



REGULATING BARRISTERS

The Legal Services Act 2007

Implications for the regulation of the Bar in England and Wales

Consultation paper

February 2008

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Introduction

1. This consultation paper is issued by the Bar Standards Board (“the Board”). The Board was established in January 2006 to regulate in the public interest barristers called to the Bar in England and Wales. The paper seeks views on how the Board should respond to the new business and regulatory regime to be set up under the Legal Services Act 2007 (“the Act”), and in particular whether and how the Bar’s Code of Conduct should be amended.
2. The Act facilitates the establishment of Alternative Business Structures (ABSs) and Legal Disciplinary Practices (LDPs) in which lawyers and non-lawyers will be able to offer legal services through the same corporate entity. This will clearly have important implications for barristers. Although the paper begins by discussing the direct implications of this part of the Act, it is not confined to that subject. It also examines, in particular, the issues raised by the possibility of permitting the establishment of business organisations involving both barristers and solicitors; the possibility of permitting the establishment of partnerships of barristers; and the possible relaxation or removal of the restrictions in paragraphs 401(b) (which prohibits self-employed barristers from undertaking certain activities) and 403.1 (which relates to the administration of self-employed practices) of the Code of Conduct.
3. These issues are of considerable importance to the future of the Bar and its clients. The paper deals with a number of long-standing restrictions on how barristers are allowed to practise which have been held to be crucial features of the profession, particularly the self-employed part of the profession: notably the “cab-rank” rule and the prohibition on partnerships. The Board believes that these restrictions need to be questioned in the light of the provisions of the Legal Services Act. Indeed, in the light of that Act, it is unlikely to be possible for the rules to remain as they are. Removal of some of the restrictions will give barristers more options about how they choose to practise and it will be for them to decide whether to take advantage of the new opportunities or whether to continue to practise as they do now. Having said that, in making any changes to the rules, the Board is committed to retaining the important features of the Bar under the new arrangements: particularly its quality and independence, which are of critical value in ensuring that the interests of clients continue to be served.
4. The paper is arranged as follows.

- Part I** Background: the Legal Services Act 2007 (paragraphs 42 to 49)
- Part II** Consequences of the Act: the Board’s approach to the issues (paragraphs 51 to 55); the “cab-rank” rule (paragraphs 56 to 65)
- Part III** Issues relating to practice in new business structures and partnerships: in what business entities should barristers be allowed to practise (paragraphs 66 to 83)
- Part IV** Issues relating to regulation of business entities and their members: business and professional regulation (paragraphs 84 to 87); what business entities should the Board regulate as professional regulator (paragraphs 88 and 89); what business

entities should the Board regulate as business regulator (paragraphs 90 to 96); partnerships of barristers (paragraphs 97 to 101)

- Part V** The structure of self-employed practice (paragraphs 102 to 124)
- Part VI** Compensation arrangements (paragraphs 125 to 127)
- Part VII** Other possibilities (paragraph 128)
- Part VIII** Transitional issues (paragraphs 129 and 130)
- Part IX** Summary of questions

The consultation exercise

5. This is the first stage of consultation on this subject. The Board will be organising seminars to discuss its contents. It will also be working on possible amendments to the Code of Conduct for consideration in the light of the results of the consultation to prepare for the probable introduction of legal disciplinary practices in 2009 (see paragraph 129 below). A list of those to whom this consultation is to be sent is at Annex 1. Responses are, however, welcomed from all who wish to contribute to the debate. A glossary of the main terms used in this paper is at Annex 2. The relevant passages from the Code of Conduct are set out at Annex 3. There will need to be further consultation on detailed proposals and costs once decisions have been taken on the core issues discussed in this paper.

Responses to the paper

6. This paper raises questions of major importance for the Bar and its clients. The Board urges all consultees to assist it in resolving how the future of practice at the Bar should look. The closing date for responses is **9 May 2008**.
7. Responses should be sent to Toby Frost, Bar Standards Board, 289-293 High Holborn, London, WC1V 7HZ or by email to TFrost@barstandardsboard.org.uk. The BSB may wish to cite individual responses in its report of the consultation. 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.

Executive summary

8. This initial consultation paper seeks views on how the Bar Standards Board should respond to the new business and regulatory regime to be set up under the Legal Services Act 2007 ("the Act") and, in particular, whether and how barristers should be allowed to practise in the proposed new Alternative Business Structures (ABSs) and Legal Disciplinary Practices (LDPs). It also examines the possibility of permitting the establishment of partnerships of barristers and considers whether there should be a relaxation of some of the current restrictions on self-employed barristers.
9. Comments should be sent to Toby Frost at the Bar Standards Board by 9 May 2008.

