime comes into effect, as to do so would have been premature at a time when the details of the proposed ABS regimes were not yet available. This will be the subject of a further consultation next year, which will review the available evidence on the impact of barrister participation in LDPs regulated by other regulators, including the interim form of ABS with 25% non-lawyer management and ownership, in evaluating the risks of going further.

This consultation does not propose that the BSB should itself seek to regulate ABSs providing non-legal services or with external owners – the risks of allowing barristers to participate in such entities will have to be addressed separately in the context of that later consultation, since the SRA’s proposed regime will ultimately include such ABSs. The question posed in this consultation is whether the BSB should itself regulate entities including a type of ABS which is broadly analogous to that in which barristers can already participate under the SRA’s interim regime (or, possibly, in a form with only a 10% or 25% non-lawyer element).

As yet barristers cannot establish BOEs, because the BOE would need to be regulated and this would require the BSB to establish an entity regulation regime for that purpose.

Similarly, barristers do not currently have the option of establishing an LDP or ABS under the regulation of the BSB, rather than that of another approved regulator.

Dual capacity

A further relaxation of the rules on 1 April now permits barristers to work in a dual capacity, for example dividing their time between working in chambers as self-employed barristers, and working part-time in an employed or managerial capacity.

The BSB as regulator

By allowing barristers to work as managers of SRA or CLC regulated LDPs and to work in a dual capacity, the BSB has already taken steps towards liberalising the ways in which barristers are able to work. The BSB believes it is a logical next stage now to consult on whether it should offer its own regime for regulating entities.

BSB's current role as regulator of individuals

The BSB is the independent regulator of barristers in England and Wales. It regulates practising barristers, whether self-employed or employed. It also regulates, to a more limited extent, barristers without practising certificates. The BSB was established in January 2006 as a result of the Bar Council separating its regulatory and representative functions, although the Bar Council remains the statutory approved regulator. The current Code of Conduct, with which all barristers must comply, is focused on barristers as individuals.

BSB's future role as regulator of entities

The BSB, and the Bar Council before it, has traditionally regulated only individual barristers. Its regulatory hold over chambers and businesses in which barristers work is limited to ensuring that the individual barristers working within them comply with the requirements in the Code of Conduct and any associated rules and guidance.

The Act requires that any entity that carries on reserved activities (which includes rights of audience and conducting litigation) has to be authorised, in addition to the individual lawyers involved in supplying those services being authorised. If barristers want to form entities through which to supply those services then those entities must be authorised. This is in contrast to the position of entities which merely arrange for services to be supplied by other authorised persons without themselves carrying on any reserved activity, as in the Bar Council's "ProcureCo" model (see below). At the moment, those barristers who do want to operate through entities do not have the option of having their entity regulated by the BSB, as opposed to another approved regulator. Further, there is currently no available regulator for BOEs, which means that barristers cannot currently establish BOEs, even though the BSB has decided that in principle they should be permitted.

If the BSB decides to authorise entities, its regulatory focus will move beyond individuals to incorporate entities. This was anticipated in the Clementi Report, though it is important to recognise that entity regulation would be in conjunction with individual regulation, not in place of it.

Becoming an entity regulator would have profound implications for the BSB and for the regulatory services it provides. The BSB would have to develop expertise in regulating entities, which would involve restructuring itself to operate new regulatory functions, such as authorisation, monitoring and interventions. It will certainly need more extensive powers, policies and procedures. All of this would come at a cost to those that the BSB regulates, which may ultimately be passed on to the consumer.

BSB regulated entities would operate in a very competitive market, with other types of legal business, and in order to remain competitive barristers might need to be given new permissions to conduct litigation, provide new and effective payment options for their services, and have in place new types of insurance and compensation arrangements. They will also have new management and financial responsibilities. This would change the nature of the Bar, in terms of how barristers work and in terms of the service they provide.

Structures and implications for the BSB

As above, there are three main structures of entity that the BSB could regulate.

BOEs

'BOE' denotes the most limited form of entity that the BSB could regulate. It defines entities with the following characteristics:

- Entirely owned and managed by barristers operating as a unit,
- Partnerships, limited liability partnerships or companies,
- Only able to provide legal services, and
- Able to employ other authorised persons or non-lawyers such as clerks, practice managers or paralegals.

Implications for BSB

If the BSB were to regulate BOEs it would need to acquire the necessary powers from changes to the Bar Councils' constitution and potentially from legislation. For example, it is likely to require statutory powers to operate an effective interventions scheme (see Chapter 4). Appropriate changes to the BSB's rules and procedures would also need to be drafted and approved by the Legal Services Board (LSB).

The BSB decided in November 2009 that in principle barristers should be able to practise in this manner. Currently no other regulators are able to regulate entities exclusively owned and managed by barristers.

LDPs

'LDP' refers to statutory entities that the SRA and the CLC have been able to regulate under sections 9 and 32 of the Administration of Justice Act 1985 since they were amended by the Legal Services Act in March 2009. This permits entities to be managed by a mix of authorised persons and up to 25% non-lawyer managers and owners. LDPs can only

provide legal services. Barristers have been able to become managers of these bodies since 1 April 2010.

When the ABS provisions in the Act come into force in 2011 (see below) any LDPs with non-lawyer owners or managers will become licensable bodies under the ABS regime. However, those without non-lawyer owners or managers will not become licensable ABSs. Therefore the BSB could regulate its own equivalent of LDPs without non-lawyer owners or managers. This would cover entities with the following characteristics:

- Owned and managed only by authorised persons,
- Partnership, LLP or corporate structure,
- Only able to provide legal services, and
- Able to employ other authorised persons or non-lawyers such as clerks, practice managers or paralegals.

Implications for BSB

As with BOEs, this would require similar changes to the BSB's constitution and potentially some legislative provisions, as well as new rules and procedures, approved by the LSB. A regime for regulating LDPs could also encompass BOEs.

ABSs

The Act provides for a licensing scheme, to be overseen by the LSB, for regulating ABSs. It is anticipated that the licensing regime will be implemented by October 2011.

Under the regime, approved regulators will apply to the LSB to become licensing authorities in order to license and regulate ABSs. In order to get approval from the LSB to become a licensing authority, the BSB's regulatory regime for ABSs would have to meet the specific requirements prescribed in the Act (as further elaborated in policy papers published by the LSB) and, if the application was granted, the Act would then confer additional powers on the BSB by virtue of its status as a licensing authority (including, for example, intervention powers). The Act allows for ABSs to be very wide-ranging in terms of services and ownership. They can have the following characteristics:

- Must have at least one authorised person as Head of Legal Practice and at least one non-lawyer manager. Otherwise, can have any mix or proportion of owners and managers that are approved by the Licensing Authority,
- Partnership, LLP or corporate structure,
- Able to provide mix of legal services and non-legal services, and
- Able to employ other authorised persons or non-lawyers.

Implications for BSB

If the BSB decides to regulate ABSs it will need to apply to the LSB to become a Licensing Authority. This application would involve the payment of a fee (to be set by the LSB) and would need to include details of proposed licensing rules, which would govern the operation of the scheme.

Single person entities

The BSB is aware that there could be financial benefits, for example in the form of tax savings, for barristers if they are permitted to incorporate themselves and form single person companies (which would be considered a BOE). This is not currently possible because there is no available regulator for BOEs, but might become permissible if the BSB does set up an entity regulation regime in the future. It is possible that self-employed barristers may wish to incorporate themselves in order to take advantage of tax savings while otherwise continuing to practise as they currently do. The extent to which a regime for entity regulation would apply to this category of barristers would be examined in any future consultations on the detail of entity regulation.

ProcureCos

It is important to distinguish these three structures for regulated entities from the recent ProcureCo model developed by the Bar Council.

The Bar Council has developed the ProcureCo model as a method of allowing barristers to work together and alongside solicitors in order to tender for block contracts. ProcureCos do not require authorisation or regulation in order to operate as they only procure work from authorised persons and do not themselves carry on any reserved legal activities. However, the Bar Council also anticipates that ProcureCos may develop into 'SupplyCos', providing legal services, and conforming to one of the three structures above, if the BSB regulates entities.

Guidance on ProcureCos can be found on the Bar Council's website at:
<http://www.barcouncil.org.uk/guidance/ProcureCo/>.

A single regulatory scheme

So long as the regulatory framework and policy is in place it would not be too great a step to move from the regulation of the most limited entity comprising only barristers (BOEs) to regulating other forms of business arrangement. It is this regulatory framework and policy that the consultation paper focuses on.

This consultation does not in general examine entity regulation separately by reference to BOEs, LDPs and ABSs but rather examines whether the BSB should regulate entities and if so, what the policy and regulatory issues are that must be addressed. However, specific reference to the type of entity is made in some chapters, where the regulatory regime may differ depending on whether it would fall under the licensing scheme.

The consultation proposes in Chapter 8 that if it did regulate entities, the BSB should limit its regulation to entities that are:

- Primarily focused on providing advocacy and ancillary services, potentially including litigation,
- Managed by any mix of barristers and other higher court advocates, and
- With up to a maximum of 10% or 25% non-lawyer management (without external ownership).

This would encompass entities that could be classified under all three possible structures. The BSB would need to apply to become a licensing authority for ABSs and it would need to set up a separate regime to regulate BOEs and LDPs. However, if the BSB does decide to regulate all three types of entity, it will endeavour to create an entity regulation regime that would apply fairly and equally across the three different models, with only such differences as are reasonably necessary.

Meeting the regulatory objectives

In deciding what sort of entities, if any, the BSB should regulate, it must consider the effect that this would have on the regulatory objectives (set out in the Introduction). The impact of the specific regulatory issues are considered in Part 2, but it is important first to consider whether regulating entities would be in the public interest, and in the interests of the Bar.

Evidence - Survey of Bar Standards Board Regulation of New Business Structures

In May 2010 the BSB issued a survey, commissioned from YouGov, in order to ascertain attitudes amongst barristers, clerks and practice managers towards the possible regulation of entities by the BSB. It received responses from 1,913 barristers and 141 clerks and practice managers.

35% of barristers who responded said that they were 'likely' or 'very likely' to join an entity within the next five years, if permitted. 84% of barristers stated that the BSB was their preferred regulator in respect of entities. 68% of barrister respondents 'agree' or 'strongly agree' that it is in the public interest for the BSB to regulate entities as well as individual barristers. This level of interest suggests that regulating entities may be in the interests of both the public and the Bar, and it supports the case for further consultation.

However, the survey also demonstrated overwhelming support for avoiding fusion of the Bar with other legal professions, with 88% of barristers responding that it is 'fairly important' or 'very important' to remain a member of the Bar as a separate and independent legal profession.

Further details of this survey, and the report of results are available at:
<http://www.barstandardsboard.org.uk/news/newsarchive/559.html>

The case for the BSB as a specialist entity regulator

The BSB believes that the following considerations must be taken into account.

It is in the public interest to continue to have access to specialist advocacy and advice services. These services are already made available by the Bar, as well as by other providers, including Higher Court Advocates.

One of the intentions behind the regime brought about by the Act was to increase choice and to promote competition in the provision of services. The Act makes it a statutory requirement that, where an entity supplies reserved legal activities (which includes exercising a right of audience), it must be regulated. For this reason, if barristers wish to participate in entities, they must be subject to the rules of an approved regulator.

This has already resulted in new entities being created which provide specialist advocacy and advice services, and in which barristers are already participating as managers or owners, regulated by other Approved Regulators. The BSB needs to provide a further regulatory response to these developments.

The BSB is the regulator with the most experience, and specialist regulatory expertise, in regulating advocacy services and other services of the type traditionally provided by individual barristers. As such it may be regarded as the natural regulatory home for these services.

The SRA and the CLC already provide a regulatory regime for entities in which barristers are permitted to participate. It could be argued that if the BSB regulates entities, this will lead to duplication. However, the BSB proposes to focus on regulating entities primarily engaged in providing advocacy and ancillary services. The BSB believes that there is a value in providing specialist regulation for these specialist services. This will be complementary to, rather than duplicative of, the regimes of other regulators, which necessarily cannot focus to the same degree on the particular regulatory challenges which advocacy (and, indeed, litigation) pose. In particular, advocacy (and litigation) services are marked out from other types of legal services by the fact that they engage questions of access to justice, of a wider public interest beyond that of the consumer of the particular service, and of overriding duties owed to the court, on which our system of justice depends.

The BSB has already taken a decision in principle to allow barristers to practise from BOEs, but there is as yet no available regulator for these types of business. The survey suggests that there is demand from some barristers to participate in BOEs, as well as other types of entity. If the BSB sets up a regulatory regime for BOEs, it would be logical to extend that regime to cover other structures of a sort appropriate for regulation by the BSB. It would be in the interests of the public and the Bar, to provide some flexibility as to the type of structure available, rather than impose BOEs as the only available structure. The BSB proposes to impose limits on the composition of BSB regulated entities. These are designed to ensure that the entities are appropriate for regulation by a specialist regulator of advocacy and related services and that any risks arising are such as to be commensurate with the BSB's experience and regulatory resources. Subject to those limits, the BSB considers that it is in the public interest and the interest of the Bar for the BSB to regulate entities managed by a

mix of legal professionals and, in the case of ABSs, to include a proportion of non-lawyer managers.

There are a number of practical limitations which the BSB would have to overcome. The BSB has no regulatory experience in regulating entities. If it were to decide to regulate entities, it would need to develop the necessary expertise relatively quickly. This would substantially expand the remit of the organisation and there is a risk that this could potentially overstretch its capabilities. The BSB must have regard to what it is capable of regulating, in acting as a responsible regulator. However, the BSB proposes to mitigate that risk by permitting entities to provide only services which it is already experienced in regulating or which (as in the case of litigation) are very closely related.

There is a potential concern that by regulating entities, the BSB will contribute to the fusion of the distinct, and independent, branches of the legal profession. There are a number of commonly cited reasons why fusion of the professions of barrister and solicitor would not be in the public interest. The BSB is committed to maintaining an independent and diverse legal profession (that is one of its regulatory objectives) and that includes a commitment to maintaining advocacy as a specialist skill. However, the BSB believes that as well as recognising the value of a distinct advocacy focused specialism, there is a benefit in terms of access to justice in allowing clients new routes by which they are able to access specialist advocates, as well as allowing advocates more flexibility as to the ways in which they offer their services. That belief led to the decisions taken last November, which were the product of extensive consultation and debate, having regard to the issue of a fused profession.

The BSB considers that it would be in the public interest for it to continue to regulate advocacy and advice services and that, by ensuring that entities providing these types of services are available to barristers within its regulatory scope, the BSB can help to secure the continued existence of a distinct specialism, focused on providing such services. This would be a regulatory response that is appropriate to the changing legal services market and would help to strengthen the provision and availability of specialist advocacy and advice. Otherwise, any barristers who wanted to provide advocacy services through an entity would necessarily need to take their entity outside the BSB's regulatory regime (and in the case of BOEs, there is no available alternative). It is clear from the responses to the survey that barristers themselves believe it would be in the public interest for there to be a BSB alternative and the BSB agrees with that view.

Furthermore, in today's legal market, any regulator committed to maintenance of advocacy as a specialism must recognise that some individuals who originally qualified as solicitors may become specialist advocates and wish to participate in advocacy focused businesses. Maintenance of the specialism is promoted rather than undermined by making BSB regulation available to advocacy focused businesses that involve both barristers and solicitors. Whilst this does pose some challenges for the relationship between the BSB, as the regulator of such entities, and the Bar Council as the representative body for barristers, these are challenges which the SRA and Law Society have already had to confront.

The costs of regulating entities are discussed in some more detail in Chapter 7, though full estimates of costs have still to be established. However, it is certain that the cost of regulating entities as well as individuals will be higher than the cost of regulating only

individuals. These costs may turn out to be prohibitive, however it will be difficult to predict the take up of new entities and whether or not the revenue generated will be sufficient to sustain a regulatory regime. The feasibility of regulating entities will be assessed in a further more detailed consultation.

Provisional conclusion

Taking into account the assumptions and reasons described above, the BSB believes that it would be in the public interest for it to continue to be a specialist regulator of advocacy and advice services, but to begin to extend its remit to regulating entities as well as individuals, provided that this is practicable.

Q1. Do you agree that it is in the public interest for the BSB to become a specialist regulator of advocacy focused entities?

PART 2: REGULATORY ISSUES

Chapter 1 – Permitted Services

- 1 If the BSB decides to regulate entities, these entities would at the very least need to be permitted to provide advocacy and legal advice services, as self-employed barristers in chambers currently do. However, the question is what other services, if any, should entities be permitted to provide that the BSB would need to regulate. This includes consideration of non-legal services, reserved legal services and non-reserved legal services.

Non-legal services

- 1.2 The BSB does not believe that it is in the public interest at the present time for it to regulate multi-disciplinary practices (MDPs) that could provide non-legal services alongside legal services.
- 1.3 It is likely that other approved regulators will seek to regulate MDPs. This will allow the potential benefits to consumers of these business structures to be realised. As a result, there is no pressing regulatory need for the BSB to extend its regulatory remit so significantly from the outset.
- 1.4 If the BSB does begin to regulate entities this would in itself be a significant extension of its remit. The BSB does not possess the relevant experience or expertise to begin regulating the provision of non-legal services by entities and it would be irresponsible for it to overstretch itself beyond its regulatory competence.
- 1.5 In light of the fact that the BSB does not currently possess relevant experience or expertise, it does not believe that it would be able to offer anything other than confusing and potentially damaging duplication of the regulation of MDPs by other approved regulators.

Legal services

- 1.6 The Act distinguishes between reserved and non-reserved legal services.

Reserved legal services (see heading A below)

- 1.7 Under Schedule 2 of the Act the BSB is able to authorise individuals to provide the following “reserved legal activities”:
 - The exercise of a right of audience,
 - The conduct of litigation,
 - Reserved instrument activities (conveyancing),
 - Probate activities, and
 - The administration of oaths.

- 1.8 The BSB currently permits self-employed barristers to exercise all of these activities with the exception of litigation. However, prohibitions on handling client money and restrictions on the ability to receive instructions directly from lay clients mean that the self-employed Bar remains focused primarily on providing advocacy and advice on a largely referral basis.
- 1.9 The BSB needs to establish whether it would promote the regulatory objectives to regulate entities that could provide any or all of the additional reserved legal activities, bearing in mind the impact that this might have on the independence of the barristers' profession and considering the public interest in ensuring that standards of advocacy are upheld. This section begins by considering whether the ban on conducting litigation should be removed, before moving onto consideration of whether the BSB should regulate entities that could provide reserved instrument activities, probate and the administration of oaths (the "other reserved legal activities").
- 1.10 The proposal is for the BSB to regulate entities that provide advocacy and related services, which might include ancillary litigation and administration of oaths.

Non-reserved legal services (see heading B below)

- 1.11 The BSB would be prepared to regulate entities providing the non-reserved legal services that self-employed barristers currently provide, such as mediation and advice services, if these are ancillary to the provision of advocacy services. See section on "Legal advice" below for further details.
- 1.12 The issue of whether it should regulate entities predominantly focused on such services is also considered further below under the heading "Advice unrelated to advocacy or litigation".

A) Reserved Legal Services

(i) Conducting Litigation

- 1.13 A commonly cited benefit of providing legal services through an entity is that consumers can benefit from receiving a wide range of services from a single provider.
- 1.14 If the BSB were to regulate entities that could only provide advocacy and advice services it would need to work largely on a referral basis from professional clients or litigators. In order to provide a complete service of representation before the courts direct to lay clients BSB regulated entities would need to be able to conduct litigation as an ancillary function to the core work of the entity.
- 1.15 The recent survey on entity regulation therefore sought to assess the level of interest of barristers and clerks in joining entities which can conduct litigation. One in eight of all barristers were interested in joining BSB regulated entities only if the entities were permitted to conduct litigation.

1.16 This section of the paper outlines the present restrictions on barristers conducting litigation; explains what undertaking litigation would involve if entities were allowed to do so; discusses the benefits and risks of allowing BSB regulated entities to conduct litigation in relation to the regulatory objectives; and considers how the risks could be mitigated. It then goes on to consider whether, if BSB regulated entities are allowed to conduct litigation, self-employed barristers should also be allowed to do so.

Extent of current restriction

1.17 Self-employed barristers are not currently permitted to conduct litigation³:

*401 A self-employed barrister whether or not he is acting for a fee:
(b) must not in the course of his practice, except as permitted by the Public Access Rules:
(ii) conduct litigation (for example issuing any claim or process or instructing any expert witness or other person on behalf of his lay client or accepting personal liability for the payment of any such person) and must not conduct correspondence or other work involving other parties save as permitted by rule 401A below.*

1.18 Schedule 2 of the Act defines the conduct of litigation under the following terms:

*4 (1) The “conduct of litigation” means—
(a) the issuing of proceedings before any court in England and Wales,
(b) the commencement, prosecution and defence of such proceedings, and
(c) the performance of any ancillary functions in relation to such proceedings (such as entering appearances to actions).*

1.19 The scope of “ancillary functions” for the purpose of this definition can be determined by reference to the case of *Agassi v Robinson*⁴ where it was decided that the words should be construed narrowly and limited to the formal steps required in the conduct of litigation. For example, conducting correspondence with the other side’s solicitor in the context of litigation does not amount to “conducting litigation”, in the narrow sense which the law has ascribed to that term.

1.20 Until very recently the Code placed restrictions on self-employed barristers that were wider than these narrow steps that legally constitute the conduct of litigation. However, following extensive consultation, the BSB decided to relax restrictions on conducting correspondence, collecting evidence and conducting interviews at police stations. These rule changes were approved by the Legal Services Board on 31st March 2010.

1.21 Therefore the main aspects of conducting litigation that the Code still prohibits for self-employed barristers include:

- Issuing any claim or process or application notice,
- Signing off on a list of disclosure,
- Instructing expert witnesses on behalf of a lay client,

³ Rule 401, Code of Conduct of the Bar of England and Wales

⁴ [2005] EWCA Civ 1507

- Accepting liability for the payment of expert witnesses, and
- Any other “formal steps” in the litigation of a sort that are currently required to be taken either by the client personally or by the solicitor on the record.

1.22 The remaining restrictions are relatively narrow, when compared to the breadth of the work that is required in preparing any case for court and managing its progress towards trial. The main significance is that a self-employed barrister cannot issue proceedings and therefore cannot go on the court record as the person responsible for the litigation in a case. In practice, this requires a solicitor to be involved at some point in the proceedings. The effect of this is that a self-employed barrister can handle all of the correspondence in a case, collect evidence and handle the advocacy (subject to certain restrictions if there is a risk that they might have to give evidence about their earlier involvement). However, they would require a solicitor to bridge the gap and actually issue proceedings or take other formal steps in the litigation.

1.23 There is an existing exception to the requirement for solicitor involvement through the Public Access Scheme. Under this scheme lay clients can instruct barristers directly, provided it is in their best interests to do so, but the prohibition on conducting litigation still applies so the clients must themselves issue proceedings and serve the documents, while the barrister completes all other functions. In practice the barrister who is being instructed is likely to prepare these documents, but the client then signs and serves them. The Public Access scheme does not currently cover publicly funded work. The Licensed Access Scheme⁵ provides another exception to the need for solicitor involvement. Under this scheme instructions can be received from any organisation or members of an organisation licensed under the scheme to instruct a barrister directly. As with the Public Access scheme, the client must file and serve all documents.

1.24 Unlike self-employed barristers, barristers in employed practice and barrister managers of LDPs are allowed to conduct litigation, subject to the Employed Barristers’ Conduct of Litigation Rules in Annex I of the Code of Conduct.

Barrister managers and employees of BSB regulated entities

1.25 If BSB regulated entities were allowed to conduct litigation, the work which constituted this reserved activity would have to be done by individuals who were themselves authorised to conduct litigation. These could either be solicitors or, if so permitted, barristers. At present, employed barristers (including managers of SRA or CLC regulated LDPs) are permitted to conduct litigation. Therefore if the BSB were to regulate bodies that could provide litigation services but not allow barrister managers or employees of these bodies to conduct litigation, there would be a discrepancy between the rights currently afforded to barristers employed by SRA and CLC regulated firms and those in BSB regulated firms. This discrepancy would be hard to justify given the fact that these bodies could be providing otherwise identical services from very similar structures. For example, barristers in a litigation and advocacy focused entity with two barrister managers, two solicitor managers and two barrister

⁵ Code of Conduct, Annex F1

employees regulated by the SRA would be able to conduct litigation, but those barristers in the same body regulated by the BSB would not be able to.

- 1.26 This consultation proceeds on the basis that if the BSB regulates entities that can conduct litigation, barrister managers and employees of these bodies would also be able to conduct litigation, subject to completing any training, accreditation or supervised practice that might be required (see below).

Practicalities

- 1.27 If the BSB regulates entities that are permitted to conduct litigation, barrister managers and employees would be able to work directly with lay clients, without the need for a solicitor or other intermediary. They would be able to go on the court record and become responsible for the day to day management of a case. They would need to serve documents within limitation periods and be liable for strike out of cases for delay. Insurance premiums may rise in order to cover this new activity and liability.
- 1.28 While barristers have been able to conduct correspondence and collect evidence since 31 March 2010, allowing them to conduct litigation is likely to entail a much greater volume of paperwork and adequate systems and processes (for example for record-keeping and keeping track of deadlines) would need to be put into place.
- 1.29 Solicitors operate sophisticated systems for filing and preparing bundles for litigation. Significant paralegal, trainee and other staff resources are expended on preparing and maintaining case files. One of the Bar's greatest competitive advantages is its low overheads. It is likely that the overheads of entities that undertake significant litigation work will rise. The extent to which overheads rise will depend upon the willingness of barristers to handle the litigation themselves as opposed to employing solicitors or support staff to manage litigation files. Conducting litigation will therefore require time and potentially additional resources.
- 1.30 Barristers would also need to become accustomed to receiving instructions from - and dealing directly with - lay clients, which is currently only possible for self-employed barristers through the Public Access Scheme and after having undertaken appropriate training.

Regulatory objectives

- 1.31 The question for the BSB to consider is whether it will promote the regulatory objectives in the Act for the BSB to offer regulation of entities that can provide litigation services as well as advocacy services. This involves consideration of:
- a) whether barristers in BSB regulated entities should be able to go on the court record and handle the litigation and advocacy in a case, given that barristers in SRA regulated entities are permitted to do so, and
 - b) whether any additional risks that would flow from barristers providing litigation services from BSB regulated entities could be satisfactorily regulated by the BSB.

1.32 Litigation is often viewed as dependent upon the ability to hold client money, in the same manner in which solicitors currently hold client money on account of fees and disbursements and act as a channel for payments passing between their client and the other side or the court. However, the BSB's current view is that it may be possible to permit entities to conduct litigation without handling client money. This matter is considered in more detail in chapter 2.

(a) Permitted barristers to go on the court record and conduct litigation

➤ Possible benefits

Consumer choice - "protecting and promoting the interests of consumers"

1.33 Support for removal of the restrictions on barristers conducting litigation is premised on a perceived benefit to consumers of legal services. The need to instruct a solicitor to formally issue proceedings may add additional and unnecessary expense and it is often argued that lay clients should have the option to instruct a barrister directly to handle both the litigation and advocacy in a case, thus receiving a complete service from a single provider. This argument was recently articulated by the OFT in an open letter to the LSB:

"The current outright ban on barristers conducting litigation work limits the choice for consumers on who they can instruct in these matters. Where there would be time and cost efficiencies from one person, such as a barrister, conducting both advocacy and litigation, the ban would prevent consumers being able to benefit from lower fees. These efficiencies appear most likely to us in the three areas of law where consumers who do not qualify for legal aid are likely to struggle to pay fees. We therefore envisage that in these areas of family law, immigration, welfare and crime access to services could be increased where there is scope for dealing with one legal professional only."

1.34 Permitting BSB regulated entities to conduct litigation could thus be seen to promote the regulatory objective of protecting and promoting the interests of consumers.

Proliferation of BSB regulated entities – "promoting competition in the provision of [legal] services"

1.35 If the BSB regulates entities that are not permitted to provide litigation services, this will reduce the opportunities for barristers, solicitors and other non-barristers who wish to work in entities which provide both advocacy and litigation services and is likely to result in lower take up of BSB regulated entities. Conversely, regulating entities that can provide litigation services may result in greater take-up of entities. This would encourage greater competition between different types of providers of legal services, in line with the regulatory objective of promoting competition in the provision of legal services, which could be expected to encourage innovation and efficiency and may result in improvements in service delivery and reductions in costs.

Specialist regulator of advocacy– "promoting the public interest", "protecting and promoting the interests of consumers" and "encouraging an independent, strong, diverse and effective legal profession".

- 1.36 Barristers can already join LDPs regulated by the SRA and the CLC and conduct litigation as employees or managers of these entities. If the BSB does not offer equivalent opportunities to conduct litigation in BSB regulated entities those barristers who do want to work through an entity may feel compelled to join an SRA or CLC regulated entity purely for these reasons. The SRA has a broad regulatory remit including the regulation of transactional work, conveyancing and probate. However, the regulation of advocacy services constitutes only a small part of the SRA's regulatory activity, whereas advocacy is the primary focus of the BSB's regulatory functions. It therefore follows that if there is to be a specialist regulator of advocacy focused entities, the BSB would be the most suitable regulator. Even if the ambit of proposed services is extended to litigation, ancillary to advocacy services, this is still considerably more specialised than the very wide range of services currently regulated by the SRA.
- 1.37 Responses to the survey reveal the value placed by barristers in the specialist regulation of advocacy - 84% of barrister respondents to the survey favour regulation by the BSB to regulation by other regulators. If the BSB were to regulate entities that provided litigation services as well as advocacy, this would give entities that wanted to provide litigation services, but whose main focus was advocacy and advice, the option of being regulated by the BSB as the specialist regulator for these activities.
- 1.38 The BSB has experience in regulating advocates and has played a part in ensuring that advocates in England and Wales remain amongst the best regarded internationally. The BSB believes that it is in the public interest that these standards are safeguarded through continued oversight of advocates by a specialist regulator. This would promote the interests of consumers and encourage an independent, strong and diverse legal profession in line with the regulatory objectives. However, the BSB considers that there is a case for removing the residual restrictions that would prevent BSB regulated entities from offering ancillary litigation services. Otherwise there is a risk that BSB regulation would be too narrow in scope for the ways in which the legal services market can and should be free to develop.
- 1.39 In order to ensure that the BSB was offering specialist regulation it would need to ensure that any litigation services offered by firms that it regulates would be ancillary to the primary focus of an entity on advocacy services. At the point of authorisation, the BSB would have to make a judgment as to whether an entity was of an appropriate sort to be regulated by the BSB. In deciding whether an entity's activities were primarily focused on advocacy and advice, the BSB could consider the following factors:
- A business plan and breakdown of proposed activities,
 - Actual performance in recent years (for existing entities),
 - The percentage of managers who are higher court advocates (ie barristers or solicitors with rights of audience in the Higher Courts),
 - The percentage of employed authorised persons who are higher court advocates,
 - The number of paralegal employees and their roles, both in total and in relation to the number of advocates, and
 - Any undertakings the entity was prepared to give about the nature of the work it undertook.

➤ Potential disadvantages

Barristers not trained or experienced in conducting litigation – “protecting and promoting the interests of consumers”

1.40 The greatest risk of allowing barristers to conduct litigation is that it would extend their remit beyond their traditional experience and expertise. Many barristers will not have any training in the skills required to conduct litigation and therefore if the BSB was to allow barristers in entities to conduct litigation it would need to be satisfied that consumers could be properly protected through regulation, supervision and training. The options for how this could be achieved are discussed below under the heading “Regulating Litigation”.

Reduction in referrals to independent advocates – “protecting and promoting the interests of consumers”

1.41 A crucial benefit of the current system is that lay clients instruct a solicitor to advise in a case who, in turn, uses their experience to instruct the most suitable specialist advocate to undertake the advocacy.

1.42 However, permitting entities to conduct litigation would not prevent an entity from referring instructions for advocacy to an external advocate. Barristers and solicitors are under a duty to act in the best interests of their client and this would include the need to refer advocacy to the most suitable individual. However, it would be harder to enforce these duties in an entity context. In practice it must be accepted that it is likely that entities will keep more advocacy in-house and refer less instructions to specialist advocates outside of their entity. This would have ramifications for the BSB’s duty to protect and promote the interests of consumers, as it could result in a decrease in the overall quality of service provided. Any ongoing monitoring of entities (see Chapter 9) would need to focus on this issue to ensure that referrals are made where necessary.

Loss of specialism - “protecting and promoting the interests of consumers”

1.43 Allowing barristers to conduct litigation might reduce the Bar’s specialist focus on advocacy and advice. This focus has undoubtedly contributed to the quality of advocacy provided by the Bar and its international reputation. It can be argued that if barristers spend more time and effort on litigation services and activities, they will have less time to develop their advocacy and advice skills. The BSB is under a duty to protect and promote the interests of consumers, which involves ensuring that quality and standards are upheld.

1.44 This risk could be mitigated if, for example, barristers used solicitors or paralegals to assist with litigation functions, thus allowing consumers to access a full service at an entity but with dedicated litigators completing the litigation and specialist advocates remaining focused on advocacy. However, it would be difficult for the BSB to impose proportionate safeguards in this respect. Therefore if the BSB did regulate entities that could provide litigation services there is a risk that it could in some instances result in advocates devoting less time to advocacy, which in turn might not promote the highest standards of advocacy and would not be in the interests of consumers.

Convergence between barristers' and solicitors' professions – "maintaining an independent, strong, diverse and effective legal profession"

- 1.45 Allowing barristers to conduct litigation would also remove a significant differentiator between the barristers' and solicitors' professions. If take-up of entities is high or restrictions for the self-employed are also removed, barristers might begin to receive direct client instructions with greater frequency and the Bar may cease to be a predominantly referral profession.
- 1.46 88% of barristers who responded to the survey stated that it was important to them that they remained a member of the Bar as a separate and independent legal profession. The BSB recognises the value of the continued independence of the barristers' profession and is mindful of the importance of protecting this through any reforms. The independent Bar is an integral part of the "independent, strong, diverse and effective legal profession" that the BSB must maintain and promote in line with the regulatory objectives.
- 1.47 In this respect it is important to stress that rule 401(b)(i) of the Code, which prevents self-employed barristers from undertaking the management administration or general conduct of a lay client's affairs, will continue to prevent barristers from acting on a retainer as general counsel for a particular client. This will maintain an important distinction between the professions regardless of the approach taken to litigation and will ensure that barristers are still offering a specialist and focused service, relative to that available from SRA regulated firms.

Overheads – "improving access to justice" and "protecting and promoting the interests of consumers"

- 1.48 It does not necessarily follow that providing combined advocacy and litigation services would result in improved efficiency and reduced costs for consumers. As already mentioned, self-employed barrister services are currently provided relatively cheaply owing to extremely competitive overheads as compared to solicitors. Entities that conduct litigation are likely to have higher overheads which could in turn lead to higher costs for legal services if the entity is less efficient than more traditional structures. Any increase in costs would not be in the interests of consumers and might also have a negative effect on access to justice.
- 1.49 However, Public Access Scheme work demonstrates that there is an appetite for relatively low overhead services in cases that do not require large numbers of staff or other resources in order to be run effectively. In cases that do need more resource, there is scope for outsourcing the provision of support services. The BSB hopes barristers will rise to the challenge of creating, for those that want them, alternative types of business structures which successfully combine relatively low overheads with the advantages of operating as an entity, thereby making a broader range of choices available for consumers. The BSB believes the proposed parameters for the types of entity the BSB proposes to regulate should help to encourage this, without being unduly restrictive.

Client pressure

- 1.50 If BSB regulated entities are permitted to conduct litigation it is possible that there will be client pressure for a full service to be provided. This could magnify all of the potential adverse effects listed and result in barristers being drawn into providing litigation services where they would otherwise prefer to remain focused on providing advocacy and advice services. The potential for this to result in a general rise in overheads and costs of legal services is perhaps the greatest risk to access to justice.
- 1.51 However, if those barristers who wish to remain exclusively focused on advocacy are unable to persuade their clients of the merits of their approach, it seems unlikely that retention of a prohibition on the conduct of litigation will tip the balance: their clients would still be free to seek out a one-stop service elsewhere, unless persuaded that there was value in a more specialist approach. Nor does it follow from the fact that the entity provides litigation as well as advocacy that individual advocates need to be distracted from focussing on advocacy (as already noted above). This would depend on how the entity organises its business.

(b) Regulating Litigation

- 1.52 Before deciding whether the benefits of allowing BSB regulated entities to conduct litigation outweigh the disadvantages, it is necessary to consider how the BSB could regulate litigation in order to mitigate the risks or reduce their impact. This will have implications both for the BSB and for the profession.
- 1.53 The most prominent risk is that untrained barristers with no prior experience of conducting litigation might lower the standard of service provided. Under the proposed new authorisation to practise arrangements about which the BSB consulted earlier this year, barristers who wish to conduct litigation will only be authorised to do so if they have complied with the relevant requirements. Currently, employed barristers and barrister managers of LDPs can only conduct litigation if they have complied with the rules at Annex I of the Code of Conduct. Paragraph 1 of this provides:
- 1. An employed barrister may exercise any right that he has to conduct litigation provided that:*
- (a) he is entitled to practise as a barrister in accordance with paragraph 202 of the Code;*
- (b) he has spent a period of at least twelve weeks working under the supervision of a qualified person or has been exempted from this requirement by the Bar Council on the grounds of his relevant experience;*
- (c) if he is of less than one year's standing (or three years' standing in the case of a barrister who is supplying litigation services to any person other than a person referred to in paragraph 501 of the Code) his principal place of practice is an office which is also the principal place of practice of a qualified person who is able to provide guidance to the barrister; and*
- (d) if he is of less than three years' standing, he completes at least six hours of continuing professional development on an approved litigation course during any year*

in which he is required to undertake continuing professional development by the Continuing Professional Development Regulations (reproduced in Annex C).

- 1.54 These are important safeguards for consumers. Similar provisions for barristers in BSB regulated entities would make it necessary to involve either a solicitor or a barrister who already had experience as a litigator as an employed barrister (to satisfy the requirements for supervision by a “qualified person”). This would inhibit the initial proliferation of barrister only entities providing litigation services but would cease to be a problem once more barristers had gained litigation experience.
- 1.55 The BSB has considered whether these rules could be relaxed to make it easier for BSB regulated entities to develop litigation services. One possibility would be to require prior accreditation, although even in these circumstances it would be highly desirable to require some practical experience and continuing supervision in the early days of practice. Another possibility for further consideration might be, at least for a transitional period, to relax the requirement that the qualified person must work in the same office and to allow the qualified person to work elsewhere provided that they were readily available to give advice and were actively involved in supervision. This would enable a BSB regulated entity to have an arrangement with, for example, a neighbouring solicitor to provide the guidance. However, there would still be significant risks in allowing an inexperienced litigator to work on his own without close supervision by an experienced person.
- 1.56 The BSB’s provisional position is that it would at the very least apply Annex I to barristers working in BSB regulated entities wishing to conduct litigation. In addition, it is also likely to impose training or even accreditation requirements. The training would need to cover the skills required in dealing directly with lay clients, as well as the practicalities of litigation.
- 1.57 The SRA does not place any specific requirements in terms of the systems or administrative processes solicitors must have in place to handle litigation, but it does have rules about client care and the need for one of the managers of an entity to be “qualified to supervise”. The BSB would need to take a view on whether it should impose similar rules on entities conducting litigation and what monitoring arrangements it would need to put in place to regulate compliance with these rules. It would also need to amend its disciplinary procedures to cover litigation and ensure that the panels considering cases have the relevant expertise to assess potential misconduct in relation to litigation services. The existing rules relating to considering whether a client’s best interests would be better served by employing a different advocate and not undertaking work for which the barrister lacks competence⁶ would apply to the conduct of litigation and would be particularly important in that context.

Provisional conclusion

- 1.58 The BSB believes it may need to be prepared to regulate ancillary litigation services if it is fully to meet the needs of the public for choice in how they procure services and

⁶ Rule 701(b) Code of Conduct.

the needs of the Bar for choice in business structures. Whilst the core services of a BSB regulated entity will continue to relate to advocacy and other services of the sort traditionally provided by the self-employed Bar, it makes sense to remove artificial barriers that would prevent barristers combining those services with services which the law would classify as “conducting litigation”. The boundary has become increasingly artificial, given the developments that have already taken place.

- 1.59 Whilst it remains essential that barristers should nurture and develop their specialism as advocates, and should maintain high standards of conduct and performance in that regard, a restrictive rule is no longer justified or effective as a means of procuring that result. Maintenance of the restriction may simply have the effect of driving barristers out of BSB regulation and depriving clients of choices that ought to be available to them. Some experience of conducting litigation may well make an individual a more effective advocate, rather than the contrary, and an advocate’s perspective may improve the handling of the case in its preparatory stages. Specialism and expertise in advocacy can be more effectively underpinned by the BSB’s work in relation to training, CPD and standards, by a regulatory regime which makes advocacy and the overriding duty the advocate owes to the court one of its cornerstones and, importantly, by the work of the Inns of Court in continuing to foster an ethos of excellence amongst their members.
- 1.60 The BSB believes that it should focus on acting as a specialist regulator of bodies whose predominant activities are advocacy and, ancillary to that, litigation services.
- 1.61 The BSB considers that the safeguards discussed would go a long way towards mitigating the risks, particularly the principal risk of allowing untrained barristers with no prior experience of conducting litigation to offer litigation services to consumers.
- 1.62 Therefore the BSB’s provisional conclusion is that, if it is decided that the BSB should regulate entities, those entities and the barristers who manage or are employed by them should be allowed to conduct litigation, subject to individual authorisation and appropriate training and supervision arrangements.
- 1.63 The BSB proposes that any costs associated with setting up to regulate litigation should be borne by the profession as a whole. On-going costs should be met by those who wish to take advantage of the ability to conduct litigation, through initial fees for authorisation of entities and individuals to conduct litigation and through higher annual fees to cover the additional costs of regulating litigation. This is a similar approach to what is proposed in chapter 7 in relation to the costs of entity regulation as a whole.

Self-employed barristers

- 1.64 If the BSB begins to regulate entities from which barristers can conduct litigation, retaining the restriction for self-employed barristers would be increasingly hard to justify, as it involves balancing similar considerations. However, there are also considerations that have more relevance to self-employed practice, which are set out below. It could be argued that these would justify permitting BSB regulated entities to conduct litigation but not self-employed barristers. Alternatively it could be argued that

this distinction would be artificial and that the BSB should either regulate both or neither.

Practical considerations

- 1.65 Currently self-employed barristers can have direct access to lay clients through either the Public Access Scheme (Annex F2 of the Code) or the Licensed Access Scheme (Annex F1 of the Code). As explained above, under both schemes a solicitor or other intermediary is avoided but as barristers are not permitted to conduct litigation, the client must technically act as a litigant in person and file and serve all documents.
- 1.66 If self-employed barristers are allowed to conduct litigation they would be able to provide a full litigation and advocacy service to lay clients and would be able to accept instructions directly from such clients outside of the provisions of either the Public Access or Licensed Access Schemes.
- 1.67 However, it is possible that barristers who undertake significant work under either of these schemes may prefer to continue to work under the established terms, whereby clients are ultimately responsible for filing and serving documents. If the BSB does permit barristers to conduct litigation it will need to establish whether this would replace these schemes or whether they could continue to provide alternative terms under which barristers could work for clients.

The case for application to self-employed barristers

- 1.68 It is clear from the recent survey that there is some demand amongst the profession to be allowed to conduct litigation; 52% of barristers agreed that self-employed barristers should be permitted to conduct litigation. Therefore a discrepancy between BSB regulated entities and BSB regulated individuals might compel self-employed barristers to join entities in order to be able to conduct litigation, resulting in an avoidable migration away from self-employed practice.

The additional risks involved

- 1.69 Allowing self-employed barristers to conduct litigation is likely to pose a greater regulatory risk than provision from entities, as self-employed barristers are less likely initially to have systems and resources to assist with conducting litigation and managing case files. The additional resources of entities might offer greater protection for clients in terms of cover during busy periods for the entity or advocate, whereas a self-employed advocate would have to manage litigation duties alongside the potential for short notice listings and receiving last minute bundles for advocacy only instructions. All of this could result in a greater risk of litigation files being inadequately managed and maintained, which could result in cases being struck out for delay or confidential information being processed in a less than satisfactory manner. Self-employed barristers who wished to conduct litigation would need to put the necessary arrangements in place to ensure that cases are managed efficiently. The BSB would need to satisfy itself that such arrangements had been made before authorising a self employed barrister to undertake litigation and monitor the effectiveness of these arrangements in order to mitigate these risks.