Part I: Background

10. At present, there are restrictions on the type of business structures through which legal services may be provided. The Code of Conduct forbids barristers from supplying legal services to the public through any body such as a partnership except in the case of barristers employed by solicitors, who may provide legal services to the firm's clients. The Act establishes a regulatory framework in which lawyers of different kinds can form joint businesses and allows non-lawyers to be managers or investors.
11. The Act establishes a new regime for the provision of legal services. It creates a system whereby individuals seeking to provide legal services will have to be regulated by an Approved Regulator. The Bar Council is an Approved Regulator, with the Bar Standards Board carrying out its regulatory functions. The Act creates the Legal Services Board (LSB) to oversee the work of Approved Regulators.
12. The Act enables the establishment of ABSs. An ABS is defined as a body in which one or more of the owners or managers is entitled to provide legal services and one or more of the others is not. ABSs will have to be licensed by a Licensing Authority approved by the LSB. The Law Society, through the Solicitors Regulation Authority (SRA), intends to seek to become a Licensing Authority. It would be open to the Bar Council, through the Board, also to seek to become one. The ABS regime is not expected to be in operation until about 2011 or 2012.
13. The Act also establishes an interim regime for LDPs to be regulated by the SRA. LDPs can comprise, for example, a partnership of solicitors and barristers. Up to 25% of the managers may be non-lawyers. The SRA is developing plans to regulate LDPs from spring 2009.

Part II: Consequences of the Legal Services Act

14. The Board considers it likely that some barristers will want to take advantage of the new regulatory regime. Although concerns have been expressed about the appropriateness of legal services being provided through ABS firms, it believes that since Parliament has legislated to permit this, it would be wrong for its rules to prohibit barristers from being involved in such firms.

15. It is aware of the virtues of the independent Bar, and aims neither to weaken them, nor to compel participation in the new structures permitted by the Act. The Board considers it important to ensure that the new business structures are covered by an appropriate regulatory regime. In making any alterations to the Bar Code of Conduct, the Board will be guided by the principles of the Act and its own Strategic Plan.
16. The Board intends to keep the public interest at the centre of its decisions.
17. **The “cab-rank” rule:** The “cab-rank” rule is relevant to many of the issues discussed in the paper. This rule requires self-employed barristers to accept work which they have time to undertake, which is within their expertise and for which an appropriate fee is offered, irrespective of the client, the nature and strength of the case or of their view of the client or his behaviour. The rule does not apply to solicitors or to barristers employed by firms of solicitors.
18. The Board considers that it would not be possible to apply the “cab-rank” rule to barristers practising in ABSs or LDPs. It sees difficulties, in terms of restrictive practices, in applying the rule to partnerships of barristers alone (if such partnerships are allowed) while disapplying the rule to ABSs and LDPs. The rule could still apply to self-employed barristers: the paper asks whether this could be seen as justifiable in the public interest.
19. The substance of rule 601 of the Code (which prohibits barristers from withholding advocacy services on the grounds that the nature of the case, or the conduct or opinions of the client are objectionable) will in any case be retained.

Part III: Issues relating to new business structures and partnerships

20. **Barristers as managers of ABS firms:** The Board believes that the rules preventing barristers from supplying legal services through other persons and companies should be relaxed. It proposes that barristers should be able to practice while managers or employees of ABS firms.
21. **LDPs and partnerships of barristers:** The paper discusses the arguments for and against allowing barristers to practise in partnerships. The Board’s present view is that if barristers are allowed to practise as managers of ABS firms, they should also be allowed to practise in LDPs. It is also likely that the public interest will require that the prohibition on barristers practising in partnership with each other should also be abolished.

Part IV: Issues relating to regulation of business entities and their members

22. **Business and professional regulation:** The Board differentiates between regulation of a business entity in which a barrister may work and regulation of the individual barrister’s professional conduct. The Board believes that it should be the regulator of the professional conduct of all barristers, including those working in ABS and LDP firms. ABS firms and LDPs will be subject to a business regulator which will have the power to decide that a particular barrister should not work in a regulated firm, but only the BSB will have the power to remove that barrister’s practising certificate.

23. The Board seeks responses as to whether it should become the business regulator for ABS firms and, if so, for what types of such firms. Doing so would use the Board's existing experience as a regulator of barristers, streamline the making of complaints and reduce the risk of the professional and business regulators coming to different conclusions over the same barrister. There may not be a suitable alternative regulator of ABSs consisting only of barristers and non-lawyers, except for the Legal Services Board itself.
24. However, the Board does not think it would be suitable to regulate ABS firms using only the Bar Code of Conduct: new forms of business regulation would need to be devised. Such regulation would be a major undertaking in terms of cost and workload. But there may be a case for seeking to become a Licensing Authority for ABS firms wholly or mainly engaged in providing advocacy services.
25. **LDPs with barrister and solicitor members:** The Board is inclined to the view that it should regulate LDPs undertaking only the sort of work currently done by the self-employed Bar; in practice these would be largely LDPs of barristers, solicitors and perhaps non-lawyers specialising in advocacy/litigation. All other LDPs which included barristers would be regulated by the SRA or another Approved Regulator
26. **Partnerships of barristers:** The Board considers that if barristers are to be permitted to provide legal services in association with other lawyers and non-lawyers, it would be difficult to justify prohibiting them from providing such services in association solely with other barristers. Any such prohibition would be easy to evade by bringing in one non-lawyer as a partner.
27. The Board therefore proposes that partnerships of barristers should be permitted but that their activities should be required to be confined to the provision of services which are supplied by the self-employed bar. It suggests that such partnerships could be regulated primarily through the professional regulation of the individual partnerships.

Part V: The structure of self-employed practice

28. The proposed relaxation of some of the restrictions on how barristers may operate makes it appropriate to consider also the current restrictions on how self-employed barristers may practise.
29. The Board provisionally suggests that barristers be permitted to share office facilities with other people where there is a complete business separation. It considers that if regulatory difficulties can be resolved there could be merit in also exploring allowing barristers to practice:
 - (a) with people approved by the Board where: (a) the number of non-barristers in the arrangement did not exceed 25%; (b) the services involved were limited to those usually performed by barristers; and (c) no client's money was handled;
 - (b) in association with people undertaking the full range of work permitted to them, so that individuals in the association might provide a mixture

of litigation, advocacy and other services and, if allowed and protected by the relevant regulatory bodies, handle clients' money.

30. If such arrangements were to be permitted (and it may be that they should be allowed only in the context of a more formal ABS or LDP structure), the Board will need to consider how to ensure that other people involved are fit and proper to do so, and what safeguards would be required. If the Board decided to move this option forward, a second consultation would probably be needed on these proposals.
31. **Prohibited Work:** The Code currently prohibits self-employed barristers from undertaking a number of types of work on behalf of clients.
32. The Board's preliminary view is that self-employed barristers should be permitted, if they wish, to undertake the management of a lay client's affairs and the conduct of inter partes work subject to having sufficient resources to carry out the work, insurance to cover it and not holding client money or property.
33. The Board proposes to consider:
 - (a) whether there should be a module providing training in litigation work on the Bar Vocational Course;
 - (b) how far it is appropriate to modify the training requirements to enable self-employed barrister to undertake this work if they wish;
 - (c) whether other requirements should be imposed.
34. The BSB will consider whether a barrister or member of chambers staff, who is not the advocate in the case, should be able to collect evidence and take witness statements.
35. A barrister should be allowed to attend at a police station interview, provided that he is not the advocate in the case.
36. The Board proposes that barristers will continue to be prohibited from handling client's funds, unless they are in a firm or LDP that permits this and has adequate protection to cover the barrister.
37. Firms and chambers should be permitted to employ other barristers.

Part VI: Compensation arrangements

38. The paper considers whether there is likely to be a need under the new regulatory regime to set up a compensation fund.

Part VII: Other possibilities

39. The paper asks whether other types of business organisation are likely to emerge and, if so, whether they would raise different regulatory issues.

Part VIII: Transitional issues

40. The Board seeks views on whether the Board should seek power to regulate LDPs consisting of barristers and non-lawyers now or should it wait until the new ABS regime (which will apply to such LDPs in future) is in force.