- 1.70 The concerns set out above (paragraphs 1.43 and 1.44) relating to reducing the specialist focus of barristers are also more relevant for self-employed barristers who may not have colleagues or employees to assist with administration associated with litigation and will therefore need to devote more time themselves to litigation and less to advocacy and advice.
- 1.71 Finally, removing restrictions on self-employed barristers conducting litigation might also subject them to commercial pressure to begin offering a combined service. Barristers might find that they need to justify why they are not offering all of the services that they have the opportunity to provide. This commercial pressure could affect the profession as a whole and could have ramifications even for the 28% of respondents to the survey who disagreed that the self-employed Bar should be permitted to conduct litigation.
- 1.72 Despite these risks, the BSB considers that it would be disproportionate and anti-competitive to prohibit self-employed barristers from conducting litigation if entities regulated by the BSB were allowed to do so.

Q2. Do you agree it is in the public interest for the BSB to permit entities that it may regulate in the future to provide litigation services which are ancillary to the provision of advocacy and advice services?

Q3. If so, do you agree that barristers who are managers or employees of BSB regulated entities should be permitted to conduct litigation, rather than being required to have in-house solicitors to do this work?

Q4. If BSB regulated entities are allowed to conduct litigation, do you agree that it is in the public interest for self-employed barristers to be permitted to conduct litigation?

Q5. Would permitting BSB regulated entities and self-employed barristers to conduct litigation pose any further risks to consumers or the regulatory objectives that are not identified above? If so, how could these further risks be mitigated?

Q6. Do you agree that barristers should be required to undertake relevant training before being authorised to conduct litigation and that they should also be subject to a period of supervision and guidance from a qualified person?

(ii) Other Reserved Legal Activities

- 1.73 As set out above, self-employed barristers are authorised to provide all of the following reserved legal activities:
- The exercise of a right of audience,
 - Reserved instrument activities (conveyancing),
 - Probate activities, and

- The administration of oaths.

1.74 Reserved instrument activities are described in Schedule 2 of the Act as:

5(1) *“Reserved instrument activities” means—*

(a) preparing any instrument of transfer or charge for the purposes of the Land Registration Act 2002 (c. 9);

(b) making an application or lodging a document for registration under that Act;

(c) preparing any other instrument relating to real or personal estate for the purposes of the law of England and Wales or instrument relating to court proceedings in England and Wales.

(2) But “reserved instrument activities” does not include the preparation of an instrument relating to any particular court proceedings if, immediately before the appointed day, no restriction was placed on the persons entitled to carry on that activity.

(3) In this paragraph “instrument” includes a contract for the sale or other disposition of land (except a contract to grant a short lease), but does not include—

(a) a will or other testamentary instrument,

(b) an agreement not intended to be executed as a deed, other than a contract that is included by virtue of the preceding provisions of this sub-paragraph,

(c) a letter or power of attorney, or

(d) a transfer of stock containing no trust or limitation of the transfer.

(4) In this paragraph a “short lease” means a lease such as is referred to in section 54(2) of the Law of Property Act 1925 (c. 20) (short leases).

1.75 Probate activities are defined as:

Probate activities

6(1) “Probate activities” means preparing any probate papers for the purposes of the law of England and Wales or in relation to any proceedings in England and Wales.

(2) In this paragraph “probate papers” means papers on which to found or oppose—

(a) a grant of probate, or

(b) a grant of letters of administration.

1.76 Some instruments of a type that self-employed barristers have traditionally prepared in the context of acting in court proceedings would fall within the definition of reserved instruments. To that extent, BSB regulated entities might need to be authorised to carry on reserved instrument activities if they are to be able to provide services that self-employed barristers currently provide. On the other hand, reserved instrument

activities also include large scale conveyancing operations of a kind remote from the type of services provided by the Bar. In practice, restrictions on barristers receiving instructions directly from lay clients and the prohibition on handling client money mean that barristers do not currently undertake probate work (although they may well give advice on a referral basis in that context).

- 1.77 The BSB believes that reserved instrument activities ancillary to litigation or, as part of the services provided by the Chancery Bar when acting on a referral basis in non-contentious work, can and should be distinguished from the broader range of reserved instrument activities and from probate.
- 1.78 As set out above, the BSB believes that it would be in the public interest for it to establish itself as a specialist regulator of entities whose core service is advocacy. Subject to the response from the Chancery Bar, the BSB does not currently see a demand for, or propose to regulate, entities whose services are unrelated to advocacy and litigation but would give this further consideration if responses to this consultation indicated otherwise. On any view, the BSB does not believe that it would be in the public interest for it to duplicate the regulation already offered by other regulators for probate or conveyancing services. The SRA has an established regime for regulating large scale reserved instrument activity and probate services. The nature of these services requires the holding of client money which the SRA regulates, administering a large compensation fund to provide redress for consumers where problems arise in this regard. These activities constitute a large proportion of the SRA's regulatory activity. Barristers who wish to provide such services from entities could do so by joining SRA regulated firms, or CLC regulated ABSs if the CLC becomes a Licensing Authority for ABS providing advocacy and litigation as well as conveyancing and probate services.
- 1.79 Therefore the BSB's provisional conclusion is that there is no regulatory need for it to regulate entities providing reserved instrument activities, other than as ancillary to advocacy and litigation, or probate services. However, the BSB invites feedback on whether there are any specific reserved instrument activities or probate activities that self-employed barristers currently conduct that they might wish to continue to conduct if they were to join an entity.
- 1.80 The administration of oaths is something self-employed barristers are authorised to do and presents a relatively low risk and requires little regulatory action or redress. It would be unlikely to constitute a significant proportion of any entity's activities (especially given that rules would necessarily preclude the entity from providing such services in a case in which it was acting). Therefore the BSB does not foresee any risk in allowing entities to provide administration of oaths as an ancillary service.

Q7. Do you agree that the BSB should not regulate entities which provide reserved instrument activities or probate services that are unconnected with advocacy or litigation?

Q8. Are there any specific reserved instrument activities or probate activities, unconnected with advocacy or litigation, that self-employed barristers currently

conduct that they should continue to be permitted to conduct if they were to join an entity?

Q9. Would prohibiting BSB regulated entities from providing reserved instrument activities or probate services have any impact for people from different ethnic groups, men and women or disabled people?

Q10. Do you agree that BSB regulated entities should be permitted to administer oaths?

B) Non-Reserved Legal Services

Legal Advice

1.81 Legal advice is a non-reserved service in that the Act does not require someone to be an authorised person in order to provide that service. However, legal advice is an important aspect of the existing services provided by self-employed barristers and in relation to which they are individually regulated by the BSB. The BSB proposes to regulate BSB regulated entities in relation to the legal advice they provide in a comparable way to the way it regulates individual barristers. The Act does not require this, but it does permit it and the BSB considers that it is in the interests of consumers that it should take this approach.

1.82 Whilst the provision of legal advice is not in generally a regulated activity, there are some areas of advice which are deemed to be sufficiently high risk to merit regulation being a statutory requirement. This includes advice in relation to immigration. The BSB will need to decide whether it should seek to allow its entities to provide immigration advice.

Immigration

1.83 Part V of the Immigration and Asylum Act 1999 (“the 1999 Act”) regulates the provision of immigration services and immigration advice.

1.84 Section 84 of the 1999 Act provides that immigration advice and immigration services can only be provided by “qualified persons”. This includes:

- All members of “designated professional bodies”, including the BSB (through the Bar Council), Law Society and ILEX, and
- Persons who register with the Office of the Immigration Services Commissioner (“OISC”) as immigration advisers.

1.85 Under the first bullet point above individual barristers are qualified persons for the purposes of the 1999 Act and are able to provide immigration advice and services.

1.86 The BSB believes that it should allow entities to provide immigration advice and services, provided it is through “qualified persons” (as defined in the 1999 Act). It does not believe that non-barrister managers or employees of its bodies should

automatically become qualified to provide immigration advice by joining a BSB regulated entity. In other words, such managers or employees should not be considered members of a designated professional body for the purpose of becoming a qualified person. However, if managers or employees of its entities are otherwise considered to be qualified persons and therefore separately permitted to provide immigration advice and services, and individually accountable for this to either the Law Society, ILEX, any other designated professional body or to OISC, they should not lose the right to provide such immigration advice by virtue of joining a BSB regulated entity.

- 1.87 In practical terms the proposed approach would seek to retain the status quo regarding the provision of immigration advice, albeit allowing qualified persons to provide this advice from new entities.

Advice unrelated to advocacy or litigation

- 1.88 This chapter has explained the BSB's contention that it would promote the regulatory objectives for the BSB to establish itself as a specialist regulator of advocacy and related ancillary services.
- 1.89 However, the BSB acknowledges that there are some segments of the self-employed Bar that are predominantly concerned with advisory work unrelated to litigation or advocacy. The BSB invites responses from those practising in such areas as to whether they foresee a need to form entities and will review its proposals if it emerges there is a significant demand for this. It may well be that, if entities were to be formed whose core work was legal advice wholly unrelated to advocacy or litigation, they would be working primarily on a referral basis, rather than providing a service direct to the lay client, and would therefore remain distinguished in that respect from solicitors' firms offering advice in similar fields. Again, the BSB invites comments from respondents about that. The BSB will assess whether to offer regulation for such entities in light of the responses but at present the BSB's impression (based on the survey) is that demand for BSB regulated entities is likely to come from barristers wishing to provide predominantly advocacy services or a combination of advocacy and litigation services as the core service, with any other legal services being subsidiary to that.

Q11. Should the BSB seek to regulate entities whose work is primarily advisory and non-contentious in nature and unrelated to advocacy or litigation work? If so, is it envisaged that such entities would be supplying services primarily on a referral basis or direct to the public?

Chapter 2 – Payment Options and Client Money

Introduction

- 2.1 Chapter 1 considers whether or not the BSB should regulate entities that are permitted to conduct litigation. In order to conduct litigation, it would be necessary to have arrangements in place to allow for the payment of fees and disbursements, as well as for managing settlements and court awards. There are a number of different possible arrangements, all of which carry varying degrees of financial and other risks, both to barristers and to their clients.
- 2.2 One option is to allow entities to hold client money on account. Unlike barristers, solicitors are currently permitted to receive and hold client money subject to the Solicitors' Accounts Rules. The restrictions on barristers holding client money could be removed, if this is shown to be necessary in order for them to provide services which are competitive with other providers. This would require a new regulatory framework to be put in place, which is likely to be both costly and onerous for businesses to comply with. Due to the complexity of such a framework, and the relatively high costs involved, the BSB does not propose to relax the current restriction on barristers holding client money.
- 2.3 However, there may be alternatives to holding client money for the payment of fees and disbursements. One alternative is for barristers to seek reimbursement for fees and disbursements after the litigation has been completed, or in stages as work is completed and disbursements paid out. Although this reflects current practice, it would create a significant financial burden where large fees are involved. Another alternative is for barristers to require fixed fees to be set in advance which would not be counted as client money for regulatory purposes. However, neither of these options would provide a solution to the need to administer court awards and settlements.
- 2.4 The BSB has to determine what payment arrangements are necessary in order to ensure that both barristers and clients are sufficiently protected from any risks which flow from a relaxation of the restrictions on conducting litigation and from entities having direct access to lay clients, whilst at the same time allowing barristers to provide competitive services. The payment options discussed in this chapter concern direct access to clients – entities will still be able to take instructions from, and work in conjunction with other legal services providers which have client money holding permissions.
- 2.5 The fewer circumstances in which entities need to handle client money, the simpler and cheaper the regulatory arrangements will be.

Effective payment options – meeting the regulatory objectives

- 2.6 The BSB wishes to ensure that the regulatory framework allows barristers enough scope to provide services that are competitive with those legal services offered by other providers. It is in the interests of consumers, and the public more widely, to ensure that any BSB regulated entities can provide competitive services. This includes ensuring

that the means to pay for litigation is attractive to clients. Payment options may therefore be regarded as an extension of litigation services.

- 2.7 Solicitors' firms and LDPs regulated by the SRA are able to provide a full range of services. They are able to hold client money on account which means they can take the responsibility away from the client for administering the payment of the costs of litigation. This may put them at a competitive advantage over BSB regulated entities, if the latter are unable to offer either a similar service, or an effective alternative.

Types of payments in litigation

- 2.8 There are three main categories of payments which are associated with litigation – fees, disbursements and court awards and settlements.

Fees

- 2.9 Under current fee arrangements a barrister asks for fees at various stages of a case, depending on the nature of the case, the status of the client, and the level of fees required.
- 2.10 Barristers in private practice most commonly issue fee notes after the work has been done, when they are instructed by solicitors or other professional clients. In this case, the barrister carries the risk of non-payment. In order to help reduce this risk, the Bar Council's Fees Collection Department assists barristers in collecting unpaid fees. In direct access work, barristers more usually stipulate a fixed fee paid in advance. Unlike solicitors, barristers cannot ask for money on account of fees, as the prohibition on holding client money prevents this.
- 2.11 There is considerable flexibility around how barristers' fees are negotiated. There are no formal scales of fees for privately funded cases. Generally barristers charge according to their level of experience and the complexity and length of time involved in any particular matter. This flexibility must similarly apply to entities.
- 2.12 Different areas of legal services may have quite different requirements in respect of fees. The Legal Services Commission (LSC) payment arrangements are likely to continue to be on the basis of quarterly payments for services provided, paid in arrears. This makes it unnecessary for barristers to hold client money in respect of lawyers' fees, for this type of publicly-funded contract, as the appropriate fee is paid after the service has been provided. However, fees in privately funded civil and commercial work operate differently and there are higher risks of non-payment.
- 2.13 Some legal services are provided on the basis of block contracts under which payments may be made in advance. Local authorities go out to tender for these types of contracts, e.g. for licensing and planning work.

Disbursements

- 2.14 It will often be necessary to pay disbursements in order to conduct litigation. Common disbursements include court fees and payments to expert witnesses. Sometimes there will be a requirement to make payments into court, as a means for providing security

as to costs, as a condition of granting some relief, or as a sanction. However, the most costly disbursements are generally for the payment of experts.

- 2.15 Under current referral arrangements, payments for disbursements are usually made by a solicitor. In direct access cases under the Public Access Scheme, the lay client will sometimes pay disbursements themselves, or will be asked to make top up payments after the expense has been incurred.
- 2.16 However, if the rules are changed to allow barristers to issue proceedings and perform the ancillary functions of litigation, this will attract new responsibilities to make payments during the course of litigation.
- 2.17 There are a number of ways this could be done. The entity could itself fund the payments, seeking reimbursement afterwards; it could require the lay client to fund payments direct to the end recipients (which might result in delays); the client could agree a fixed fee paid in advance to cover both the barristers fees and disbursements; or the client could pay the entity money on account of fees and disbursements, in which case the funds would need to be held as client money.

Q12. If barristers are permitted to conduct litigation, will it be necessary for them to hold client money to pay disbursements?

Court awards and settlements

- 2.18 Court awards and settlements resulting from litigation can be very substantial and therefore involve a significant risk of misappropriation or misapplication, with serious consequences for those affected.
- 2.19 Settlements made by the losing party in litigation usually include sums in respect of lawyers' fees. These are usually paid into a solicitor's client account so that these fees can be deducted before the balance is returned to the client. Therefore if settlements and awards are paid directly to the winning party there is a risk that barristers will not receive fees included in the settlement award. Conversely, if settlements and awards are paid to the entity, there is a potential risk that individuals within the entity misappropriate the money. The BSB proposes a solution to these risks at paragraph 2.56, below.

Options for the payment of fees and disbursements

- 2.20 The following are a number of options for the payment of fees and disbursements. The first two options are permitted under current rules, the third option is prohibited. None of these options are mutually exclusive:
- Option 1 - reimbursement and payment in arrears,
 - Option 2 - fixed fees in advance, and
 - Option 3 - client money held on account.

Option 1 – reimbursement and payment in arrears

2.21 One option to arrange the payment of litigation fees and disbursements is for clients to pay after the event, reimbursing costs and expenses and paying professional fees in arrears. Under such an arrangement barristers would conduct litigation first and carry the credit risk that the client would not pay for any disbursements or fees due.

Contractual Terms of Work

2.22 The terms by which work will be taken on by barristers operating within an entity are likely to be different to the ‘honorarium’ system, traditionally operated by barristers. Entities, which will have a legal personality, are likely to enter into contracts with their clients.

2.23 The Bar Council published a consultation in April 2010 on contractual terms of work for the supply of legal services by barristers to solicitors. Subject to the outcome of the consultation, the Bar Council proposes to change the current default position where barristers are instructed by solicitors on non-contractual terms – the “Terms of Work on which barristers offer their services to Solicitors and the Withdrawal of Credit Scheme 1988 as amended” (“the Terms of Work”). (The current Terms of Work can be viewed on the BSB’s website at: <http://www.barstandardsboard.org.uk/standardsandguidance/codeofconduct/>.) The Bar Council proposes that the new default position will be on the basis of New Contractual Terms which will form a binding contract and which will be enforceable.

2.24 The New Contractual Terms would operate on an ‘opt out’ basis, with barristers and solicitors continuing to be free to negotiate whatever terms they consider appropriate. However, it is also proposed that barristers will not be obliged to accept instructions if they are not offered on the New Contractual Terms.

2.25 Barristers operating within entities are likely to make use of such contractual terms in order to ensure that they have a mechanism for enforcement in the event of non-payment, although they would have discretion to decide their own terms. Barristers might decide that the payment of fees in arrears would be acceptable on a contractual basis, provided that there was manageable risk of non-payment.

‘Pay as you go’

2.26 Where litigation is complex or long-running it might be possible for entities to bill clients for fees and disbursements in stages as the litigation progresses, on a ‘pay as you go’ basis. Non-payment could amount to breach of contract and may see the services provided by the entity withdrawn, subject however to similar rules as apply to solicitors withdrawing from the record on grounds of non-payment.

2.27 However, reimbursement is different to the way in which solicitors’ firms generally conduct litigation, where clients are required to make payments in advance, held on account, in that the entity would bear the credit risk.

Q13. Would it be feasible for entities conducting civil and commercial litigation to receive payments for fees and disbursements in arrears?

Q14. If entities receive fees and disbursements in arrears, what impacts might this have for consumers and access to justice?

Option 2 – fixed fees in advance

2.28 If a client were to pay disbursements in arrears, a barrister could incur considerable ongoing costs and might need access to substantial funds to cover these costs in advance of receiving payment. In cases where the litigation requires a high level of disbursements, this would be a substantial outlay and might be commercially unviable. In these circumstances barristers might need the client to make payments in advance. There are two possibilities:

- The client could pay a general amount into an account held by the entity, which could then be used to meet ongoing fees and disbursements, with any remaining funds being returned to the client. This would be classified as ‘client money’, discussed below, and is currently prohibited.
- Barristers could require fixed fees to be paid to them in advance to cover their own fees and disbursement costs. Fixed fees are currently permitted and would not be classified as client money.

2.29 The success of fixed fees paid under the Public Access Scheme (see below) suggests that the second option might be attractive to both barristers and their clients. Other professional services are provided on a similar basis.

Public access scheme

2.30 The Public Access Scheme offers some evidence of how barristers might be able to obtain payment for litigation services within an entity.

2.31 Under this Scheme, members of the public are able to instruct barristers directly, acting as litigants in person, as defined by section 28(2) of The Courts and Legal Services Act 1990. In these circumstances it is the client’s responsibility to sign and submit a claim form or appeal notice in person and to act as a litigant in person in relation to the formal steps at court. In civil proceedings litigants in person are able to recover costs and expenses, ordered to be paid by the court, by the Litigants in Person (Costs and Expenses) Act 1975.

2.32 The Scheme provides model contractual terms which allow barristers to receive fees in advance of their performance of the contract, or at least at the time when work is handed over to a client.

2.33 In some areas of civil and commercial work a public access client will often be previously unknown to the barrister, who consequently wants to limit the risk of non-payment. Contractual terms help to avoid this risk.

2.34 Barristers who take on public access work try to ensure that there is transparency about fees when they are instructed. Work is usually undertaken in stages, requiring accurate and disciplined costing, but with the resulting certainty about costs being an attraction for the client.

2.35 The Bar Council has received only a very limited number of complaints from barristers about the Scheme relating to non-payment, since the Scheme's inception in 2004. The Scheme appears to work well in this respect, with some barristers reporting that payments made under Public Access are more reliable than payments from professional clients.

Q15. How well do you think the Public Access Scheme works in respect of fees and disbursements? Could a similar approach to be taken by entities?

Q16. Would an entity be able to conduct litigation where fees and disbursements are paid in advance, on contractual terms?

Option 3 – Client money held on account

Definition of client money

2.36 Paragraph 407 of the Bar's Code of Conduct states that:

(d) A self-employed barrister must not receive or handle client money... other than by receiving payment of remuneration.

2.37 The Code does not define 'client money', but it is appropriate to refer to the Solicitors Accounts Rules which defines categories of money at Rule 13. All money held or received in the course of practice falls into one or other category of 'client money' or 'office money', the latter belonging to the solicitor or the practice.

2.38 For the SRA's purposes, client money includes money held or received:

- As trustee;
- For payment of unpaid professional disbursements;
- As agent, bailee, stakeholder, or as the donee of a power of attorney, or as a liquidator, trustee in bankruptcy, Court of Protection deputy or trustee of an occupational pension scheme;
- As a payment on account of costs generally;
- As commission paid in respect of a solicitor's client;
- Money held to the sender's order is client money;
- If the SRA intervenes in a practice, money from the practice is held or received by the SRA's intervention agent subject to a trust under Schedule 1 paragraph 7(1) of the Solicitors Act 1974, and is therefore client money.

2.39 Many solicitors' firms hold large sums of their clients' money on trust, in client accounts. A very significant proportion of these holdings result from conveyancing matters such as the proceeds of the sale of a home or business. Probate work can also involve significant sums. The majority of interventions from the SRA, where client money is at risk, involve this area of work. However, some undoubtedly relate to client

money held for fees and disbursements, for example, where the solicitor has been transferring money from office to client account in breach of the rules.

- 2.40 The BSB does not propose to allow entities to provide conveyancing or probate services, so the areas of work associated with the highest risks to client money would not be available to BSB regulated entities. The BSB would like to know whether or not BSB regulated entities could provide litigation services without holding client money on account.