Part IX: Summary of questions

41. A list of the questions on which the Board would welcome views is in this section.

Part I: Background

The Legal Services Act 2007

42. The Act seeks to facilitate the establishment of a regulatory framework in which different types of lawyer and non-lawyer are able to form businesses together, and to allow non-lawyers to be involved in the management or ownership of businesses providing legal services. At present, there are a number of restrictions on the type of business structures through which legal services may be provided. These restrictions are largely contained in the rules laid down by the Board and other professional regulators. For example, paragraph 205 of the Bar's Code of Conduct forbids self-employed barristers from supplying legal services to the public through or on behalf of any other person (including a partnership, company or other corporate body). An exception applies to barristers employed by solicitors to provide legal services to the firm's clients.¹
43. The Act establishes a new regime for the regulation of legal services. In particular:
- (a) individuals who wish to provide reserved legal services as defined in the Act (ie exercising rights of audience in the higher courts, conducting litigation, conveyancing, probate and immigration work) will need to be regulated by an Approved Regulator. The Bar Council is such a regulator (others include the Law Society, the Council for Licensed Conveyancers, the Institute of Legal Executives, the Chartered Institute of Patent Agents and the Institute of Trade Mark Attorneys);
 - (b) Approved Regulators will need to ensure that their regulatory functions are separated from their representative functions. In anticipation of this, the Bar Council established the Board to carry out its regulatory work;
 - (c) the Legal Services Board (LSB) will oversee the work of the Approved Regulators and have power to intervene if satisfied that their work prejudices the regulatory objectives set out in the Act;
 - (d) special provisions exist to permit "Alternative Business Structures"(ABSs) which will permit those who are entitled to provide reserved legal services to do so in conjunction with people who are not.
44. Under the Act the LSB has a duty to promote the following regulatory objectives:
- (a) protecting and promoting the public interest;
 - (b) supporting the constitutional principle of the rule of law;
 - (c) improving access to justice;
 - (d) protecting and promoting the interests of consumers;
 - (e) promoting competition in the provision of services;
 - (f) encouraging an independent, strong, diverse and effective legal profession;

¹ Paragraph 502. At present, owing to Law Society and Bar Council restrictions, such barristers cannot become partners in the firm unless they requalify as solicitors.

- (g) increasing public understanding of the citizen's legal rights and duties;
- (h) promoting and maintaining adherence to the professional principles.

The professional principles mentioned in (h) are:

- (a) that authorised persons should act with independence and integrity;
 - (b) that authorised persons should maintain proper standards of work;
 - (c) that authorised persons should act in the best interests of their clients;
 - (d) that persons who exercise before any court a right of audience, or conduct litigation in relation to proceedings in any court, by virtue of being authorised persons should comply with their duty to the court to act with independence in the interests of justice; and
 - (e) that the affairs of clients should be kept confidential.²
45. The provisions governing ABSs are set out in Part V of the Act. An ABS is defined as a body in which at least one of the owners or managers is entitled to provide reserved legal services and at least one of the others is not. This would permit the following types of organisation:
- (a) a commercial organisation, such as an insurance company or supermarket offering legal services by their employed lawyers to their clients;
 - (b) a law firm floating itself on the stock market;
 - (c) a partnership or company of lawyers and other professionals offering, say, accountancy and legal services;
 - (d) partnerships of lawyers taking on a practice manager or other non-lawyer as a partner;
 - (e) firms of lawyers only, shares in which are substantially owned by a commercial organisation.

There are likely to be many other possibilities. For convenience in this paper, such bodies are referred to as "firms", although they also include limited companies and limited liability partnerships (LLPs).

46. ABS firms will have to be licensed by a Licensing Authority approved by the LSB. The Licensing Authority must itself be an Approved Regulator for the reserved services offered by the firms it regulates. Firms seeking licences will need to satisfy the Licensing Authority that their owners and managers satisfy appropriate tests of character, that there are appropriate arrangements for avoiding conflicts of interest, and that they have a suitably qualified Head of Legal Practice (HOLP) and Head of Finance and Administration (HOFA). The HOLP is responsible for ensuring that the firm carries out its legal work appropriately and complies with the relevant practice rules. The HOFA is required to ensure that the financial and administrative arrangements of the firm are performed properly. Other managers and employees (including non-lawyers) will be under a duty to comply with the relevant rules, which must cover conduct, discipline, indemnification, client money and compensation.
47. The Law Society, through the Solicitors Regulation Authority (SRA), has indicated that it intends to seek to become a Licensing Authority. It would also be open to the Bar Council, through the Board, to seek to become one.

² Legal Services Act 2007, section 1.

48. Schedule 16 to the Act establishes an interim regime for certain Legal Disciplinary Practices (LDPs) to be regulated by the SRA. In general, LDPs can (among other possibilities) comprise solicitors and barristers; solicitors, barristers and non-lawyers; barristers and non-lawyers; and barristers, qualified European lawyers and non-lawyers, though once the ABS regime comes into force any firm with a non-lawyer as manager or owner will have to be regulated under that regime. The SRA's interim power³ allows it to regulate LDPs where there is a solicitor or a registered European lawyer or "qualified body" as a manager. The power extends to firms of which up to 25% is owned by non-lawyers provided that the non-lawyers are managers and are approved by the SRA as being suitable. This interim regime paves the way for barristers and non-lawyers to become partners or to own equity in such firms.
49. We understand that the LSB is likely to be established in early 2010. It is unlikely that it will have rules ready to designate Licensing Authorities until rather later; and it may not be until 2011 or 2012 that ABS firms will be able to offer reserved services. However, the SRA has indicated that it proposes to use its more limited powers to regulate firms with outside ownership from March 2009. Thus it is likely that some lawyers taking part in ABS firms, or a legal services body (LDP) approved by the Law Society under the interim regime, could be covered by two regulators: the regulator from which they gain the right to carry out particular activities and the regulator of the business entity within which they carry out those activities. Although other legal regulators may in due course provide business regulation opportunities for firms that include barristers, this paper only address what the SRA is proposing and the question of what the BSB should do. We do not believe that business regulation or licensing by other legal regulators raises any different issues of principle than the ones raised here.

³ Whether the SRA would choose to exercise the power is, of course, a matter for the SRA.

Part II: Consequences of the Legal Services Act

50. It is clear from paragraphs 42 to 49 above that the Act creates a new regulatory environment which will allow and facilitate the emergence of a range of new business structures. In the Board's view it is necessary to reassess, against the background of the new environment, the arguments that have been used in the past to justify important features of the current Code of Conduct that, as they stand, would prevent or inhibit barristers from entering into these new structures. This document discusses and seeks views on the following main issues:
- (a) in what types of business entity should barristers be permitted to supply legal services to the public, and subject to what, if any, conditions?
 - (b) which of those types of entity should the Board regulate?
 - (c) if barristers are permitted to supply legal services through new business structures, to what extent is it feasible and desirable to maintain the "cab-rank" rule in its existing form?

The Board's approach: general

51. In considering the issues outlined in the previous paragraph the Board has adopted the following approach.
52. First, the Board considers that it is likely that some barristers will wish to take advantage of the provisions of the new regulatory regime. While it is aware that there are concerns about the appropriateness of legal services being offered through ABS firms, it believes that, since Parliament has legislated to permit this, it would be wrong for its rules to prohibit barristers from being involved in such firms. This, however, has a number of implications for the present rules⁴. In particular:
- (a) it will be difficult to justify the existing position whereby barristers are prohibited from entering into partnership with each other, or with solicitors, if they can practise in an ABS firm with solicitors and other barristers together, or in a firm of barristers in which non-lawyers have a shareholding;
 - (b) it will be difficult or impossible to impose a number of the rules governing self-employed barristers, notably the "cab-rank" rule, on barristers working in ABS or LDP structures, and this may call into question whether those rules should continue apply to the self-employed bar;
 - (c) it is necessary to consider how far the Board should regulate ABS or LDP structures.

⁴ Essentially these are: paragraph 205, which prohibits barristers from offering legal services through a partnership or other corporate structure, except as employees of solicitors' firms or advice centres; paragraph 403, which prohibits self-employed barristers, with a few minor exceptions, from sharing the administration of their practice with anyone other than a barrister; and paragraph 502, which prohibits employed barristers from practising otherwise than as an employee of a solicitor or legal advice centre.