Costs and practical arrangements

- 2.41 The BSB would need to consider to what extent regulatory costs would increase if it were to permit client money handling. The SRA's client money regime provides some evidence of what might be required.
- 2.42 Much of the cost of regulating solicitors results from interventions in failing firms and from the costs of compensating clients. The major reason for the SRA to intervene in a firm's affairs is as a result of suspected breaches of Solicitors' Accounts Rules which determine the procedures for holding client money on account. The BSB currently avoids these costs due to the client money prohibition.
- 2.43 The SRA's March 2010 Summary of Performance Measures and Statistics points to an increase in the percentage of interventions resulting from accounts rule breaches during 2009 and 2010. In the 12 months to March 2009, 49% of interventions resulted from accounts rule breaches. In the 12 months to March 2010, the figure was 59%. Over 70% of interventions concern sole practitioners.
- 2.44 It is difficult to separate the regulatory costs to the SRA incurred as a result of breaches of the Solicitors' Account Rules relating to client money, from the regulatory costs in other areas. Most failing firms have a variety of difficulties which lead to grounds for intervention and most will inevitably require client money to be dealt with. For example, this is the case where interventions become necessary as a result of illness or abandonment. However, over 70% of interventions result from a trigger event which leads to grounds of suspected dishonesty or breaches of the accounts rules.
- 2.45 The SRA's costs incurred as a direct result of regulating client money are extensive and include agents' costs and internal staff costs.
- 2.46 Following an intervention, the effect of the Solicitors' Act 1974 is that the SRA holds client money on trust while it investigates. These are termed statutory trusts. During this period, clients with a beneficial entitlement to money held on trust may make a claim on the Compensation Fund. The Compensation Fund can then claim against the Statutory Trust Accounts for a grant already paid out. A Statutory Trust Team is in place to assist agents in fulfilling the SRA's obligations.
- 2.47 The SRA also has teams dedicated to gathering information and intelligence relating to dishonesty - the Fraud and Confidential Intelligence Bureau (FCIB) and the Risk Assessment and Designation Centre (RADDC), which receive regulatory information

other than confidential intelligence. Caseworkers are also in place to prepare matters for adjudication.

- 2.48 The Law Society acts as trustee of client money held following interventions. It therefore owes duties to potential beneficiaries. This leads to complex obligations which are expensive to fulfil. It is common for accounts records of a firm subject to an intervention to be non-existent, incomplete, or deliberately falsified. For this reason the accounts must be reconstructed and tested for accuracy against other extrinsic evidence. Other obligations incumbent on the Law Society in its role as trustee include locating clients and arranging payments, including the calculation of *pro rata* payments where there is a shortfall.

Financial risk to the client

- 2.49 The main risk to the client of any payment arrangements is that a barrister either misappropriates or loses their money, whether dishonestly or through incompetence (eg poor record keeping leading to confusion as to who is due what). The BSB is aware from cases concerning solicitors that where client money is held on account there is always a risk that a solicitor might misappropriate the money or that money can be lost through a solicitor's failure to maintain proper accounts, or other administrative failings. These scenarios lead to interventions from the SRA and sometimes result in closure of the firm. It is reasonable to suggest that barristers would pose a similar risk to their clients. Most barristers have limited experience of managing firm accounts and in that respect may pose a higher risk, at least before they gain suitable experience or training.
- 2.50 In the case of an intervention where accounts have not been kept properly, it may be difficult to ascertain to whom the money belongs and to return it. This means that any regulatory structure would need to include costly practical arrangements, including staff, or agents, who are qualified to administer the accounts of failed entities. The need for a BSB interventions scheme is discussed further in chapter 4.

Compensation claims

- 2.51 It will not be possible for barristers to obtain insurance against all risks, if client money holding is permitted. It is not possible for an individual to insure himself against his own dishonesty. For cases involving either dishonesty, or failure to account, there would need to be arrangements to set up a compensation fund, which might be similar to the SRA's arrangements. The purpose of such a compensation fund would be to give redress to consumers who have suffered loss as a result of actions by a barrister where indemnity insurance or other forms of redress might be unavailable.
- 2.52 In terms of the SRA's compensation fund, in order to be eligible to apply the loss must have happened during the normal work of a regulated person or firm, and claimants must have suffered loss because of a firm's dishonesty, or be suffering hardship due to a firm's failure to account for money received. Claimants do not need to be a client or a former client.

2.53 The SRA's Claims Management Unit handles applications for grants from the Compensation Fund. During the first quarter of 2010, 1,238 out of a total of 1,563 claims received related to client money. A very high proportion of claims and payments against solicitors therefore result from holding client money.

The self-employed Bar

2.54 A further reason why the BSB does not propose to permit holding client money is that there would be implications for the self-employed Bar if the BSB decided to relax the restrictions. The BSB proposes that the same rules about conducting litigation should apply to entities and to the self-employed Bar. These implications would need to be considered in parallel to the implications of permitting barristers to conduct litigation, discussed in chapter 1. It might be difficult to justify allowing barristers practising in entities to hold client money, whilst at the same time retaining the prohibition on client money for the self-employed Bar, assuming that both were permitted to conduct litigation. A chambers of self-employed barristers cannot be made collectively responsible to account for the money, or for the systems put in place to protect it. The BSB therefore does not believe that self-employed barristers should, on any view, hold client money. This could put barristers who chose to practise in traditional chambers structures at a competitive disadvantage to barristers practising from a BOE, LDP or ABS.

Handling settlements and court awards

2.55 As set out above, court awards and settlements are usually paid into a solicitor's client account in the first instance to allow fees to be deducted before a client receives the balance. The issues to balance in this regard are protection of the barrister or entity from non-payment of fees by clients with the risk of barristers or entities misappropriating settlements or court awards that are owed to clients.

Custodian or third party arrangements

2.56 The BSB believes that one option for managing money resulting from settlements and court awards might be via a custodian, or third party, arrangement. In this arrangement, the custodian would hold money belonging to the clients of an entity on trust, to be released on the provision of relevant documents, such as court documents, authorising payments to the beneficiaries. The BSB is currently investigating this option and is in discussion with the Bar Council as to whether it would be possible to offer a member service where the Bar Council would act as custodian.

2.57 A custodian arrangement would be likely to involve a single bank account into which settlements and court awards relating to BSB regulated entities would be paid. The management of this account would be provided by a bank. It would include reconciliation against transactions made through any subsidiary accounts and full account reporting facilities. The bank would also oversee interest pricing, secure access and software that provided a ledger facility.

2.58 The single bank account would allow the custodian to operate multiple, 'virtual', satellite accounts, over which the custodian would have control. For example, there

could be an account opened for each entity making use of the service. Payments would be made into and out of each of those separate accounts, controlled by the custodian.

- 2.59 The custodian would need financial staff to deal with the banking aspects of holding money and returning it to clients. There would need to be administrative arrangements in place to allow the custodians of the account to know when to release funds.
- 2.60 The service would be funded by those entities wishing to make use of it and costs could be covered by adding a small percentage charge to the client for each transaction. It may also be possible to partly fund this service from any interest accruing on the capital in the account. However, the feasibility of such a scheme will depend on the number of payment transactions that are required, and the number of entities opting to make use of the service.
- 2.61 This arrangement could help to mitigate risks by concentrating responsibility for administering money belonging to clients on a small number of key staff, employed by the custodian. The custodian would provide expertise and efficient business systems and processes. The BSB could concentrate on satisfying itself of the honesty and competence of the relatively small number of people responsible for authorising movements from the custodian account, rather than having to monitor client money handling by large numbers of regulated entities. This would remove financial responsibility from staff within individual entities. By mitigating these risks, this would help to reduce the need for accounts rules and the regulatory procedures needed for monitoring compliance and for enforcement by the entities.
- 2.62 A number of banking products are already available for solicitors' firms to manage client money and these could potentially be adapted to enable the proposed arrangement. Whilst the BSB appreciates that this is only an outline of an idea which would need a great deal of further, detailed development if it were to be adopted, the purpose of raising the possibility here is to test reactions to whether it merits further work or is a non-starter, and to invite proposals as to alternative approaches that might be considered.

Q17. Do you agree that the BSB should continue to prevent all barristers (except those who are practising as managers of recognised bodies regulated by other approved regulators) from holding client money?

Q18. Do you think that, in principle, a custodian service for holding court awards and settlements could be a sufficient alternative to allowing entities to hold client money?

Q19. Are there any alternative approaches you can suggest?

Chapter 3 – Accepting Instructions

3.1 This section examines two issues which would affect the acceptance of instructions by BSB regulated entities. It sets out the potential for an increased incidence of conflicts of interest and the suggested requirement that BSB regulated entities should establish appropriate systems to identify and manage conflicts. The second part of this section explains how the BSB proposes to apply the cab-rank rule to entities it may regulate.

A) Conflicts of Interest

3.2 Conflicts of interest are infrequent and relatively easy to identify for self-employed barristers. This would not be so if barristers were to form or join entities.

Background

3.3 The Code of Conduct prohibits barristers from representing a client where they have a conflict of interest. This has a number of implications:

- Individual conflicts - barristers cannot represent a client where there is a conflict between a client's interest and the interests of the barrister (or the barrister's firm in an entity situation). For example, this could preclude a barrister from representing a client in proceedings against a member of the barrister's family or that relate to a separate business interest of the barrister or firm.
- Multiple client conflicts – a barrister cannot represent different clients with competing interests on the same case. This does not prevent self-employed barristers from appearing against other members of the same chambers because they are independent practitioners, but it would prevent barristers in the same entity from appearing against each other
- Information conflicts – conflicts can also relate to holding confidential information from one client which might have ramifications for representation of another client in a separate matter. This can include information held or received from historic instructions.

3.4 Participation in entities would increase the incidence of multiple client conflicts as barrister managers or employees of entities could be conflicted out of appearing against other members of the same entity or in cases where another member of the entity had previously represented a different party to the dispute. It would also increase the complexity of managing potential information conflicts. Therefore barristers in entities would need to refuse more instructions for reasons of conflict than self-employed barristers currently do. This has the potential to reduce the overall availability of advocates and potentially reduce access to justice.

3.5 This risk has been highlighted in a previous BSB consultation in the context of permitting barristers to join entities regulated by other approved regulators⁷. This consultation stated that the risks would be mitigated by the commercial disincentive for

⁷ *Legal Services Act – Legal Disciplinary Practices and Partnerships of Barristers* (December 2008)

barristers in small or niche markets to risk being conflicted out of significant work by joining an entity. Furthermore, it suggested that if consolidation did occur, other advocates would move into the area to take advantage of the increased opportunities for work. This reasoning was accepted following consultation and barristers are now permitted to manage entities regulated by other approved regulators.

- 3.6 The same reasoning applies to participation in BSB regulated entities and therefore the increased incidence of conflicts of interest should not in itself prevent the BSB setting up to regulate entities. If the BSB decides to regulate entities it will need to increase its focus on the management and resolution of conflicts of interest to mitigate the risk of detriment to consumers of legal services.

Regulatory implications

- 3.7 Solicitors are accustomed to working within entities and identifying and managing conflicts of interest in this context. Rule 5.01 of the Solicitors' Code of Conduct requires effective management of the identification of conflicts of interest. The guidance to the Code sets out in more detail what is expected:

Identification of conflicts - 5.01(1)(d)

19. Firms must adopt a systematic approach to identifying and avoiding conflicts of interests, dealing with conflicts between the duties of confidentiality and disclosure, and maintaining client confidentiality. See also the guidance to rule 3 (Conflict of interests) and to rule 4 (Confidentiality and disclosure) for assistance in identifying the sort of issues your arrangements will need to address.

- 3.8 The BSB would be likely to require a similar "systematic approach" to the identification and management of conflicts of interest, to ensure that all of the entities that it regulates are in a position to identify and properly manage conflicts of interest. Entities would therefore need to put appropriate systems in place and consider whether any conflicts arise before accepting any instructions.
- 3.9 In addition to regulatory requirements, the BSB would provide assistance to entities in setting up to manage conflicts of interest. This would include drafting guidance on when conflicts would be an issue. It may also arrange seminars or training for new entities on conflict management.

Q20. Do you have any comments on the proposal for regulating conflicts of interest in BSB regulated entities?

Q21. Are any further safeguards required to protect consumers of legal services?

B) Cab-rank rule

- 3.10 All advocates are subject to a statutory non-discrimination requirement (which is reflected in rule 601 of the Code of Conduct):

601. A barrister who supplies advocacy services must not withhold those services:

- (e) on the ground that the nature of the case is objectionable to him or to any section of the public;
- (f) on the ground that the conduct opinions or beliefs of the prospective client are unacceptable to him or to any section of the public;
- (g) on any ground relating to the source of any financial support which may properly be given to the prospective client for the proceedings in question (for example, on the ground that such support will be available as part of the Community Legal Service or Criminal Defence Service).

3.11 This rule will apply to entities the BSB may decide to regulate. The proposed new Code of Conduct (on which the BSB consulted last year) will extend the rule to all services supplied by practising barristers.

3.12 Self-employed barristers are also subject to the cab-rank rule which normally requires them to accept any appropriate brief they are offered. This rule does not apply to employed barristers or to advocates working in entities regulated by other Approved Regulators. The cab-rank rule is set out in the Code of Conduct at rule 602:

Acceptance of instructions and the 'Cab-rank rule'

602. A self-employed barrister must comply with the 'Cab-rank rule' and accordingly except only as otherwise provided in paragraphs 603 604 605 and 606 he must in any field in which he professes to practise in relation to work appropriate to his experience and seniority and irrespective of whether his client is paying privately or is publicly funded:

- (h) accept any brief to appear before a Court in which he professes to practise;
- (i) accept any instructions;
- (j) act for any person on whose behalf he is instructed;”

and do so irrespective of (i) the party on whose behalf he is instructed (ii) the nature of the case and (iii) any belief or opinion which he may have formed as to the character reputation cause conduct guilt or innocence of that person.

3.13 The cab-rank rule does not apply if accepting instructions would result in a barrister being professionally embarrassed (notably this includes where there would be a conflict of interest) or if the instructions come from a lay client.

Benefits of the cab-rank rule

3.14 The cab-rank rule has a number of important benefits:

- It maintains and reinforces the independence of advocates who take cases because it is their professional duty, not because they support or approve of the client,
- It facilitates access to justice by ensuring that unpopular individuals and causes are able to obtain appropriate legal representation,
- It requires barristers to work on a “first come, first served” basis, meaning in theory that they cannot refuse to act for one party in a case in the hope that another of the parties with larger resources and able to pay a higher fee will

instruct them instead. Similarly, it does not allow barristers to refuse instructions on the basis that it might conflict them from acting in a more lucrative case in the future, and it prevents them from entering into exclusive deals with particular clients which would prevent them from appearing against those clients in future,

- Providing a positive requirement to represent all persons protects barristers from criticism for acting for certain clients,
- It enables an unknown professional client from any part of the country to obtain for their lay client the services of a top ranking barrister of their choice, and
- It is also seen by many as a key differentiator between the barristers' and solicitors' professions.

3.15 These benefits have fostered significant support from the profession for the maintenance of the rule. 63% of barristers respondents to the recent survey stated that maintenance of the cab-rank rule was 'important' or 'very important' to them.

Cab-rank rule for entities

3.16 The benefits of the cab-rank rule would be necessarily watered down to some extent in an entity context as an entity would need to refuse more instructions on the grounds of conflicts of interest.

3.17 Binding entities to the cab-rank rule would also make it more difficult for the entity to manage conflicts of interest, as it would preclude an entity from refusing instructions on the grounds that the instructions in question might conflict the entity out of significant work in the future. This may in turn reduce the appeal of entities and could reduce participation.

3.18 Some of the benefits of the cab-rank rule would be achieved purely through the application of the "non-discrimination rule" contained within rule 601 of the Code (set out above), which would be applied to barristers in entities regardless.

3.19 The non-discrimination rule would go some way towards achieving the first two benefits of the cab-rank rule identified above (especially the first two bullet points) and would not interfere with the management of conflicts of interest. However, it would offer less protection to consumers and less overall benefits if used as an alternative (rather than supplement) to the cab-rank rule. As a result, the BSB believes that the benefits to clients and to access to justice of the cab-rank rule mean that it should apply to all entities that it might regulate⁸. The effect that the cab-rank rule might have on the management of conflicts of interest is discussed further below.

3.20 The BSB's provisional view is that the cab-rank rule should apply to entities and advocates in BSB regulated entities in a manner which would mirror the application of the rule to self-employed barristers, so far as possible. Proposals as to how this could be achieved and where there may be scope for variation follow.

⁸ At its November 2009 Board Meeting the BSB decided that barristers in partnerships should be subject to the cab rank rule. This should extend to any other entities that the BSB could regulate.

3.21 **The cab-rank rule should continue to apply only to instructions from professional clients.** Instructions from lay clients have always been exempted from the rule. Only those self-employed barristers who have done the required Public Access Scheme training may provide services direct to lay clients and they are exempted from the cab-rank rule by rule 604(e) which states:

604. Subject to paragraph 601 a self-employed barrister is not obliged to accept instructions:

(e) from anyone other than a professional client who accepts liability for the barrister's fees

3.22 If the BSB regulates entities that can conduct litigation, these entities will be receiving instructions direct from lay clients with some frequency. While there may be value in barristers working directly for lay clients, and there is clearly appetite amongst certain sections of the bar for this to increase⁹, it would fundamentally alter the status of the barristers' profession if barristers could be compelled by the Code of Conduct to accept instructions direct from lay clients. It would also be very burdensome if they potentially had to accept instructions from an unknown client who might not be able to pay them.

3.23 It is also important to bear in mind that it is proposed that the cab-rank rule should only apply to advocacy services (see below), for which instructions are likely in most instances to still come from a professional client.

3.24 **The cab-rank rule should continue to apply to instructions for named advocates.** The cab-rank rule should continue to operate as a discipline on individual advocates when they are asked to act. The way it operates in the context of an entity should not undermine but nor should it extend that obligation. The cab-rank rule therefore would not oblige an entity to provide an advocate where the professional client simply makes a general request for representation without naming any advocate, nor would it oblige the entity to provide alternative counsel if the named advocate is not available. It should remain the professional client's responsibility to choose the best advocate for the case. Whilst the entity may of course choose to make suggestions or put forward alternatives (and if it does, must do so with the client's best interests in mind), it would be inappropriate to compel it to do so. However, where an approach for a named advocate is made, the entity (as well as the individual advocate) would be under an obligation to ensure that the cab-rank rule is obeyed by that advocate (subject to the established exceptions).

3.25 **In an entity context, where advocacy could be provided by barristers or potentially solicitors and legal executives, the cab-rank rule should apply on an individual basis to all of these advocates.** The arguments for applying the rule to barristers in BSB regulated entities are equally relevant to other advocates and it would be illogical to exempt them from compliance with the rule. Both the entity and

⁹ 56% of barrister respondents to the survey stated that they 'agree' or 'strongly agree' that lay clients should be able to have direct access to barristers in all fields. The Public Access Scheme does not currently extend to publicly funded clients.

the named advocate should be under an obligation to provide the services requested, subject to exemptions similar to those which apply to self-employed barristers.

3.26 The cab-rank rule should be limited in its application to advocacy services. The essence of the cab-rank rule is to ensure that everyone has access to an advocate to represent them in hearings. The cab-rank rule currently applies to all instructions a barrister can receive, which includes instructions to provide advice and other non-advocacy services¹⁰. This makes it easier to comply with and enforce. However, entities may be providing a wider range of services (see chapter 1) which the cab-rank rule was never intended to apply to. If this is the case, it will be necessary to seek to define the scope of the cab-rank rule's application, notwithstanding the difficulty in doing so.

3.27 Consistency with the current application of the rule could be achieved through limiting the rule to "advocacy and advice on a referral basis from a professional client". However, there may be a case for confining the cab-rank rule to "advocacy in substantive hearings". This would preserve the main essence of the cab-rank rule whilst making it easier for entities to manage conflicts. It would allow an entity to refuse instructions for advice or for representation at a preliminary hearing that might have significant consequences for the entity in terms of conflict further down the line. In limiting the application of the cab-rank rule to substantive hearings in this fashion, entities would be better able to ensure that their advocates remain available to undertake advocacy regularly. On the other hand, there might be problems about determining what constituted a "substantive hearing".

Q22. Do you agree that the cab-rank rule should apply to entities and advocates in the entity context in a similar fashion to the way it operates for self-employed barristers?

Q23. Do you agree in principle that the cab-rank rule should apply to all advocates in an entity and not just to barristers?

Q24. Should the cab-rank rule be limited in its application to "advocacy and advice on a referral basis from a professional client" or to "advocacy in substantive hearings, on a referral basis from a professional client"? Is there a better way to define its scope?

Q25. Do any of the proposals in relation to the cab-rank rule have any equality implications or positive or negative effects on people from different ethnic groups, men and women or disabled people?

Abuse of the rule

3.28 The cab-rank rule is intended to promote access to justice by providing that consumers have recourse to adequate representation when they require advocacy services. However, in the entity context there is a risk that the rule could be abused and actually serve to reduce access to justice.

¹⁰ Subject to the exceptions set out in Rules 603 to 606.

- 3.29 This risk relates to the potential for tactical use of instructions by cynical clients to conflict certain entities out of appearing against the client. This problem would be most acute in practice areas where barristers grouped in a limited number of entities, as this would allow clients to conflict out a significant number of leading advocates through instructing these entities on minor related matters. Even if the barristers concerned suspected this, they would be bound by the cab-rank rule to accept the instructions. This problem exists in theory for self-employed barristers, although the ramifications are less severe.
- 3.30 Limiting the application of the rule to advocacy in substantial hearings would limit the potential for tactical use of instructions. To reduce the risk of abuse still further, advocates might need some form of recourse in circumstances where they have reasonable grounds for believing that a client is seeking to abuse the essence of the rule and purposely conflict the entity out. However it is not easy to see how such recourse might work. If advocates were, at their discretion, allowed to reject instructions on such grounds that would create a loophole, although the entity would leave itself open to disciplinary action if it refused to act in questionable circumstances. On the other hand, any arrangement involving application for a waiver would take too long when decisions on whether or not to accept instructions have to be taken urgently.

Q26. How serious do you think is the risk of clients abusing the cab-rank rule and how might it be mitigated?