53. Secondly, the Board is very conscious of the virtues of the independent Bar. Members of the public can seek specialist counsel in all areas of law, and cannot be denied the services of the counsel of their choice by the actions of other persons. Barristers in independent practice are free to focus on advocacy and on giving specialist legal advice without the burdens involved in conducting litigation and managing clients' legal affairs. Their overhead costs are low. The courts can have confidence in a barrister's independence. The Board would not wish to weaken these virtues. However, those virtues are generally valuable to the clients of the Bar; and normal market forces can be expected to sustain the majority of them, while the protection of the independence of the advocate is one of the professional principles that the LSB and through it the approved regulators are bound to promote⁵. The Act permits the emergence of new forms of business organisation in which barristers can participate; but it does not compel such participation. It would in the Board's view be wrong to base consideration of the issues discussed in this paper on the assumption that new forms of business organisation are bound to drive out existing forms, or that the virtues of the independent Bar cannot be preserved under the new regulatory regime.
54. Thirdly, the Board does not think it would be advisable to take the attitude that all consideration of the regulatory issues raised by the potential emergence of new business structures can be deferred until they do emerge. That may be reasonable as regards some aspects of the issues. But to adopt it as a general principle would run the risk that new organisations would emerge and begin operations without being governed by a regulatory regime adequate to protect the public.
55. Fourthly, as the Board's Strategic Plan 2007-2009 pointed out, it is necessary for the Board both to revise the Bar's Code of Conduct in order to ensure that its rules are up to date and fit for purpose, and to examine the provisions in the Act concerning ABSs to identify necessary changes to the regulatory system. In conducting this review the Board will be guided both by the principles set out in the Act and by the values and principles summarised in the Strategic Plan. In particular, the Board needs to ensure:
- (a) that barristers are able to provide competitive, high-quality services in their area of expertise;
 - (b) that its rules do not prevent those services from being available to all sections of the community;
 - (c) that its regulation is cost-effective and proportionate.

The public interest will be central to the Board's decisions.

Q.1 Do you agree with the general approach set out in paragraphs 51 to 55 above?

The "cab-rank" rule: ABS firms and partnerships

56. There is one particular issue which is relevant to so many of the matters discussed in this paper that it is convenient to raise it at an early stage and as a separate issue. The "cab-rank" rule (paragraph 602 of the Code) requires self-employed barristers to accept work which they have the time to undertake,

⁵ See para 43, above.

which is within their expertise, and for which an appropriate fee is offered, irrespective of the strength of the client's case or their view of the character, beliefs or behaviour of the client. This, it is argued, ensures that unpopular litigants are assured of representation.

57. The "cab-rank" rule is unique to the self-employed Bar. It does not apply to solicitors or to barristers employed in solicitors' offices.⁶ It prohibits self-employed barristers from refusing cases on the grounds of the perceived weakness of the case or on the grounds of the litigant's character, guilt or innocence.
58. It is argued that the "cab-rank" rule promotes access to justice, and that it protects a barrister's independence and avoids associating the barrister with the client. The barrister represents the client because it is a professional duty to do so, not because he or she endorses the client's story or approves of the client's behaviour.
59. The Board has considered whether the rule should apply:
 - (a) to barristers practising in ABS firms or LDPs;
 - (b) to barristers practising in partnership with each other (if such practice is in future permitted);
 - (c) to the self-employed Bar.

The Board does not consider that it would be possible to require the "cab-rank" rule to apply to the first category. The acceptance or refusal of instructions will be a matter for the firm as a business entity, not for an individual taking part in it. As regards both ABS firms and LDPs the effect of applying the rule would be that a firm could be "conflicted out" of litigation by instructing a relatively junior member of the firm to undertake a minor piece of work. The Board considers that such firms or partnerships would be placed under such a disadvantage by this rule that it would be a considerable disincentive to them to form those structures, contrary to the legislative purpose.

60. It is arguable that if the "cab rank" rule does not apply to ABSs or LDPs it should not apply to partnerships of barristers either, if these are permitted. The possibility of "conflicting out" applies equally to such partnerships, and could be a particular problem in specialist partnerships. Some argue that the "cab-rank" rule is not required or justified by considerations of access to justice. The rule does not apply to solicitors; and there is no evidence that members of the public are unable to find solicitors to represent them because of the nature of their case. Although there is evidence of so-called advice deserts in areas of publicly funded work, this appears to be because solicitors are unwilling to undertake this work because they perceive the fees offered to be uneconomic. Since legal aid fees in family and criminal work are not deemed to be reasonable fees for the purpose of the "cab-rank" rule, abolition of the rule is unlikely to make any difference in these circumstances.

⁶ However, all barristers who supply advocacy services are subject to paragraph 601 of the Code, which forbids them to withhold such services on the grounds that the nature of the client's case is objectionable; or that the client's conduct or opinions are unacceptable; or on any ground relating to the source of any financial support that may be given to the client.