Chapter 4 - Interventions

Introduction

- 4.1 If the BSB decides to regulate entities as well as individuals it will need to ensure that arrangements are in place to deal with situations where those entities are failing to meet the regulatory objectives, or where they fail and cease trading, for whatever reason, putting clients' interests at risk. The BSB will need powers, procedures and resources to intervene in appropriate cases. It does not currently possess such powers and would therefore need to establish a new interventions scheme.
- 4.2 The need for interventions can be minimised by reliance on existing, or modified, practising rules that impose obligations, on both individuals and entities, to take their own steps in order to ensure that clients' interests are protected. However, whilst such rules are desirable as a first line of protection, they may be insufficient to protect clients in cases where those entities, and the individuals within them, are either unwilling or unable to continue acting in the clients' interests. In some cases it may have to step in. Indeed, in the case of ABSs, the Act gives the Licensing Authority express power to intervene in specified circumstances, including insolvency or suspected dishonesty. It would be anomalous if the BSB did not equip itself with comparable powers in relation to entities that were structured as BOEs or LDPs, rather than as ABSs. The need for protection is no less.

What is an intervention?

- 4.3 An intervention is a process designed to protect clients' interests and money. This process is triggered when it becomes apparent that a business is no longer able to provide adequate legal services to consumers or where there are concerns about the financial arrangements of the business. The purpose of an intervention is to ensure that clients continue to receive the services that they need, with the minimum delay and interruption, and that money, documents and other property are secured and returned to any beneficiaries.
- 4.4 The grounds for an intervention in existing schemes include where a business becomes insolvent, or has breached financial rules; where the business is no longer able to manage its affairs, or has been abandoned (eg if its managers become sick or die); or where there are suspected to be serious instances of misconduct, fraud or theft.
- 4.5 If the BSB creates its own scheme, it will need to establish the grounds on which it will intervene. It will also need to establish powers, procedures and resources to enable it to take physical control and management of: a) practice documents, including files belonging to clients; b) money held by the entity; and c) business premises.
- 4.6 The SRA already has an established interventions scheme in place to handle solicitors' firms. This has been extended to cover LDPs and will eventually apply to ABSs. A BSB scheme would be likely to share some, though not all, of its features. Comparable intervention schemes also exist in other sectors, such as financial services.

Regulatory need

4.7 The BSB believes that a scheme is necessary to protect and promote the public interest, the interests of consumers, and also help to ensure access to justice, for the following reasons:

- Processes for intervention must necessarily form part and parcel of any regulatory arrangements put in place for ABSs, since this is required by the statutory scheme for ABSs. However, clients of LDPs and BOEs have the same need to be protected against the risks posed by, for example, dishonesty or insolvency. If the BSB is to regulate all three forms of entity, it does not make sense to limit the intervention scheme to ABSs.
- These new business structures all bring new risks, discussed below, which are not present to the same extent in a traditional chambers structure. An intervention scheme may help to mitigate these risks.
- Some of these risks are likely to be similar to those associated with solicitors' practices, which are already subject to intervention when appropriate grounds have been established.
- It is in the public interest to provide a level of protection, for consumers of legal services provided by BSB regulated entities that is at least equal to the protection afforded to clients of entities regulated by other bodies.

4.8 Doing without an intervention scheme is not an option if the BSB's regime is to include ABSs and, even if that were not so, failing to put appropriate intervention powers in place could have serious implications for protecting the interests of clients, for the reputation of the Bar and for the BSB. It could also attract a risk of external intervention by the LSB, which has the authority to impose requirements on the BSB, or, more probably, would cause the LSB to refuse approval for the proposed regulatory arrangements for regulating LDPs and BOEs.

4.9 Intervention powers are, however, by their nature very intrusive and they can have profound and draconian consequences for businesses and individuals within them. That said, the ability to monitor entities and intervene where necessary is a fundamental part of regulatory control. In any given case, the BSB will need to consider carefully whether or not it is possible to find an effective alternative to intervention which may be more proportionate to the risks or whether in fact a formal intervention is the appropriate safeguard. However, the power to intervene must be available to the BSB in appropriate cases.

4.10 There would be a cost involved in setting up an interventions scheme and this must be regarded as a necessary element of setting up entity regulation. Ongoing costs would be mitigated by ensuring that intervention was a last resort and by seeking to recover the cost from the entity intervened into wherever possible. However, it is likely that there would be a residual element that would have to be spread across all BSB regulated entities.

Why is an interventions scheme required?

4.11 There are a number of different risks which an interventions scheme would help to counter.

Dishonesty

4.12 A majority of interventions into solicitors' firms are associated with money relating to conveyancing. This is largely because of the high volume of conveyancing transactions undertaken by firms, as well as the large sums involved, which leads to higher risks. The BSB is not proposing to regulate entities that could provide conveyancing services (see chapter 1) which means that this particular risk should not apply to BSB regulated entities.

4.13 Apart from money relating to conveyancing, however, there would be a remaining, relatively low probability but high impact risk that an individual barrister, or other person within a BSB regulated entity, misappropriates money belonging to clients. The opportunities to do this will depend on what permissions to manage money are given to barristers and those with whom they work. Over 70% of SRA interventions result from a trigger event which leads to grounds of suspected dishonesty or breaches of the accounts rules. In some cases individual solicitors have stolen money belonging to clients that results from court awards and settlements and SRA evidence suggests that it is a significant risk. However, at present the BSB does not propose to give barristers the same permissions to hold client money as solicitors, and this is likely to greatly decrease the number of interventions which would otherwise be necessary.

4.14 There will remain some risk of dishonesty and fraud on the part of barristers or other managers or employees of a BSB regulated entity, even if the scope for this is much reduced by the fact client money is not held. The BSB will need to have appropriate procedures in place to take swift and effective action where dishonesty is suspected. The Act includes powers for licensing authorities to intervene in ABSs in cases of suspected dishonesty (see Powers to Intervene section below). There should be comparable powers put in place to deal with suspected dishonesty within an LDP or BOE.

Insolvency

4.15 Recent news reports have identified a risk of medium to large firms of solicitors becoming bankrupt due to unsustainable levels of borrowing and resulting debt. This risk has become more acute as a result of the recent recession. In such cases of insolvency, the SRA recognises that it may well need to intervene in order to oversee the remaining parts of the business, after more profitable parts of the business are sold off, and it has the necessary powers to enable it to do this. There is likely to be a small but high impact risk of larger BSB regulated entities becoming insolvent as a result of financial mismanagement. The BSB may therefore need similar powers to the SRA to intervene and oversee an orderly closure or winding up of the entity. This would ensure that work is redistributed in an orderly manner, in accordance with the wishes of the relevant client, and that any urgent matters are dealt with by the agent appointed to carry out the intervention, so that the client's interests are not prejudiced.

4.16 Again, such powers are specifically provided for in the case of ABSs. Under Schedule 14(2)(c) of the Act, licensing authorities have powers of intervention where 'a relevant insolvency event has occurred in relation to the licensed body'. A relevant insolvency event includes where: a resolution for a voluntary winding-up is passed without a declaration of solvency under section 89 of the Insolvency Act 1989; the body enters administration; an administrative receiver is appointed; a creditors' meeting is held, converting a members' voluntary winding-up into a creditors' voluntary winding up; or an order for the winding up of the body is made. If the BSB became a licensing authority, it again would need to establish similar powers to intervene on the grounds of insolvency in relation to LDPs and BOEs.

Administration

4.17 There are also risks associated with the maladministration of legal practices. These risks are particularly acute in the case of litigation services, where there is a need to maintain paperwork and meet deadlines.

Abandonment

4.18 It can happen that solicitors' firms are abandoned or suddenly closed, whether due to illness, death or other personal reasons. Approximately 10-15% of interventions launched by the SRA result from abandonment or closure. Businesses owned and managed by barristers, especially smaller ones, are likely to be subject to similar risks.

Failure to renew

4.19 A more probable, but lower impact risk may be where the BSB fails to renew or replace an ABS's licence, on whatever grounds. In the case of an ABS, the intervention powers in Schedule 14 of the Act would apply in these circumstances and the BSB would need to ensure it had oversight of the business, which would now be unlicensed. The BSB will need similar powers in relation to BOEs and LDPs where they have ceased to be authorised.

Risks different in nature from those generally posed by self-employed practice

4.20 If an individual practitioner in a chambers ceases to practise, whether due to illness, insolvency, as a result of being struck off or for some other reason, there is a strong business incentive for chambers to swiftly and efficiently redistribute the work both for the sake of the reputation of chambers and as opportunities for other members of chambers to take on additional work. Work can be redirected to other barristers in that chambers or elsewhere and the clerks can be expected to manage that process without any need for outside intervention. However, where an entity has to be shut down, or the business is abandoned, there may be a much bigger volume of work requiring redistribution and no one to manage that process and ensure that clients interests are not prejudiced in the meantime. Only a relatively small proportion of self-employed barristers, out of the total numbers of self-employed practitioners, practise outside a chambers. Therefore the problems posed by any one of them ceasing to be able to practise are likely to be much more limited in scope and rare enough that putting special measures in place for this would be disproportionate. That said, once

an intervention scheme had been established it might be possible also to apply it in such a case, if that were necessary.

Monitoring as an adjunct to an intervention scheme

- 4.21 Effective monitoring is vital to ensure that a regulator has relevant and up to date information on any entities which it regulates. The LSB places particular importance on approved regulators having in place effective monitoring regimes.
- 4.22 The BSB is developing a chambers monitoring scheme and this would be extended to any entities it decides to regulate. Any BSB interventions process would have to be coordinated with these monitoring functions. Monitoring entities will inevitably reveal potential risks and areas of concern, and some of these may be so serious as to constitute grounds for intervention (although this ought to be the exception), whilst in other cases (and much more frequently) the appropriate response will be to require the entity to take remedial steps.
- 4.23 The BSB would provide effective support and guidance for entities, which should help to avoid the need for interventions. Under a risk-based approach, support could be particularly focused on entities which have shown early signs of being in financial or other difficulties. For example, the BSB could develop processes and guidance for entities which are threatened with insolvency, to ensure that they are wound down in an orderly way.
- 4.24 The BSB will also need to decide the extent of possible obligations placed on managers of entities. It might, for example, be considered desirable to make all the managers of an entity that is intervened into personally responsible for meeting any losses to clients resulting from dishonesty attributable to the entity. They could also be responsible for securing alternative representation for a client if the entity is no longer able to provide it, including a personal obligation to meet the cost of providing that representation if the client has already paid an insolvent entity to provide it. However, such provisions would not be sufficient where no managers are willing and able to meet these obligations. Moreover, a balance has to be struck between protecting consumers on the one hand, and allowing barristers freedom to adopt business structures which limit their personal liability, given that this is permitted to managers of SRA regulated entities that structure themselves as LLPs or companies. This, therefore, is amongst the matters that would require more detailed analysis in the context of a further consultation on the detailed rules, once a decision of principle to regulate entities had been taken.

Powers to intervene

- 4.25 The BSB will need to ensure that it has any necessary powers of intervention. The source of these powers will depend on whether or not the entity subject to an intervention is regulated as a 'licensable body' under the Act regime (ABS); or whether it is an entity to which the licensing regime would not apply (a BOE or an LDP).
- 4.26 Powers to intervene in the practices of licensable bodies are contained in Schedule 14 of the Act. This schedule sets out: the grounds, or 'intervention conditions', on which

the BSB would be able to intervene, were it to become a licensing authority; powers to take actions in respect of money held by or on behalf of the licensable body; and powers to take possession of property and documents. These provisions would also allow the BSB to apply to the High Court for various orders to facilitate such actions, including orders as to the disposal or destruction of documents and property, and for the appointment of trustees.

- 4.27 It is important to be aware that if the BSB were to become a licensing authority, it would gain significant powers over licensed bodies, which it currently does not have in relation to barristers working in chambers or in employed practice. For example, paragraph 8 of Schedule 14 creates a summary offence where a person in possession of documents relating to the activities of the licensed body, and trust documents, fails to deliver them to the BSB when put on notice. The consequences of an intervention on owners, managers, and employees would be severe and might include potential disciplinary actions and liability for costs.
- 4.28 Whether or not the BSB decides to become a licensing authority, if it decides to permit BOEs or LDPs, any powers to intervene must be established separately, because the relevant provisions in the licensing regime under the Act would not apply to LDPs or BOEs. Unlike the SRA (which already has statutory powers of intervention in respect of solicitors firms and LDPs, independently of whether or not it becomes a licensing authority for ABSs) the BSB has no existing statutory power of intervention. The intention would be to obtain, as far as possible, similar powers to those conferred by Schedule 14, which is likely to involve both statutory provision and amendments and additions to the Code of Conduct.
- 4.29 It would be possible, subject to the LSB's approval of the necessary changes, to make changes to the Code of Conduct to provide some of the equivalent powers to those contained in Schedule 14 of the Act (for example powers to deliver up documents or inspect premises or records). However, it is likely that legislation would also be necessary, to provide the BSB with recourse to the courts in the event of noncompliance, and to provide the subject of the intervention with an appropriate avenue for mounting a challenge (comparable to the redress that is available to entities intervened into by the SRA).

Costs

- 4.30 Interventions can attract significant costs. The cost of an individual SRA intervention has been estimated at approximately £60,000 - £100,000. However, much of this cost arises from cases concerning client money, which the BSB does not propose to allow barristers to hold. The residual average cost of an intervention is likely to be substantially lower, but will vary depending on the nature and size of the business. The average cost for the SRA closing a file has been estimated at £1000.
- 4.31 Aside from accounting for client money, one of the most significant costs in the SRA's interventions scheme results from storing documents belonging to, or connected to, clients. The highest storage costs are associated with original documents, usually relating to probate or conveyancing services. The latter are both services that the BSB does not propose to permit entities to provide and this would help to keep costs down

for a BSB scheme. However, it may still be necessary to store copy documents for any ongoing litigation, at least until files can be transferred to an alternative authorised person or entity. Some documents may also need to be stored in case of any future professional negligence, or other, claims brought against the entity or an individual barrister. Relatively long limitation periods for these types of claim mean that documents might have to be stored for several years.

- 4.32 In respect of licensed bodies, costs incurred by the BSB for the purposes of Schedule 14 could be recovered from the licensed body as a debt owing to the BSB, as the licensing authority. It would also be possible for the BSB to apply to the High Court to obtain an order for a liable party to pay a proportion of costs. A 'liable party' is defined as, in the case of a partnership, any former partner in the licensed body, and in any other case, any manager or former manager of the licensed body. The BSB would seek to obtain similar powers to recover costs in respect of BOEs and LDPs, whether by way of requiring their agreement to this as a condition of authorisation, or by way of legislation conferring that right on the BSB as part and parcel of the other legislative changes referred to above.
- 4.33 However, there will need to be funds available to cover intervention costs where the money cannot be recovered from the entity or from liable parties. See chapter 5 for further detail.
- 4.34 There would be ongoing staff costs to run an interventions scheme, as well as the cost of fees paid to any interventions agents instructed by the BSB. The SRA has a panel of law firms which it uses to handle the redistribution of instructions and case files. The SRA spends several million pounds a year on interventions, however the BSB's operations would be on a far smaller scale and are likely to cost only a small fraction of this figure. There would inevitably be a cost for permanent staff to be retained 'on fire watch', even in the absence of a significant number of interventions. It is proposed that these costs, so far as they cannot be recovered from the entities intervened into, be spread across all BSB regulated entities. Initial set up costs, however, would be spread across the profession as a whole, in common with other costs relating to the initial set up of entity regulation.

Summary key features of a BSB interventions scheme

- 4.35 A BSB interventions scheme would be likely to have the following characteristics:
- The scheme would permit the BSB to intervene where an entity that it regulates is putting clients at serious risk, for example where it becomes insolvent, where it has been abandoned, where there are grounds to suspect dishonesty, or where its licence, or other authorisation, has not been renewed or has been removed.
 - BSB staff would have oversight of the intervention process, but they would instruct agents with appropriate skills, qualifications and experience to undertake any administrative, accounting and legal work involved.
 - The BSB would make use of a secure storage facility for files and documents belonging to existing and former clients of the intervened business.

- The interventions scheme would be closely linked to the BSB's monitoring regime, currently under development.
- The scheme would be funded partly by recovery of costs from entities that has been the subject of an intervention and partly through fees charged to all regulated entities.
- If (contrary to the BSB's proposal) entities are permitted to hold client money to any extent, there would need to be a BSB Compensation Fund to cover claims arising in relation to an intervention.
- Legislative changes would be needed to give the BSB the necessary powers.

Q27. Do you agree with the BSB's proposals for the interventions regime it proposes to establish, if it begins to regulate entities?

Q28. Do you agree with the BSB's proposals for how the intervention regime should be funded?

Chapter 5 – Insurance and Compensation

- 5.1 All practising barristers are required by the Code of Conduct to be insured against professional negligence claims.
- 5.2 Self-employed barristers are currently required under rule 402 of the Code of Conduct to be registered as a member of the Bar Mutual Indemnity Fund (“BMIF”). This compulsory scheme provides a minimum level of professional indemnity insurance at competitive rates based on a barrister’s level of income.
- 5.3 Employed barristers and barrister managers of LDPs can only provide reserved legal services to the public if they have professional indemnity insurance that satisfies the requirements of the approved regulator of the entity from which they are practising¹¹.
- 5.4 The possibility of barristers forming or joining BSB regulated entities requires consideration of the options for insuring such entities.

Insurance for BSB regulated entities

- 5.5 The BSB will need to ensure that consumers using any entities that it might regulate receive (at the very least) the same minimum levels of protection as they would if they were using the services of an entity regulated by another approved regulator. These could cover similar requirements to those set by the SRA, which currently includes elements of the following¹²:
- 1) Professional indemnity – cover for professional negligence claims.
 - 2) Directors & Officers – cover for wrongful acts by company directors.
 - 3) Bond insurance – cover for breach of undertakings or guarantee agreements.
 - 4) Fidelity guarantee – cover for theft by staff. Only relevant to BSB regulated entities if they are permitted to handle any client money. See chapter 2 on client money above also the section on compensation funds below.
 - 5) Crime – cover for theft of deposits by third parties. Also only relevant to BSB regulated entities if they are permitted to handle any client money (see chapter 2). See also the section on compensation funds below.
- 5.6 Self-employed barristers are currently only required to have professional indemnity insurance, which is provided by BMIF.
- 5.7 Consumer protection would be best achieved through comprehensive insurance cover for the entity as a whole. Consumers should be able to rely on the fact their claim will be covered by the entity’s insurance, regardless of the nature of the failure or which individual within the entity is responsible. Nor is it desirable for there to be scope for doubt or argument as to which insurer is liable to cover a given claim against the entity.

¹¹ Rule 204 of the Code of Conduct.

¹² Solicitors Indemnity Insurance Rules 2009, Appendix 1: Minimum Terms and Conditions of Indemnity Insurance for Solicitors and Registered European Lawyers in England and Wales.

Premiums are also likely to be more competitive if they can cover all of the entity's liability in its entirety, as opposed to being limited to certain aspects.

5.8 At this stage the fact that insurance is unlikely to be a significant barrier to setting up entities is key. However, if the BSB does decide to regulate entities it will need to decide how insurance for entities will be provided. There are two main options, which are discussed below. More detailed consideration would need to be given if the BSB does decide to regulate entities.

1) Consider using a mutual scheme for entities

5.9 A mutual insurance company is an insurer that provides collective self insurance to its members. It has no shareholders and is owned and controlled by its members. By pooling their risks together in a mutual, members take control of the extent of their insurance cover and obtain their insurance cover at cost. Mutuals do not have external shareholders taking profits out of the business in the form of dividends. Any surplus produced by the operating activities of a mutual is applied to for the sole benefit of its members.

5.10 BMIF has confirmed that in principle it is open to considering providing insurance options for BSB regulated entities.

Advantages

- Mutual schemes do not calculate premiums for individuals on the basis of the risk posed by each party but through spreading the costs of insuring a group across all members of the group. A mutual scheme should therefore ensure that all entities are offered affordable premiums and would eradicate the risk of commercial providers refusing to ensure certain entities. This would serve to mitigate potential barriers to setting up small firms, which are most likely to experience difficulty in obtaining insurance in the open market. Smaller entities are likely to play an important role in ensuring an effective and diverse legal profession in line with the regulatory objectives.
- The BMIF mutual scheme currently covers 12,500 self-employed barristers¹³ and it handles relatively few claims. This leads to competitive premiums compared to the open market.
- BMIF currently provides an excellent claims handling service and it has experience of claims arising from the services barristers provide.

Disadvantages

- Under mutual schemes there is little reward for not generating claims and therefore some low risk entities may end up paying higher premiums than they would on the open market.

¹³ There were 12241 self-employed barristers in England and Wales in December 2009, see page 56: <http://www.barcouncil.org.uk/assets/documents/2009%20Bar%20Council%20Annual%20Report.pdf>

2) Allow entities to obtain insurance from commercial providers on the open market (subject to minimum terms set by the BSB)

Advantages

- Provided that entities are required to obtain commercial insurance in line with minimum terms established by the BSB, permitting entities to take advantage of the open market would enable them to negotiate the most competitive premiums whilst still protecting consumers. Low risk firms would be rewarded with lower premiums and would not bear the cost of entities that have claims upheld against them. Lower insurance costs may lead to lower prices for consumers of legal services.
- Commercial insurance premiums should not be affected by take-up of entities and there would be little effect on premiums if take-up is slow in the early years.
- The SRA has a Qualifying Insurers Agreement, which allows it to monitor who is providing insurance to the terms they require. A similar arrangement would allow for cover to a set standard with minimum interference from the BSB.

Disadvantages

- The solicitors' profession abandoned its mutual scheme (the Solicitors Indemnity Fund) in 2000 in favour of allowing firms to secure their own insurance under minimum terms set out in its Qualifying Insurers Agreement. While premiums for many firms have dropped since the agreement was introduced, it has placed the profession at risk of market fluctuations and premiums have increased in recent years in a 'hard' insurance market. Some small firms and sole practitioners in particular have struggled to secure commercial insurance, as such entities are seen by many insurers to present the greatest risk.
- It could be argued that regulatory risks would be lower if entities that insurers are not prepared to underwrite are precluded from setting up. However, the main risk is with existing entities being unable to renew their policies due to drastically increased premiums or insurers refusing to offer renewal. If an entity loses its right to provide reserved services as a result of not having insurance existing clients could suffer in the same manner as clients of an otherwise failing firm would suffer (see chapter 4).
- The BSB would need to consider this issue as part of its overall intervention strategy. In doing so it would need to bear in mind the experiences of the SRA in dealing with these issues through the Assigned Risk Pool (ARP). Under this scheme the SRA charges premiums and issues policies to those who are unable to obtain insurance on the open market. It was set up to provide up to two years of cover to allow insurers to take a different view or for firms to restructure in such a way as to make themselves viable for commercial insurers to cover. In practice many firms who enter the ARP stay there for

longer than intended and the ARP has generated substantial losses in recent years. The SRA consulted recently on significant changes to the scheme¹⁴.