61. It is also argued that the various exceptions to the “cab-rank” rule enable barristers to avoid it for perfectly legitimate reasons, for example by deciding that they are too busy or by asking a high fee.
62. Against these arguments, it could be contended that the risk of members of a partnership of barristers being “conflicted out” of cases in the way described, and so losing the opportunity of earning what might be substantial fees, would be one of the considerations that would be taken into account by barristers contemplating entering into a partnership. If the balance of advantage is held to favour abolishing or modifying the “cab-rank” rule as regards barristers supplying legal services in one form of business, it does not follow that the balance of advantage will lead to the same conclusion as regards barristers in another form of business. On that basis, it is argued that the “cab-rank” rule should be retained for partnerships of barristers, and that the market for the provision of legal services should be relied on to provide a satisfactory outcome.
63. The Board considers that in any event the substance of paragraph 601 should be retained. It regards the arguments relating to the “cab-rank” rule in Paragraph 602 as much more evenly balanced. There may be legal difficulties, in terms of restrictive practices, in applying the “cab-rank” rule to partnerships of barristers only while at the same time allowing barristers to practise in ABSs and LDPs free from the rule.
64. The Board’s initial view is that there does not appear to be enough evidence to justify applying the cab-rank rule to partnerships of barristers alone that it regulates, while disapplying the rule to ABSs and LDPs.

Q. 2 How effective in practice, in your experience, is the “cab-rank” rule in securing for clients the Counsel of their choice? Do you consider that the adverse consequences mentioned above are likely to occur if the rule is abolished? If so, how could they be reduced or avoided?

Q. 3 Do you agree that it will not be possible to apply the “cab-rank” rule to barristers practising in ABS or LDP firms?

Q. 4 Should the “cab-rank” rule, as set out in paragraph 602 of the Code of Conduct, be abolished as regards barristers who are members of a partnership of barristers?

The “cab-rank” rule: self-employed barristers

65. The Board is aware that most self-employed barristers regard the cab-rank rule as an essential part of their identity and a protection of their independence. The disadvantages that the rule would cause to firms do not really affect the self-employed Bar; nor is the argument based on potential conflicts of interest leading to restriction of choice of advocate relevant to sole practitioners. It would, therefore, be perfectly possible for the rule to continue to apply to self-employed barristers without causing any major difficulties. Against that it could be argued that in order to provide a “level playing field” if the rule is abolished as regards barristers practising in partnerships or ABS firms it should also be abolished as regards self-employed barristers. The rule could then be seen as a restriction on the freedom of self-employed barristers.

Would it be justifiable, in the public interest, if the rule had been disapplied to barristers working in ABSs, LDPs and partnerships of barristers?

Q. 5 If the "cab-rank" rule is abolished as regards barristers practising in ABS firms and partnerships, should it also be abolished as regards sole practitioners?

Part III: Issues relating to practice in new business structures and partnerships

In what business entities should barristers be permitted to practise?

66. What business structures for the provision of legal services to the public are permissible is a matter for Parliament, not the Board. The question for the Board is whether barristers should be prohibited from providing legal services to the public (including clients of a firm) through particular forms of business entity otherwise than as employees⁷, or should be allowed to do so only under conditions relating either to their own activities or to the business. It is important in considering this and related questions to remember that the Code of Conduct lays down the requirements for practice as a barrister and standards of conduct relevant to such practice⁸. The Code makes it clear⁹ that a barrister practises as a barrister if he or she supplies legal services¹⁰. It is not the purpose of the Code to prescribe what other forms of activity a barrister may or may not undertake or what financial interests a barrister may have, provided that he or she does nothing that would bring the Bar into disrepute. Hence the questions posed in this paper relate to what should be laid down regarding practice as a barrister.¹¹
67. As an illustrative example, one might take the case of a medical practitioner who was also qualified as a barrister and who was a manager of an ABS firm specialising in medical negligence cases. Clearly the Board could not forbid that person to act as a manager of the firm. The questions for the Board would be whether he or she should be permitted to practise within the firm as a barrister, i.e. supply legal services; and (if not, as a secondary question) whether he or she should be allowed to be described as a barrister in connection with the firm's activities.

Alternative Business Structures: should a barrister be allowed to provide legal services as manager¹² of an ABS firm?

68. Under the existing rules of conduct barristers are allowed to supply legal services to the public as self-employed persons or as employees of solicitors. They are not allowed to do so through or on behalf of any other person (including a company, partnership or other corporate body)¹³. It is clear that if a barrister is to be able to practise while acting as a manager or an employee of an ABS firm these rules will have to be relaxed.

⁷ An amendment to the Code would be required even to allow a barrister to be *employed* by an ABS or LDP: the current exception is limited to employees of solicitors or other authorised litigators.

⁸ Paragraph 104.

⁹ Paragraph 201.

¹⁰ Defined in paragraph 1001 as including advice representation and drafting of legal documents, with several specific exceptions.