Q29. If the BSB does decide to regulate entities, what is your preference between using a mutual scheme for entities or commercial insurance based on minimum standards set by the BSB?

Compensation Fund

- 5.11 The BSB would set robust minimum terms for insurance (whether through a mutual scheme or commercial providers) to ensure comprehensive cover. However, it will not be possible for entities to obtain insurance against all types of risk.
- 5.12 In particular, insurance does not respond in cases of dishonesty by the insured. While this risk to consumers can be mitigated by ensuring that insurers agree to cover losses if any of the managers or partners in an entity (as policy holders) are not guilty of dishonesty, insurers will not pay out in circumstances where all of the policy holders have acted dishonestly.
- 5.13 This risk exists with self-employed barristers, whose policies under the BMIF would likewise not respond in cases of the barrister's dishonesty. However, in the context of legal services, the risk of losses resulting from dishonesty is almost exclusively related to administration of client accounts and handling of client money.
- 5.14 The SRA has operated a compensation fund for many years. In order to be eligible to apply for compensation under its scheme, the loss or hardship must have occurred during the normal work of a regulated person or firm and it must have been caused by dishonesty or failure to account for money received. The SRA's Claims Management Unit handles applications for grants from the Compensation Fund. During the first quarter of 2010, 1,238 out of a total of 1,563 claims received related to client money.
- 5.15 If the BSB does permit barristers to handle client money to any extent, it will also need to decide whether it needs to set up a compensation fund to provide redress to consumers where insurance or other forms of redress might be unavailable. If it did set up such a fund it would be likely to require a levy, which the BSB would be likely to impose on all regulated entities or self-employed barristers who hold client money.
- 5.16 However, as already noted, the BSB's current view is that it should not permit BSB regulated entities (or self employed barristers) to handle client money. In those circumstances, the BSB does not propose to establish a Compensation Fund.

Q30. Do you agree with the BSB's view that a Compensation Fund is not necessary provided that client money is not held by BSB regulated entities or self employed barristers?

¹⁴ <http://www.sra.org.uk/sra/consultations/assigned-risks-pool-arp-review-november-2009.page>

Chapter 6 – Non-Barristers

Introduction

6.1 If the BSB regulates entities, it will need to have rules which regulate the conduct of entities, their owners, managers and employees, and disciplinary procedures in the event of breaches of the rules or misconduct. This chapter addresses the extent to which the BSB's rules and disciplinary and appeal arrangements should be extended beyond individual barristers.

6.2 The BSB proposes to put in place three levels of compliance:

1. Entities

All entities which the BSB would consider regulating will provide reserved legal activities and will meet the definition of 'authorised person' in section 18 of the Act. Consequently the BSB will need to create a new set of rules applicable to entities, as authorised persons in their own right. Entities will be subject to disciplinary procedures and penalties in the event of breaching those rules.

2. Managers

The BSB proposes that all managers of entities will also be individually responsible for compliance on the part of the entity with key rules applicable to the entity. Managers will also be responsible for complying with those rules that are applicable to them individually. However, the latter rules may vary depending on the manager's specific role and function within the entity, the extent to which they have supervisory responsibility over employees and their status as a barrister, other authorised person, or a non-lawyer. The BSB may, for example, require entities to notify it of the individual managers, or manager, with responsibility for specified key functions, supplying this information at the point of authorisation and in annual returns thereafter. As explained further below, this expands on and develops for other types of entities the approach taken in the Act, whereby special duties and responsibilities are imposed on those persons designated as Head of Legal Practice (HOLP) or Head of Finance and Administration (HOFA) in relation to an ABS. Managers who are authorised by other approved regulators will also be subject to those regulators' individual conduct rules. The documentation, such as partnership deeds, defining the managers' relationship with, and duties toward, the entity, and the circumstances in which this relationship can be terminated, will need to reflect and support these regulatory duties.

3. Employees

The BSB also proposes to require all employees of entities to comply with certain basic duties and for entities to reflect these duties in any contracts of employment.

Where an employee or manager acts dishonestly, or where there are other appropriate grounds, the BSB proposes to establish a power to prohibit that employee or manager from being employed by or acting as manager of another BSB regulated entity or as an employee of a self-employed barrister.

Extending the scope of disciplinary arrangements

Current arrangements – conduct complaints

- 6.3 The BSB Complaints Committee considers complaints made about barristers on grounds of conduct. In minor cases of misconduct, the Committee can impose sanctions by consent. Where the barrister concerned does not accept a finding of misconduct, or where there is a serious matter to consider, cases are remitted to a Disciplinary Tribunal.
- 6.4 Disciplinary Tribunals are appointed and run by the Inns of Court, with the BSB acting as the prosecutor. Separation of the prosecution function from the tribunal is necessary for compliance with the right to a fair trial, under Article 6 of the European Convention on Human Rights. Appeals from Disciplinary Tribunal decisions are to the Visitors to the Inns of Court, who are the High Court Judges under whose rules a panel or judge is appointed to hear appeals.
- 6.5 The current source of the BSB's powers to take disciplinary action is the constitution of the Bar Council and the Inns. However, these powers may be extended by provisions in the Act which apply to all approved regulators, as discussed below.
- 6.6 At present these disciplinary arrangements only apply to barristers, but they would have to be extended to cover entities and those participating in them, in order to ensure consistency in terms of compliance, and sufficient protection for consumers of services.

Powers over non-barrister managers and employees

- 6.7 Section 176 of the Act provides that 'regulated persons' have a duty to comply with the regulatory arrangements of their approved regulator, insofar as they apply to them. This applies to two categories of regulated person:
1. 'Authorised persons', who are individuals or entities, authorised to carry out reserved legal activities, and
 2. Managers and employees of authorised persons.
- 6.8 Section 176 therefore provides the BSB with potential powers to require entities and non-barrister managers and employees of entities, as well as those who are barristers or other authorised persons to comply with its rules. It would allow the BSB to impose and enforce conduct rules, subject to approval from the LSB. In addition, section 52 of the Act requires that the entity requirement prevails over the individual requirement if there is a conflict between the regulatory requirements of the entity regulator over an entity, its managers and employees, and a regulatory requirement of another approved regulator. These are likely to be the main statutory source for extending the BSB's regulatory hold.
- 6.9 To obtain these powers in practice, the BSB would need to seek approval from the LSB for relevant amendments to its Code of Conduct and related guidance and procedures. The Bar Council's constitution would also require amendment as it currently only provides for the regulation of barristers as individuals. Assuming approval were to be

granted, the BSB would then gain disciplinary powers which would be more extensive in terms of their reach, and which would be underpinned by statute and by the Bar Council's status as an approved regulator, rather than depending on call to the Bar.

- 6.10 The SRA has disciplinary powers over non-solicitors working as managers or employees in LDPs. These are derived from amendments made by the Act to the Solicitors Act 1974. The SRA has powers to subject non-solicitors to its code of conduct, imposing fines in the case of non-compliance. Non-solicitor managers and employees of 'recognised bodies', which include LDPs, are included in the definition of 'regulated persons' and as such are subject to disciplinary procedures. These powers allow the SRA to give a written rebuke, or impose a financial penalty. The BSB will need to decide whether or not subjecting non-barrister employees to similar sanctions would be proportionate and would further the regulatory objectives. At this stage of consultation, it does not propose to extend sanctions to this category of employee, but does propose that all managers, including non-barristers, should be subject to penalties.
- 6.11 However, the SRA also has the power to prevent non-solicitors from working as managers or employees of SRA regulated entities, by virtue of amendments made to section 43 of the Solicitors Act 1974. It is proposed below that the BSB should have a similar power to prevent non-barrister managers or employees from working in entities which it regulates, where there is good cause. Powers such as these would have a substantial impact on the future careers of individuals and would have human rights implications. This is discussed further below.
- 6.12 The BSB expects to seek further advice as to what statutory basis would be required in order to provide it with similar powers to those available to the SRA. The BSB will also need to ensure that any powers it has over managers and employees are consistent with any civil or employment rights which those individuals hold.
- 6.13 Subject to that, the BSB proposes that its powers in respect of non-barrister managers should include written reprimands, imposition of a financial penalty, conditions on acting as a manager of a BSB regulated entity, temporary suspension of entitlement to act as a manager of a BSB regulated entity and (in the most serious cases) prohibition on acting as a manager of any other BSB regulated entity. In the case of barrister managers, appropriate amendments would need to be made to the existing rules as to the circumstances in which written reprimands or fines can be imposed or practising certificates suspended, made subject to conditions or revoked, and/or individuals are referred to their Inn for disbarment.

Entities

- 6.14 The BSB proposes to introduce rules which would apply to entities as authorised persons in their own right. The conduct rules will as far as possible be the same as those for self-employed barristers but will include additional rules. There will be further detailed consultation on the content of these rules, should the BSB decide to develop a framework for entity regulation. The rules will be linked closely to the authorisation, or licensing, procedure and will include obligations to have in place certain policies and procedures.

6.15 Entities will be subject to disciplinary procedures and penalties in the event of a breach of those rules and it is proposed that representatives of the entity (managers) will appear before the Disciplinary Tribunal in any hearing.

Barrister managers and employees

Barrister only Entities (BOEs)

6.16 If the BSB decides to regulate only BOEs and no other type of entity, it will continue to exercise control over individual barristers, who would by definition be the only type of manager. It is anticipated that disciplinary arrangements for barrister partners or managers would be similar to those for barristers working in chambers and in employed practice. They could be disciplined for breaches of the Code of Conduct and any new provisions applicable to entities. Necessarily, there will be some new duties imposed on barrister managers and the BSB will need to decide on appropriate sanctions and penalties for these.

Legal Disciplinary Practices (LDPs) and Alternative Business Structures (ABSs)

6.17 The BSB proposes that barrister managers working in any type of entity will have a duty to comply with all the rules in the Code of Conduct that are applicable to them (which may vary depending on their role, as noted above) and they will also be subject to disciplinary proceedings as individual barristers.

Barrister employees

6.18 Employees of an entity who are barristers will be subject to the rules and disciplinary procedures applicable to them as individual barristers, and may also have some specific duties in respect of the entity.

Non-barrister managers

6.19 BSB regulated LDPs and ABSs would include non-barrister managers. The BSB will need to decide the extent to which the BSB should regulate non-barrister managers in terms of disciplinary arrangements in both types of entity.

6.20 The BSB proposes that all managers of entities will have a duty to ensure that the entity complies with the rules that apply to the entity, as well as a personal responsibility to comply with those rules that apply to the manager individually.

6.21 For example, all lawyer managers who are authorised persons will continue to have different responsibilities in terms of the practising rules to which they are subject, such as in relation to their rights of audience. On the other hand, all managers within an entity, whether lawyers or not, will be under a duty not to cause any individual who is an advocate to breach any duty that applies to that individual (for example, by putting pressure on an advocate to breach his or her duty to the Court).

Other authorised managers and employees

6.22 The Act provides that all authorised persons participating in an entity are subject to the rules laid down by the regulator of that entity. Employees who are individually

authorised by other regulators, such as solicitors, will therefore be subject to the BSB's rules as the regulator of the entity, in respect of their conduct as manager or employee of the entity, as well as being subject to the rules of their approved regulator, as individuals. The BSB will need to liaise with other approved regulators, and the LSB to ensure consistency and to avoid regulatory conflicts. As noted above, the BSB's rules, as regulator of the entity, will take precedence over any inconsistent conduct rules that would otherwise have applied to those individual employees or managers who are authorised by other approved regulators.

- 6.23 If employees who are authorised persons are responsible for a serious breach of the rules, they could be reported to their approved regulator, triggering a separate disciplinary procedure by that regulator.

Non-authorised persons

- 6.24 Managers who are not authorised persons would not be subject to the rules of another approved regulator and may not be subject to any form of professional regulation at all. If and to the extent that there is a real prospect of significant overlap with regulation by regulators outside the field of legal services, section 54 of the Act requires the BSB to make reasonable efforts to avoid duplication or conflict between regulatory regimes. In circumstances where the BSB does not currently propose to regulate MDPs, this appears unlikely to be a major issue.

Specific management roles

- 6.25 Managers who are undertaking specific roles may be subject to extra duties to those imposed on managers in general. Sections 91 and 92 of The Act impose specific duties on the HOLP and HOFA to take steps to ensure compliance on the part of ABSs.
- 6.26 The BSB believes that these provisions add a helpful structure of management responsibilities, which will greatly aid compliance, and it would propose to include similar requirements for specific management roles for all BSB regulated entities, whether or not they are licensed bodies. The BSB proposes that the HOLP should be a manager but that this role and that of the HOFA can be undertaken by the same person or split between a number of people, depending on the needs and size of the business. The BSB will consult in more detail on these requirements if it decides to regulate entities, including consideration of the impact that such requirements could have on smaller firms.

Q31. Do you agree that all managers should be subject to the same conduct rules (with authorised persons and specific management roles (HOLPs and HOFAs) being subject to relevant further rules)?

Q32. Do you agree that entities which do not require to be licensed, BOEs and LDPs, should also be required to have in place a HOLP and a HOFA, in order to improve compliance? What implications might this have for smaller firms and how could the BSB mitigate any negative impacts?

Non-lawyer employees

- 6.27 It will also be necessary to consider the extent to which an entity's employees who are not barristers should be subject to the rules, including whether and to what extent they would be subject to disciplinary procedures. There are broadly two types of employee – those employees who undertake tasks directly contributing to the provision of legal services (for example, paralegals); and those employees who provide non-legal services to the business itself (for example finance or IT staff).
- 6.28 Partnerships of solicitors are a comparable business arrangement to what BOEs may become, in terms of the line management relationship between partners and employees. In solicitors' firms, employees such as paralegals are often directly involved in the provision of legal services, yet their supervising solicitors, as authorised persons, are deemed to be providing the service and have traditionally been responsible for their work and conduct in terms of disciplinary matters. Employees are covered by the firm's insurance policy. In practice, paralegals can often undertake many of the supporting tasks for solicitors, as well as having direct contact with clients.
- 6.29 However, as of 31 March 2009, the SRA's code of conduct has been amended to directly impose its rules on employees to the extent that the rules apply to what they do. Breach of relevant rules can lead to disciplinary action against employees. It can be argued that the BSB should follow suit and introduce duties on employees of entities it chooses to regulate. This would help to ensure consistency across different types of legal services providers.
- 6.30 Barristers' chambers have traditionally taken, in respect of clerks and other chambers employees, a similar approach to that taken by solicitors' firms under the SRA regime as it stood prior to 31 March 2009, although a key difference is that clerks are not directly involved in the provision of legal services. Individual barristers, including the Head of Chambers, supervise the work of clerks and are answerable for their performance. Under the Code, barristers are held responsible for any activities undertaken on their behalf. This supervisory role extends to overseeing the conduct of employees, and ensuring that they comply with relevant duties and policies, such as the equality and diversity policy. Heads of chambers act as the first port of call for complaints about employees, and the BSB is only involved where a head of chambers fails to deal adequately with the complaint.

Regulation of employees

- 6.31 It would be possible to continue to regulate employees only indirectly, by virtue of their supervision by managers. Under this option, entities would be required to ensure that employees understood the rules which affected their work, were required by their employer to observe them, and to have systems in place to ensure the rules were followed. Disciplinary action could be taken against the entity and relevant managers if these conditions were not met, but the BSB could not itself take disciplinary action against employees who were not themselves authorised persons. The weakness in this approach is that if an employee is dishonest or causes a serious breach of rules by an entity and is sacked by the entity as a result, there is nothing to prevent that ex-

employee from getting a job with another BSB regulated entity or self-employed barrister.

- 6.32 The SRA has powers to prevent a recognised body from employing a person who has been found, after due process, to be unsuitable. This power has a number of attractions; it is serious enough in its implications for the career of the individual that it is likely to act as a significant deterrent and it will ensure that the public are protected from dishonest employees, who having been disciplined and sacked by their current employer manage to move on to put clients at risk in another business. For these reasons, the BSB proposes that it should adopt a similar approach, assuming that suitable powers are available to it, as above. It would need to develop a human rights compliant procedure for imposing such a prohibition, analogous to the SRA's procedure for making orders under section 43 of the Solicitors Act 1974 (under which the person who is the subject of the order has a right to be heard and a right of appeal).
- 6.33 Section 90 of the Act imposes duties on non-authorized persons who are employees (or managers) of an ABS, not to do anything which causes or substantially contributes to a breach by the ABS, or any authorised person working for it, of the regulatory arrangements imposed by the approved regulator.
- 6.34 This means that an employee of a BSB regulated ABS who is a non-authorized person, for example a paralegal, administrative or financial assistant would be under a statutory duty not to cause a breach of the rules imposed by the BSB on the business or the lawyers within it. The BSB could impose similar duties on employees of non-licensed entities. This would reinforce the onus on employees to comply. The question would then arise whether there should be sanctions such as fines if an employee broke the rules or whether the proposed prohibition order would be adequate.
- 6.35 On balance, the BSB believes that, having regard to the regulatory objectives and seeking a proportionate approach, it should introduce a duty on the part of the entity to write into all its employment contracts an obligation on the part of employees to comply with the regulatory rules relevant to their work, making breach a disciplinary matter. In this way the entity itself would be responsible for ensuring compliance on the part of its employees, via their contractual duties. The BSB would only become involved with non-lawyer employees where there were grounds to prohibit an employee from going on to work in another business. Otherwise, where there were rule breaches, it would deal solely with the entity and its managers.

Q33. Do you agree that all employees (in LDPs and BOEs, as well as within ABSs, where this is a statutory requirement) should be made subject to a minimum duty not to cause the entity or an authorised person working in it to breach the rules applicable to them?

Q34. Do you agree that the BSB should have a power to prohibit BSB regulated entities or self employed barristers from employing named persons who have been found, after due process, to be unsuitable to be employed in such a business?

Disciplinary procedures in practice

6.36 The BSB's current disciplinary arrangements apply only to individual barristers. Full details of the current disciplinary procedure are laid out in the Disciplinary Tribunal Regulations 2009, at Annex K of the Code of Conduct, available on the BSB's website. If the BSB becomes an entity regulator, it will need powers to enable it also to discipline entities themselves, non-barrister managers, and employees who are authorised persons, and to impose prohibition orders.

Procedures

6.37 The BSB believes that, for the sake of consistency and efficiency, a similar, staged procedure should operate for entities, and those participating in them, as for individual barristers.

6.38 Disciplinary procedures will therefore continue to operate through four main stages:

1. Imposition of fines for technical breaches – with a right of appeal,
2. More serious allegations – consideration of whether there is a case to answer; determination by consent for minor breaches of conduct rules,
3. Decisions on allegations of serious breaches and imposition of sanctions, and
4. Appeals.

6.39 The first stage of the procedure, as now, would be administrative. The role of the Complaints Committee could be extended to the second stage (but may have an implication for costs, as below). At present, the third stage is undertaken by the Council of the Inns of Court (COIC) which runs the Disciplinary Tribunals. The question is whether this arrangement would be appropriate for persons who are not members of an Inn. In principle there is no obvious objection, provided that COIC was willing to take on this new work.

6.40 If the BSB decides to regulate entities, it will consider appropriate sanctions in detail at a later stage of consultation, in conjunction with deciding what new rules would be necessary for entities. All sanctions would be as consistent as possible with those imposed on individual barristers. Details of current sanctions are available in the BSB's Sentencing Guidance, available on the BSB website.

Costs

6.41 If the same process for disciplinary hearings is extended to include entities, managers, and potentially employees, some of whom are not barristers, there would be capacity and resource implications for the BSB's investigations team, the Complaints Committee and Disciplinary Tribunals.

6.42 Investigations of alleged rule breaches and disciplinary procedures are expensive and constitute a large percentage of the total regulatory cost, but this burden is much reduced in the case of the Bar by the very extensive pro bono input by barristers.

- 6.43 This pro bono representation encompasses barrister members of the Complaints Committee, barristers and judges who are tribunal members and sometimes prosecutors. This service is of immense value to the Bar and it is ultimately reliant on the goodwill of barristers and judges who are prepared to volunteer their services free of charge.
- 6.44 If it is not possible to extend the current arrangements for hearings and representation to entities and non-barristers, then an alternative will have to be found. This would be likely to take the shape of a new Disciplinary Tribunal appointed directly by the BSB or an independent appointments committee.
- 6.45 This alternative would weaken the separation of the functions of prosecutor and tribunal. It would also either have to be run in parallel to the disciplinary system for individual barristers, which would be inefficient and may lead to inconsistencies, or would have to be extended to individual barristers. Most importantly, however, it would attract greater costs, particularly if barristers and judges were unwilling to provide pro bono services in hearings for businesses and non-barristers. Tribunals are currently composed of a QC or judge, one or more barrister members and one or more lay members. A similarly constituted tribunal would be more expensive if all its members were remunerated.
- 6.46 If necessary, the BSB would need to make a detailed budget assessment of the set up and running costs for new disciplinary arrangements to establish the feasibility of establishing such a regulatory framework for entities.

Future appeal arrangements

- 6.47 At present appeals from the Disciplinary Tribunals lie to the Judges of the High Court in their capacity as Visitors to the Inns. This basis for appeal plainly cannot be extended to individuals who are not members of an Inn, or to entities. It would be necessary to provide equivalent rights of appeal for anyone who was subject to the disciplinary process, regardless of whether they were or were not a barrister. This is likely to require legislation.
- 6.48 The Government has stated its intention to legislate to ensure that disciplinary appeals by barristers relating to the Bar will in future be heard by the High Court rather than the Visitors to the Inns. This approach might be extended to apply to appeals by non-barrister managers and employees.
- 6.49 An alternative route for appeals in the future might be made available by establishing a single appeals body to hear all legal services appeals. The LSB has stated its preference for creating such a body for ABSs in its recent consultation document *Alternative business structures: approaches to licensing* (2010). There would be advantages in all appeals relating to entities being dealt with by the same body.

Service complaints

- 6.50 This chapter is concerned with conduct complaints, rather than service complaints. However, it is important to note that section 114 of the Act establishes The Office for

Legal Complaints (OLC) which is set up to provide users of legal services with an independent ombudsman to resolve disputes about those services. The Legal Ombudsman, which is currently being established by the OLC, will commence operation on 6 October 2010 and the BSB's involvement in service complaints will be phased out. The Ombudsman will be able to investigate service complaints against all authorised persons, including entities. The BSB would therefore have no direct responsibility for handling service complaints against entities, other than a monitoring obligation in respect of how those complaints were first dealt with by the entity.

Implications for self-employed barristers

- 6.51 If employees of BSB regulated entities are made subject to a duty not to cause a breach of rules then it may be desirable to extend this requirement to employees of chambers in order to achieve consistency and a level playing field for different types of business. Similarly, the proposed prohibition order should apply to employees of chambers as well as those of entities.
- 6.52 The BSB and the Bar Council intend to establish a joint working group to consider the regulation of barristers' employees in all business arrangements, including chambers. The BSB sees some advantages in having, as far as possible, a common platform of regulation across the self-employed Bar and any entities it may decide to regulate, subject only to such differences as are necessary and appropriate in light of the differences between self-employed practice and practice through an entity. The regulatory issues posed by employees are not fundamentally different in the context of a self-employed practice and the solutions proposed above are likely to be equally appropriate in that context.

Chapter 7 - Costs

7.1 Regulating entities will inevitably involve costs to set up the regulatory regime, as well as running costs to operate it. If the BSB does begin to regulate entities the proposal is for set up costs to be borne by the whole profession and authorisation (where applicable) and running costs to be covered by fees charged to entities.

Set up costs

7.2 Set-up costs would include developing rules to provide for entity regulation, recruiting and training staff, IT costs and developing monitoring and disciplinary arrangements. If the BSB were to apply to become a licensing authority for ABSs, it would also include the prescribed fee payable to the LSB for such an application.

7.3 Set up costs may need to be recouped either from regulated entities or from the profession as a whole.

7.4 It is proposed that set up costs should be recouped from the profession, most likely through a small increase in the practising certificate fee. The BSB is mindful of the need to act proportionately when applying the costs of entity regulation to the Bar. The exact cost will be dependent upon the type of entity (if any) that the BSB sets up to regulate. The costs of entity regulation would be assessed in more detail once a provisional approach has been agreed by the BSB.

7.5 Recouping set up costs from the whole profession is preferable to recouping money from fees charged to entities for a number of reasons:

- From an equitable standpoint, BSB regulated entities would be available to the whole profession and therefore the whole profession can justifiably be expected to pay to allow for the realisation of this opportunity
- It would assist with budgeting for these costs, as income from practising certificates is reasonably consistent, whereas any income from entities will be dependent upon take-up.
- It would allow caution to be exercised in setting lower initial entity fees. This would allow the BSB to gauge interest in the early stages and enable any new system to get up and running before longer term entity fees are re-assessed.
- Minimising financial barriers for those wishing to set up entities at the start of the regime is likely to increase uptake. This might result in greater income further down the line, which could in turn allow a reduction in the individual practising certificate fee.

On-going operational costs

7.6 Regulated entities would be charged for applications to become authorised or licensed, and for other applications (for example to change status or add new managers), and would have to pay an annual fee. However, there will also be costs that cannot be directly attributed to an individual entity, for example monitoring and the running of an investigation and disciplinary system (which may not result in disciplinary action against an individual entity).

- 7.7 The proposal is that the fees to apply for an entity authorisation or licence and then to retain this annually should be set at a level intended to cover the overall operational costs of regulating entities. This would mean that only those wishing to take advantage of the new structures would be paying for their regulation.
- 7.8 The first step for the BSB would be to establish what the operational costs are likely to be. There would be little point in the BSB setting up to regulate entities if it could not offer entities fees which are competitive with other regulators. Current indications are that this should be feasible. However, there are a number of factors which could have a significant impact on the overall costs; including the approach taken to client money, the establishment of an intervention scheme and the extent to which barristers will contribute to running disciplinary procedures for entities pro bono as they currently do for self-employed barristers.
- 7.9 In order to set fees aimed at recovering the overall operational costs, the BSB would need to complete comprehensive analysis of the costs of each component part of a regulatory regime and complete accurate projections for likely take-up based on setting fees at different levels. It would be likely to set entity fees based on turnover, size or regulatory risk.
- 7.10 Other regulators who already regulate entities (such as the SRA) have used entity fees to fund reductions in the equivalent of practising certificate fees. If demand for BSB regulated entities is strong it is possible that similar reductions could be made to the practising certificate fee for barristers.

Q35. Do you have any comments on the proposals for covering the costs of entity regulation?

Q36. What equality and diversity implications will recouping set up costs from the whole profession (by way of an increase in the practising certificate fee) have on people from different ethnic groups, men and women or disabled people?

Q37. How important do you think it is that the BSB should set fees for entities that are competitive with other entity regulators? Do you think barristers would be willing to pay slightly more (if this was necessary) to retain the BSB as their primary regulator?

Summary

- If the BSB does decide to regulate entities on the terms set out above it could mean barristers working in partnership with other lawyers and non-lawyers, potentially in partnership or other corporate structures, in entities providing advocacy and advice services and potentially some ancillary litigation. If litigation is permitted, entities and barristers could receive instructions directly from lay clients. This might also require specific arrangements for the payment of fees and money for disbursements and potentially a form of custodian arrangement to handle the award of court settlements.
- Entities would need to establish systems for identifying and managing conflicts of interest. They could not accept instructions if they gave rise to a conflict of interest for the entity and they would need to manage any conflicts that arose during the course of representation.
- Entities and all advocates in an entity would be subject to a modified cab-rank rule which would replicate the application of the cab-rank rule to self-employed barristers, as far as possible.
- BSB regulated entities would require insurance that adhered to minimum terms that would be set by the BSB. This could be provided for by the establishment of a mutual scheme or through commercial providers.
- Entities would require a HOLP and HOFA. All managers of entities would be subject to conduct rules. All employees of entities would have to comply with certain basic duties and these duties would be reflected in contracts of employment.
- The BSB would need to introduce an interventions scheme, or establish an effective alternative, to oversee entities in financial or other difficulties.
- It is proposed that the set up costs of any entity regime would be borne by the whole profession through a small increase in the practising certificate fee. Thereafter operational costs would be funded by fees charged to entities.

PART 3: ENTITY REGULATION – THE BSB’S ROLE

Chapter 8 – Potential Characteristics of a BSB Regulated Entity

- 8.1 Part 2 analysed some of the key regulatory issues to consider in relation to the overarching question of whether the BSB should regulate entities. This chapter summarises the proposals made regarding the services that BSB regulated entities might be permitted to provide and examines the position of non-barrister and non-lawyer ownership and management of entities in light of this.
- 8.2 As set out in Part 1, as long as the regulatory framework and policy is in place it would not be too great a step to move from the regulation of the most limited entity managed only by barristers (BOEs) to regulating other forms of business arrangement (LDPs and ABSs).
- 8.3 Therefore the consultation has not examined entity regulation by reference to BOEs, LDPs and ABSs individually but rather examined whether the BSB should regulate entities and if so, what the policy and regulatory issues are that must be addressed.
- 8.4 This section concerns the regulatory issues and policy surrounding the services that the BSB would permit its regulated entities to provide and the categories of managers that it would allow. It assesses the outer limit of what the BSB would be prepared to regulate. This in turn will determine whether a BSB entity regulation regime would encompass BOEs, LDPs, ABSs or all of the above.

Issues to consider

- 8.5 The BSB is an established and proven regulator of advocacy and advice services by barristers. If it began to regulate entities in addition to individuals the BSB would be significantly extending its regulatory remit. If it does decide to regulate entities, it will need to consider the extent to which it should restrict:
- The services that its entities could provide (heading A below),
 - Who it would allow to own and manage these entities (heading B below), and
 - Who the entities could employ (heading C below).
- 8.6 In considering these restrictions, the BSB will need to have regard to:
- Its existing experience and competence to regulate,
 - The regulatory hold and control that it would have over entities,

- The regulatory objectives, and
- The regulatory need.

8.7 The decisions the BSB makes on services, ownership and employment will determine what structures it would be willing to regulate.

A) Services

8.8 It is essential that the BSB does not regulate too far beyond its existing experience and does not seek to authorise entities that it is not competent to regulate. Therefore it will be important for the BSB to set limits on what sort of entities it would be prepared to regulate. This will involve restricting the services that BSB regulated entities could provide, and the extent of external ownership.

8.9 As discussed in chapter 1, if the BSB does decide to regulate entities, it believes that it would be in the public interest for it to regulate entities focused on providing advocacy services, alongside ancillary services including legal advice and, potentially, litigation services. The overarching intention here is for the BSB to become a specialist regulator of advocacy services, as opposed to just a specialist regulator of barristers providing these services.

8.10 The BSB does not believe it would promote the regulatory objectives if it were to regulate multi-disciplinary practices offering non-legal services alongside legal services, which will be offered by other approved regulators with more relevant experience.

8.11 These limits on the services that BSB entities would be able to provide will ensure that the BSB is only regulating entities that are providing services closely related to those that it currently regulates and which are within its competence to regulate. This would be enforced through scrutiny of information included in applications for authorisation (further details in chapter 9). It would have a monitoring scheme for entities to ensure that entities complied with this thereafter.

Structures

8.12 The proposed restrictions in services would apply to BOEs, LDPs and ABSs.

B) Ownership and management of BSB regulated entities

8.13 The BSB will also need to decide who it will permit to own and manage its entities. This will determine whether its regime could include BOEs, LDPs, ABSs or all of these structures.

General safeguards

8.14 In order to ensure that the BSB has appropriate regulatory control over all owners of entities it might regulate, the BSB proposes to require owners of BSB regulated

entities to also be active managers. This would prevent external investment from ‘silent partners’ and also the issuing of shares to those with no active role in the management of an entity. Requiring owners to be managers would help to foster a common culture across an entity and ensure that owners are aware of the consequences and reality of all decisions. The role of all owners and managers would be assessed at authorisation stage to enforce this.

- 8.15 As set out in chapter 6, the BSB also proposes that all entities that it might regulate would need to have an equivalent of a Head of Legal Practice (HOLP) and a Head of Finance and Administration (HOFA). This is a requirement for ABSs contained within Schedule 11 of the Act. It ensures that at all ABSs there is an individual who is personally responsible and accountable for compliance with a licence or authorisation and separation of legal services from business concerns and an individual responsible for proper financial management and accounting. The BSB would seek to apply similar conditions to all entities that it regulates. It is likely to allow the same person to be both the HOLP and HOFA in the same entity, but to require at least the HOLP to be a manager.

Permitted managers

- 8.16 If the BSB decides to regulate entities it will at the very least need to regulate BOEs managed exclusively by barristers. However, it might also decide to regulate LDPs, which could also be managed by other authorised persons¹⁵ or ABSs, which could be managed by a mix of barristers, other authorised persons and non-lawyers.
- 8.17 The proposals regarding permitted owners set out below suggest that the BSB would be prepared to regulate BOEs, LDPs and ABSs (the latter with up to 10% or 25% non-lawyer managers).

Other authorised persons (LDPs and ABSs)

- 8.18 There could be a number of benefits of allowing barristers to work in management with other authorised persons:
- If entities can provide advocacy and ancillary litigation services, barristers might want to bring solicitors or other legal professionals into the entity to share experience of conducting litigation, managing large case files and dealing directly with lay clients. This will assist entities to provide complete high quality services to consumers.
 - Allowing authorised persons to manage entities will be more attractive than just allowing them to join BSB regulated entities as employees, which would assist BSB regulated entities to attract authorised persons of all levels of seniority and ability.
 - Further, the proposal for the BSB to become a specialist regulator of advocacy and advice as opposed to a specialist regulator of individual barristers would be strengthened if the BSB permits non-barrister advocates (such as solicitors or legal executives) to join its entities and assume its regulation.

¹⁵ Solicitors, legal executives, licensed conveyancers, notaries, law costs draftsmen, patent attorneys and trade mark attorneys.

Non-lawyers (ABSs)

8.19 Similarly, there could be many benefits in allowing non-lawyers to become managers of entities:

- Non-lawyer managers could provide a number of very important internal services to an entity, such as practice management or clerking, internal finances and accounting, information technology, human resources or general office management. This would allow for dedicated and full-time managers with relevant experience and skills to handle the administration and running of an entity and allow the legal professionals to focus on providing legal services.
- As with authorised persons, allowing non-lawyers to be managers as opposed to requiring them to be employees would allow entities to offer potentially better terms and therefore attract the very best candidates. It would allow an entity to offer an interest in the business to non-lawyer managers which could also serve as a performance incentive.

8.20 However, regulating non-barristers would present new regulatory challenges for the BSB. Therefore it will need to decide whether it would be willing to permit non-barrister managers of entities and if so, whether to impose limits on the number or proportion of non-barrister managers. In deciding this, it will need to consider:

- (a) Its own experience and competence to regulate
- (b) The regulatory control that it has over different managers

(a) Experience and competence to regulate

8.21 The proposal to regulate by reference to the services provided by the entity will mean that the BSB should not need to set minimum numbers or proportions of barrister managers in order to keep entities within its regulatory competence.

8.22 While other authorised persons might in theory be able to provide services beyond those of barristers, in their capacity as managers of BSB regulated entities they would only be able to provide clients with the services that BSB entities are permitted to provide. In this sense they would pose very similar regulatory issues to barrister managers. However, it is proposed that the BSB should require that the majority of authorised person managers should be entitled to practice as advocates in the higher courts. In practice, this would mean that the majority would need to be barristers holding practising certificates or Higher Court Advocates with higher rights under the SRA regime. This would serve to reinforce the services requirement that entities would need to be focused primarily on the provision of advocacy services.

8.23 Non-lawyer managers would not be able to provide reserved legal services (such as exercising a right of audience in the Higher Courts, or taking on behalf of the entity a formal step of the sort that constitutes conducting litigation, such as issuing a claim form). They might provide some non-reserved legal activities to clients such as advice and correspondence, appropriately supervised (as, for example, paralegals do within

SRA regulated entities). However, non-lawyer managers are likely to be primarily involved in internal services or management matters.

(b) Regulatory control

8.24 All entities would be subject to the Code of Conduct (or at least relevant parts of it). In addition, all managers and owners will be subject to proper “fitness to own” tests (see chapter 9). The following sets out how each of the three categories of potential owner and manager would be regulated and could be held accountable thereafter:

- Barristers – barrister managers would be subject to the entire Code of Conduct and could be disciplined both in relation to their position as manager of an entity (either through a fine, removal from position or a ban from joining any other BSB regulated entities) and also individually in a similar fashion to self-employed barristers. The BSB would ultimately be able to remove their practising certificate and prevent them from exercising reserved legal activities.
- Other authorised persons – managers who are non-barrister authorised persons would be subject to the Code of Conduct insofar as it relates to entities and could be disciplined in relation either to their position as manager of an entity or as an authorised person working for the entity (either through a fine, removal from position or a ban from joining any other BSB regulated entities). The BSB would not be able to remove their authorisation, although it would be able to refer them to their individual approved regulator to take appropriate action.
- Non-lawyers – as above, non-lawyer managers would be subject to large parts of the Code of Conduct and could be disciplined in relation to their position as manager of an entity (either through a fine, removal from position or a ban from joining any other BSB regulated entities). Non-lawyers are unlikely to be regulated in relation to their conduct in a personal capacity, unrelated to their work in the entity, other than in a case where that conduct is such as to make them an unsuitable person to be a manager of a BSB regulated entity.

8.25 The BSB would need to develop robust Memoranda of Understanding between itself and the other approved regulators to ensure continuity of regulation, both on an entity and individual basis. This would ensure that non-barrister authorised persons are regulated to the same extent as barristers and the BSB would have similar regulatory control (albeit less directly). As they would also be limited to providing the same category of services as barrister managers, the BSB does not believe that other authorised persons should be seen as presenting an additional regulatory risk compared to barrister managers. Therefore it believes that in principle it should be prepared to regulate entities managed by authorised persons who are not barristers. Further, it does not believe that it would be necessary to specify a minimum number or proportion of barrister managers or owners.

8.26 However, it is clear that non-lawyers, who may not be regulated as individuals, would not be subject to the same level of regulation. Furthermore, non-lawyers will not have received the same training in ethics and legal duties, such as duties to the court and clients, as all lawyers who are authorised persons do as part of their required training.

This difference in background and culture does present different regulatory risks. While the BSB believes that it should, in principle, be prepared to regulate ABSs with non-lawyer managers, this suggests the need for the imposition of certain restrictions on the number or proportions of non-lawyer managers.

Potential restrictions on non-lawyer management (ABSs)

8.27 The requirement for all owners to also be managers would serve as a natural limit on non-lawyer management of BSB regulated entities, as they would need to show that they were contributing something to the management and operation of the entity beyond investment and it is unlikely that entities primarily focused on advocacy and related services would need significant numbers of non-lawyers in management roles.

8.28 However, the BSB believes that in the interests of minimising regulatory risk and ensuring that it has strong regulatory control over all entities it might need to impose a restriction. The full options available to the BSB in this respect are:

- Prohibit all non-lawyer management and ownership and therefore preclude the regulation of ABSs;
- Follow the provisions in the Act for ABSs requiring a minimum of one authorised person as Head of Legal Practice, and one authorised person as a manager, with no additional restrictions;
- Replicate the current statutory provisions for the SRA, whereby a limited form of ABS is permitted (regulated as an LDP until such time as the full ABS regime comes into effect) in which 75% of managers and owners must be authorised persons¹⁶. This would ensure that the majority of all managers are regulated professionals, and that control is in their hands; or
- Replicate the provisions in the Act relating to “low-risk” ABSs, which can only have 10% non-lawyer management.

8.29 The BSB will need to decide the most proportionate response to the risks posed by non-lawyer management and ownership, bearing in the mind the potential benefits of allowing this.

8.30 Its provisional view is that it should follow either the statutory precedent for defining lower risk ABSs (10%) or the statutory precedent under which the SRA is regulating a limited form of ABS (25%). Both proportions were agreed by Parliament as proportionate limits and the BSB could take a similar approach at the outset, with the intention of reviewing this once any entity regime has been operational for a period of time.

8.31 In this regard it is worth considering that the 25% limit for SRA regulated LDPs was set as a proportionate means of introducing entities that combined ownership from different legal professionals alongside non-lawyers for an established entity regulator with experience of regulating non-solicitor and non-lawyer employees. The BSB does

¹⁶ Sections 9 and 9A Administration of Justice Act 1985.

not have experience of entity regulation or of regulating non-barristers. Moreover, advocacy focused businesses may not have a need for non-lawyers to make up as much as 25% of their managers. The BSB's provisional proposal is to favour a 10% limit as permitted for lower risk ABSs. Restricting BSB regulation to low risk ABSs would also have the effect of enabling the BSB to disapply some parts of the statutory regime, under s106 of the Act, and thereby simplify the necessary regulatory arrangements.

8.32 The main risk in adopting a 10% limit is that it might have a bigger effect on smaller entities, which might have impacts for smaller firms and for equality and diversity. It would make the minimum size 10 managers, of whom one is a non-lawyer, as opposed to 4 managers, of whom one is a non-lawyer. The BSB invites comments on whether this is likely to prove to be too restrictive. The BSB would need to factor these considerations into its overall decision on the most proportionate limit.

Q38. Do you agree that if the BSB does decide to regulate entities it should be prepared to regulate entities managed by other authorised persons (LDPs)?

Q39. Do you agree that if the BSB does decide to regulate entities it should be prepared to regulate entities managed by non-lawyers (ABSs)?

Q40. Do you agree that if the BSB did regulate entities it should require that the majority of the managers should be entitled to practise as advocates in the higher courts?

Q41. Do you agree that the BSB should set a requirement for a maximum of 10% non-lawyer management of ABSs it may regulate or do you consider that the BSB should impose a maximum of 25% or some other proportion?

Q42. Would setting a 10% maximum for non-lawyer ownership of ABSs as opposed to 25% have any impact on equality and diversity?

C) Employees

8.33 In addition to managers, BSB regulated entities could also employ authorised persons and non-lawyers. As discussed above in chapter 6, the BSB would have stronger regulatory control over managers than employees. However, this reflects the fact that managers are relied on to supervise employees and present more of a regulatory risk.

8.34 As with managers, the additional regulatory risk in regulating other authorised persons and non-lawyers as employees would be small and proportionate in light of the potential benefits (see above).

8.35 The BSB does not believe that it would be well suited to regulate businesses with very few managers and lots of employees, where the focus of regulation would be more on the entity and processes and less on individuals and their conduct. This might include claims management type entities with significant numbers of paralegal employees dispensing advice and handling small claims or entities with large numbers of solicitor

employees providing commoditised litigation and advice services. The BSB does not believe there is a public interest in it offering regulation of such entities, whose services are remote from its core expertise. Nor is it suited to a regulatory approach that is focused, and which the BSB proposes should remain focused to a considerable extent, on the conduct of those individually responsible for providing advocacy services (whether they are doing so as self-employed barristers or as managers or employees of a BSB regulated entity).

- 8.36 The BSB is well suited to regulating individual advocates and business structures that are predominantly managed by these advocates as a vehicle to provide their services. In these circumstances the risks, in terms of individual behaviour and the necessary business systems, will be more similar to those posed by a chambers of self-employed barristers, which the BSB is accustomed to regulating. Specialist regulation by the BSB, focused on the particular challenges that are posed by advocacy as a legal service, can offer real public benefits.
- 8.37 This might justify some restrictions on the number or proportion of non-advocates that BSB regulated entities could take on as employees. However, the BSB believes that the position in this regard is less clear cut than in relation to the proposed restrictions on the composition of management.

Options

- 8.38 A set limit on non-advocate employment would be necessarily rigid and it would be difficult to agree a limit that would be proportionate to risk in all contexts. For example, a small advocacy focused entity with three barrister managers might conceivably want to employ a clerk or practice manager and a number of paralegal support staff to handle ancillary litigation under their supervision. This would mean a high proportion of non-lawyer members but at an entity that is comfortably within the BSB's competence. Equally, a larger entity might conceivably have a high number of non-advocate employees, in absolute terms, but who represent a small proportion of the total numbers of those involved in the entity.
- 8.39 A rigid limit on non-advocate employees could therefore have a profound effect on the business models that entities might employ. This would need to be justified as proportionate in terms of regulatory risks. At this stage the BSB does not have enough relevant evidence on which to base a proportionate limit.
- 8.40 In light of these issues the BSB does not propose that it would set a limit on non-advocate employment at the outset of an entity regulation regime. Instead, it would exercise discretion at authorisation stage to ensure that the employment and management structure of all entities would place them within its experience and competence. As set out in chapter 1 it will also scrutinise application information to ensure that any proposed entities would be providing services that are within its experience and competence (primarily advocacy and advice services with any litigation services ancillary to this). If the BSB adopts this approach there would need to be a published policy, so that applicants understand the criteria and approach that the BSB will apply when exercising its discretion in this regard.

8.41 The BSB would need to review this once any entity regulation regime is operational and it is in possession of evidence on how the scheme is operating, which might then justify setting a limit at a certain level.

Q43. Do you agree that the BSB should not set a hard limit on the number or proportion of non-advocate employees in BSB regulated entities but should use authorisation to ensure all entities are within its experience and competence to regulate effectively?

Summary

8.42 In this chapter it has been proposed that if it did regulate entities, the BSB should limit itself to entities:

- primarily focused on providing advocacy services, alongside other ancillary legal services including, potentially, litigation;
- managed by a majority of authorised persons with rights to conduct advocacy in the higher courts and not more than 10% or alternatively up to 25% non-lawyer management and no external ownership, and
- with a mix of barristers, other authorised persons and non-lawyers as employees (provided the entity is not employing large numbers of non-advocate employees to provide other legal services).

8.43 This would encompass entities that could be classified as BOEs, LDPs or ABSs. The BSB would need to apply to become a licensing authority for ABSs and it would need to set up a separate regime to regulate BOEs and LDPs. However, if the BSB does decide to regulate all three types of entity, it will endeavour to create an entity regulation regime that would apply fairly and consistently across the three different models with only such differences as are reasonably necessary.

Chapter 9 – Regulation of Entities in Practice

- 9.1 This section outlines some of the practicalities of how a BSB scheme for regulating entities might operate and the impact this could have on entities. This is purely illustrative; if the BSB does decide to proceed with entity regulation it would issue a second consultation covering the detail of how any scheme for entity regulation could actually operate.
- 9.2 The practical implications will be influenced by what sort of entities the BSB seeks to regulate; for example if it decides to regulate ABSs the Act already confers many powers on licensing authorities and sets out a regulatory framework, whereas for BOEs or LDPs the BSB would need to set up a scheme from the beginning and might need to secure some of the necessary regulatory powers through legislation. At this stage, it seems likely that BSB regulated entities would be subject to the following practical arrangements.

Authorisation

- 9.3 All entities would need to be authorised to provide specific reserved legal services, which would involve an application to the BSB. The BSB would be likely to require the following information in an application:
- Type of entity and legal structure (BOE, LDP or ABS; company; partnership, or LLP)
 - A business plan
 - Proposed nature of business and reserved legal activities to be provided
 - Details of proposed owners and managers
 - Nominations of a HOLP and HOFA
 - Place of business
 - Description of governance arrangements
 - Numbers of employees, distinguishing between lawyers and non-lawyers
 - Insurance arrangements
 - Confirmation that the entity has in place policies on:
 - complaints procedures
 - equality and diversity
 - conflicts of interest
 - confidentiality
 - risk management
 - arrangements for employees to raise concerns
 - bullying and harassment
 - Explanation of how the application will promote access to justice
- 9.4 An application fee would be charged, reflecting the cost of the work involved for the BSB to consider the application.

- 9.5 The BSB would consider whether the entity's proposed activities brought it sensibly within its remit, and in particular whether, if it proposed to do litigation, that litigation would be ancillary to advocacy and advice.
- 9.6 The BSB would check whether the proposed managers are fit and proper persons. For barristers and other lawyers who are themselves authorised persons, this check is likely to focus on confirmation that they have a valid practising certificate and are of good standing. Where non-lawyers are included more detailed checks, similar to those made before a barrister is called to the Bar, would be undertaken.
- 9.7 If the BSB was satisfied by the information provided, it would grant authorisation. There would be appeal arrangements for rejected applications. It is likely that there would be a power to attach conditions to an authorisation.
- 9.8 Authorisation would be for an indefinite period. Entities would be required to provide updated information at regular intervals and to pay an annual fee. If an entity ceased to meet the authorisation requirements, or failed to comply with the relevant rules, there would be a procedure for removing authorisation subject to due process and appeal arrangements. Practising certificates for individual barristers will continue to require annual renewal.
- 9.9 The BSB would publish a register giving details of all authorised entities.

Administration

- 9.10 Entities would be subject to similar requirements to chambers in relation to their administration but with some additional requirements to reflect additional complexity:
- Managers, like Heads of Chambers, would be under a duty to take all reasonable steps to ensure that their business is administered competently and that their staff are competent. They would also have to ensure that their employees are familiar with all the rules which are relevant to their duties.
 - Like chambers, all entities will be required to have a complaints procedure, equality and diversity policies and policies on bullying and harassment which comply with the Code. In addition, they will be required to have policies on conflicts of interest, confidentiality and risk management.
 - Entities would need to have defined governance arrangements. This would include the need to appoint a HOLP who will be responsible for ensuring that the entity and its managers and employees comply with the relevant rules and a HOFA who would be responsible for ensuring that the finances of the entity are well managed. This would be mandatory for ABSs but is likely to also apply to other entities.
 - Entities which are companies or LLPs will be required by statute to produce annual accounts. The BSB might also extend this requirement to partnerships.

Code of Conduct

- 9.11 The BSB is in the process of updating its Code of Conduct. In its new form, it will consist of Core Duties and Conduct Rules (which have already been consulted upon) and Practising Rules (on which it will be consulting later this year).
- 9.12 Entities and all practising barristers would be subject to the same Core Duties. Most of the Conduct and Practising Rules would also be the same or very similar for both categories.
- 9.13 There would need to be additional rules on administration for entities as discussed above. Some rules might need modification to fit the different circumstances of entities but broadly the rules should be familiar to self-employed barristers.
- 9.14 If entities are permitted to conduct litigation, there will need to be additional rules on that subject (which would also apply to self-employed barristers if they were allowed to conduct litigation).

Monitoring

- 9.15 The BSB is developing monitoring arrangements for chambers. This will involve monitoring chambers for compliance with particular regulatory requirements. Monitoring will commence in 2010 and will run annually thereafter.
- 9.16 Entities would be subject to broadly similar monitoring arrangements as chambers will be under these new arrangements. However, in view of the new structures and their greater complexity, it is likely that monitoring would be more stringent in a number of respects:
- A monitoring visit would be made to each entity within the first year,
 - Monitoring reports and visits would cover a wider range of subjects, to include issues such as the management of conflicts of interest,
 - After the first year routine visits would generally take place every few years or on a thematic basis on issues which have given rise to widespread problems, and
 - Visits could also be made on a risk assessed basis.
- 9.17 The purpose of monitoring visits would be to help and encourage entities to improve the running of their business. Only in the case of serious concerns about breaches of the rules, or failure to take action on previously identified weaknesses, would disciplinary action be considered.
- 9.18 The BSB would need to set up an interventions regime for entities that pose serious risks to clients. This would include firms that are facing severe financial problems, or practices that have been abandoned.

- 9.19 Formal interventions would be a last resort for the BSB. Entities which are performing well and have not raised any regulatory issues will not come into contact with the interventions regime. Similarly, the BSB would attempt to assist firms that it has concerns about to overcome problems without the need for formal intervention.
- 9.20 Where an intervention is necessary, the BSB would appoint an agent to intervene in the practice of an entity and ensure that all existing instructions are redistributed. It would take control of relevant documents and where required these would be safely stored.

Complaints

- 9.21 Discipline with regard to breaches of the code of conduct (on an individual or entity level) will be dealt with by the BSB. Service complaints from clients about entities, like those involving self-employed barristers, will be dealt with by the Office for Legal Complaints (the Legal Ombudsman).

PART 4: CONCLUSION

BOEs, LDPs and ABSs

In this consultation it has been proposed that if the BSB does become a regulator of entities it should focus on services and seek to become a specialist regulator of entities providing primarily advocacy alongside other ancillary services, including legal advice and, potentially, litigation. Within this, the BSB proposes to permit bodies that could include both lawyer and non-lawyer managers.

It follows from this that the BSB would be willing to regulate BOEs, lawyer only LDPs, and ABSs (albeit only in a limited form and not the full range of multi-disciplinary or externally owned ABSs that are permitted under the Act).

It will not be possible to regulate all of these structures under one regime; any entity with a non-lawyer owner or manager would need to be licensed as an ABS under the Act and any entity without a non-lawyer owner or manager would not be able to be licensed as an ABS. Therefore the BSB would need to apply to the LSB to become a licensing authority for the purpose of regulating ABSs and set up a separate regime for authorising and regulating other non-ABS entities without non-lawyer managers.

Within the constraints created by the Act, the BSB would seek to create as unified a scheme as possible that would provide consistency of regulation across regulated entities. This would involve treating BOEs and LDPs as a single regime to cover entities with no non-lawyer managers and basing such a scheme on the provisions set out in the Act for ABSs and the licensing rules that the BSB would need to provide in this regard. In practice, the BSB would also be able to use the same resources to handle authorisation, monitoring and interventions of the different entities.

Implications for self-employed barristers

A number of the regulatory issues discussed in this consultation have implications for self-employed barristers. If the BSB begins to regulate entities this might impact upon those who do not wish to join entities. The specific areas where this is possible have been highlighted in Part 2 but are also summarised below:

- Litigation – if the BSB decides to regulate entities that can conduct ancillary litigation services, it is proposed that self-employed barristers should also be permitted to conduct litigation.
- Client money – it is likely that any decisions made on payment options for entities or their ability to hold client money will need to be reflected as well for the self-employed bar. Otherwise it could place self-employed barristers at a competitive disadvantage.
- Accepting instructions – amendments to the scope of the cab-rank rule for entities might also be applied to self-employed barristers.

- Discipline – the approach the BSB takes to regulating employees of entities might also require it to take a more proactive approach to regulating and disciplining employees of chambers.

Conclusion

This consultation has set out the key regulatory issues arising if the BSB decides to regulate entities. It has proposed a number of possible approaches to these issues.

The BSB's *Survey on Bar Standards Board Regulation of New Business Structures* (May 2010) indicated significant interest from the profession in working in new business structures regulated by the BSB. This supported the need to consult further on how business structures could be regulated by the BSB.

The consultation proposes a number of policy positions to illustrate how BSB entity regulation might operate. It proposes that the BSB would maintain its regulatory focus on advocacy and advice services. It also proposes that barristers would need to be granted permission to undertake litigation in order to offer a competitive service direct to clients. The consultation suggests a number of different options for clients to pay for these services, but does not propose that the general prohibition on holding client money will be relaxed. It also discusses a number of disciplinary implications, as well as options for obtaining insurance.

The BSB would be likely to need further resources to undertake new functions such as authorisation, monitoring and interventions. This would have cost implications which will need to be properly assessed. The BSB proposes that these costs would be met by a small increase in the Practising Certificate Fee for set up, and fees charged to entities for ongoing, operational costs.

The BSB's provisional conclusion is that it would be in the public interest for it to establish itself as a specialist regulator of entities providing primarily advocacy and ancillary services, including legal advice and litigation. However, it is yet to reach a definitive conclusion that it should regulate entities. It will revisit this, as well as the potential scope of the entities that it could regulate, in light of the responses received to this consultation.

Q44. In light of the regulatory implications do you think the BSB should begin to regulate entities?

Q45. If so, do you agree with the proposals for it to seek to regulate BOEs, lawyer only LDPs and ABSs with up to 25% non-lawyer managers?

Q46. Are there any other regulatory implications which the BSB needs to consider in making this decision?

Q47. Are there likely to be any negative consequences for people from different ethnic groups, men and women or disabled people arising from the BSB's proposals to regulate entities? If so, how could these be mitigated?

Next steps

All responses to this consultation will be considered in detail by the BSB and an analysis conducted. A full report of the consultation analysis will be published on the BSB's website.

The BSB will conduct further, detailed assessments of the regulatory implications and in particular the cost implications. The feasibility or otherwise of the BSB providing a regulatory structure for entities will partly depend on the take-up of business opportunities by the Bar and the funding which this generates. The BSB will need to provide competitive fees, which will depend on the overall costs of the regulatory regime.

If the BSB concludes that it would have the powers and competencies required to regulate entities and that this would promote the regulatory objectives, then it will issue a further consultation containing more detailed proposals, including full estimated costs and new draft rules. It will also help to assess the impact on equalities of any proposals.

The BSB will also issue a separate consultation on whether or not it should in principle permit barristers to work in ABSs.

Throughout this process the BSB will continue to liaise with other regulators and the LSB, in order to achieve consistent and workable regulation, in the public interest.

Consultation Questions

Background

Q1. Do you agree that it is in the public interest for the BSB to become a specialist regulator of advocacy focused entities?

Chapter 1 – Permitted Services

Q2. Do you agree it is in the public interest for the BSB to permit entities that it may regulate in the future to provide litigation services which are ancillary to the provision of advocacy and advice services?

Q3. If so, do you agree that barristers who are managers or employees of BSB regulated entities should be permitted to conduct litigation, rather than being required to have in-house solicitors to do this work?

Q4. If BSB regulated entities are allowed to conduct litigation, do you agree that it is in the public interest for self-employed barristers to be permitted to conduct litigation?

Q5. Would permitting BSB regulated entities and self-employed barristers to conduct litigation pose any further risks to consumers or the regulatory objectives that are not identified above? If so, how could these further risks be mitigated?

Q6. Do you agree that barristers should be required to undertake relevant training before being authorised to conduct litigation and that they should also be subject to a period of supervision and guidance from a qualified person?

Q7. Do you agree that the BSB should not regulate entities which provide reserved instrument activities or probate services that are unconnected with advocacy or litigation?

Q8. Are there any specific reserved instrument activities or probate activities, unconnected with advocacy or litigation, that self-employed barristers currently conduct that they should continue to be permitted to conduct if they were to join an entity?

Q9. Would prohibiting BSB regulated entities from providing reserved instrument activities or probate services have any impact for people from different ethnic groups, men and women or disabled people?

Q10. Do you agree that BSB regulated entities should be permitted to administer oaths?

Q11. Should the BSB seek to regulate entities whose work is primarily advisory and non-contentious in nature and unrelated to advocacy or litigation work? If so, is it

envisaged that such entities would be supplying services primarily on a referral basis or direct to the public?

Chapter 2 – Payment Options and Client Money

Q12. If barristers are permitted to conduct litigation, will it be necessary for them to hold client money to pay disbursements?

Q13. Would it be feasible for entities conducting civil and commercial litigation to receive payments for fees and disbursements in arrears?

Q14. If entities receive fees and disbursements in arrears, what impacts might this have for consumers and access to justice?

Q15. How well do you think the Public Access Scheme works in respect of fees and disbursements? Could a similar approach to be taken by entities?

Q16. Would an entity be able to conduct litigation where fees and disbursements are paid in advance, on contractual terms?

Q17. Do you agree that the BSB should continue to prevent all barristers (except those who are practising as managers of recognised bodies regulated by other approved regulators) from holding client money?

Q18. Do you think that, in principle, a custodian service for holding court awards and settlements could be a sufficient alternative to allowing entities to hold client money?

Q19. Are there any alternative approaches you can suggest?

Chapter 3 – Accepting Instructions

Q20. Do you have any comments on the proposal for regulating conflicts of interest in BSB regulated entities?

Q21. Are any further safeguards required to protect consumers of legal services?

Q22. Do you agree that the cab-rank rule should apply to entities and advocates in the entity context in a similar fashion to the way it operates for self-employed barristers?

Q23. Do you agree in principle that the cab-rank rule should apply to all advocates in an entity and not just to barristers?

Q24. Should the cab-rank rule be limited in its application to “advocacy and advice on a referral basis from a professional client” or to “advocacy in substantive hearings, on a referral basis from a professional client”? Is there a better way to define its scope?

Q25. Do any of the proposals in relation to the cab-rank rule have any equality implications or positive or negative effects on people from different ethnic groups, men and women or disabled people?

Q26. How serious do you think is the risk of clients abusing the cab-rank rule and how might it be mitigated?

Chapter 4 – Interventions

Q27. Do you agree with the BSB’s proposals for the interventions regime it proposes to establish, if it begins to regulate entities?

Q28. Do you agree with the BSB’s proposals for how the intervention regime should be funded?

Chapter 5 – Insurance and Compensation

Q29. If the BSB does decide to regulate entities, what is your preference between using a mutual scheme for entities or commercial insurance based on minimum standards set by the BSB?

Q30. Do you agree with the BSB’s view that a Compensation Fund is not necessary provided that client money is not held by BSB regulated entities or self employed barristers?

Chapter 6 – Non-barristers

Q31. Do you agree that all managers should be subject to the same conduct rules (with authorised persons and specific management roles (HOLPs and HOFAs) being subject to relevant further rules)?

Q32. Do you agree that entities which do not require to be licensed, BOEs and LDPs, should also be required to have in place a HOLP and a HOFA, in order to improve compliance? What implications might this have for smaller firms and how could the BSB mitigate any negative impacts?

Q33. Do you agree that all employees (in LDPs and BOEs, as well as within ABSs, where this is a statutory requirement) should be made subject to a minimum duty not to cause the entity or an authorised person working in it to breach the rules applicable to them?

Q34. Do you agree that the BSB should have a power to prohibit BSB regulated entities or self employed barristers from employing named persons who have been found, after due process, to be unsuitable to be employed in such a business?

Chapter 7 – Costs

Q35. Do you have any comments on the proposals for covering the costs of entity regulation?

Q36. What equality and diversity implications will recouping set up costs from the whole profession (by way of an increase in the practising certificate fee) have on people from different ethnic groups, men and women or disabled people?

Q37. How important do you think it is that the BSB should set fees for entities that are competitive with other entity regulators? Do you think barristers would be willing to pay slightly more (if this was necessary) to retain the BSB as their primary regulator?

Chapter 8 – Potential Characteristics of a BSB Regulated Entity

Q38. Do you agree that if the BSB does decide to regulate entities it should be prepared to regulate entities managed by other authorised persons (LDPs)?

Q39. Do you agree that if the BSB does decide to regulate entities it should be prepared to regulate entities managed by non-lawyers (ABSs)?

Q40. Do you agree that if the BSB did regulate entities it should require that the majority of the managers should be entitled to practise as advocates in the higher courts?

Q41. Do you agree that the BSB should set a requirement for a maximum of 10% non-lawyer management of ABSs it may regulate or do you consider that the BSB should impose a maximum of 25% or some other proportion?

Q42. Would setting a 10% maximum for non-lawyer ownership of ABSs as opposed to 25% have any impact on equality and diversity?

Q43. Do you agree that the BSB should not set a hard limit on the number or proportion of non-advocate employees in BSB regulated entities but should use authorisation to ensure all entities are within its experience and competence to regulate effectively?

Conclusion

Q44. In light of the regulatory implications do you think the BSB should begin to regulate entities?

Q45. If so, do you agree with the proposals for it to seek to regulate BOEs, lawyer only LDPs and ABSs with up to 25% non-lawyer managers?

Q46. Are there any other regulatory implications which the BSB needs to consider in making this decision?

Q47. Are there likely to be any negative consequences for people from different ethnic groups, men and women or disabled people arising from the BSB's proposals to regulate entities? If so, how could these be mitigated?

List of Consultees

All Heads of Chambers

Bar Standards Board Committees/Panels

Complaints Committee
Education and Training Committee
Equality and Diversity Committee
Qualifications Committee
Quality Assurance Committee
Standards Committee
Performance and Best Practice Committee

Bar Council Committees/Panels

Access to the Bar Committee
Alternative Dispute Resolution Committee
Bar Council GMC
Bar Human Rights Committee
Employed Barristers' Committee
Equality and Diversity Committee
European Committee
Fees Collection Committee
Finance Committee
Information Technology Panel
International Relations Committee
Law Reform Committee
Legal Services Committee
Policy and Research Group
Professional Practice Committee
Public Affairs Committee
Remuneration Committee
Training for the Bar Committee
Young Barristers' Committee

Consumer bodies

Consumer Focus
Legal Services Board Consumer Panel
Which?

Licensed Access organisations

Architects Registration Board
Architecture & Surveying Institute

Association of Authorised Public Accountants
Association of Average Adjusters
Association of Consultant Architects
Association of Taxation Technicians
Chartered Association of Certified Accountants
Chartered Institute of Loss Adjusters
Chartered Institute of Management Accountants
Chartered Institute of Taxation
Chartered Insurance Institute
Faculty of Actuaries
Incorporated Society of Valuers & Auctioneers
Institute of Actuaries
Institute of Chartered Accountants in England and Wales
Institute of Chartered Accountants in Ireland
Institute of Chartered Accountants of Scotland
Institute of Chartered Secretaries and Administrators
Institute of Chemical Engineers
Institute of Financial Accountants
Institution of Civil Engineering Surveyors
Institution of Civil Engineers
Institution of Engineering and Technology
Institution of Mechanical Engineers
Institution of Structural Engineers
Insolvency Practitioners Association
Royal Institute of British Architects
Royal Institution of Chartered Surveyors
Royal Town Planning Institute

Other bodies

AdviceUK
Advocacy Training Council
Association of Chartered Certified Accountants
Association of Law Costs Draftsmen
Association of Muslim Lawyers
Association of Women Barristers
Attorney General
Bar Association for Commerce, Finance and Industry
Bar Mutual Indemnity Fund
Carter Diversity Group
Chancellor of the High Court
Chartered Institute of Patent Agents
Circuits
Confederation of Business Interests
Council of the Inns of Court
Council for Licensed Conveyancers
Crown Prosecution Service

Deloitte
Department for Business, Enterprise and Regulatory Reform
Discrimination Law Association
Equality and Human Rights Commission
Ernst & Young
Faculty of Advocates
Immigration Law Practitioners Association
Inns of Court
Institute of Barristers' Clerks
Institute of Chartered Accountants in England and Wales
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