¹¹ There is also a secondary question which it would in the Board's view be premature to raise at this stage regarding the circumstances in which a barrister should be allowed to describe him or herself as such.

¹² Defined in the Act as a partner, director or other member of the governing body.

¹³ Paragraphs 205 and 502 of the Code of Conduct.

69. Should the rules be relaxed in this way? The Board's view is that they should. To prevent barristers from providing legal services as managers or as employees of ABS firms would be open to objection both as frustrating the will of Parliament in enacting the Act and as unreasonably restrictive of competition in the provision of legal services. It could be justified only if there were strong arguments of public interest for maintaining the restrictions mentioned in the previous paragraph under the new regime.

Q. 6 Should the Code of Conduct be revised so as to permit a barrister to supply legal services to the public while acting as manager or as an employee of an ABS firm? If not, what are the arguments that would justify retaining the present restrictions (or something closely akin to them)?

Legal Disciplinary Practices and partnerships of barristers

70. Businesses which are wholly owned and managed by lawyers will not come under the regime created by the Act to regulate ABSs. Businesses which are predominantly owned and managed by lawyers will in due course come under the ABS regime, but in the meantime the Act gives the Law Society through the SRA new powers to enable it to regulate them provided that they have at least one solicitor, registered European lawyer or approved body as a member. For convenience, both categories are called "Legal Disciplinary Practices" (LDPs) in this paper, but the second category will cease to exist once the ABS regulatory regime comes into force. In this interim period, and for the future in relation to the first category of LDPs, the question arises whether barristers should be permitted to be a manager or owner of an LDP and, more widely, whether they should be allowed to participate in other forms of partnership. The range of possibilities, in broad outline, is:
- (a) partnerships of barristers alone;
 - (b) partnerships of barristers and other lawyers;
 - (c) partnerships of barristers and non-lawyers, with or without other lawyers.

However, the last of these would fall to be regulated as ABS firms in due course, in respect of which the relevant arguments are set out in paragraph 67 above. The transitional provisions for such types of ABS are addressed in section VIII of this Paper. This section is concerned only with the first two types of possibility.

71. The main issue turns on the fact that a barrister in partnership could not act against another member of the partnership, because there would be a conflict of interest. In specialist fields this could give rise to serious problems of access to justice: it would even be possible to "conflict out" the entire market by asking barristers in all of a small number of partnerships for an opinion. It may well be that this prospect would deter most sets of Chambers from forming a partnership. However, that is not a conclusive reason for prohibiting those who do wish to form such partnerships from doing so. Such a prohibition would, among other things, mean that solicitors could form partnerships, or practise with other lawyers in an ABS firm, to provide advocacy services while barristers wishing to join such entities otherwise than as employees would have to requalify as solicitors. It could be argued that this was objectionable both as running counter to the spirit of the Act and as unreasonably restricting competition in the provision of legal services.

Arguments against allowing barristers to practise in partnerships

72. The Board is aware that fears have been expressed that the arrival of ABS firms may adversely affect access to justice. It is argued that such firms may take profitable work away from local solicitors; that those solicitors may consequently be unable to undertake less profitable work; and that, as a result, people may be unable to obtain legal advice. In view of these arguments, the Act requires Licensing Authorities to consider the implications for access to justice before granting particular licences. The Bar's previous refusal to amend the ban on partnerships for self-employed barristers was based on similar considerations.
73. It has been argued¹⁴ that access to justice is the principal reason for prohibiting barristers from entering into partnerships. The argument is that barristers provide an important source of expertise as advocates and advisers, particularly in niche areas of the law. There are relatively few barristers who specialise in such areas as defamation, competition and tax law, and most of them operate from a small number of sets of chambers. The fact that barristers are not in partnership with each other and have no financial interest in the success of their colleagues means that they can appear against their colleagues in chambers without any conflict of interest arising. The same arguments applied to barristers in the provinces where barristers tend to practise from a relatively small number of sets of chambers.
74. This, it is argued, has the beneficial effect of allowing chambers to develop specialisms, and for the public to be able to instruct the full range of practitioners without finding that a substantial proportion of specialists in one area or town were conflicted out. It is suggested that there is a real danger that if many barristers took advantage of a relaxation of the rules the number of barristers available to the public would be reduced significantly, thus causing considerable problems of access to justice.
75. It is also argued that the ban on partnerships fosters the independence of barristers in that the fact that they are not part of any formal structure enables them to provide impartial advice to clients; and that the competitive nature of the Bar fosters expertise.

Arguments in favour of allowing barristers to practise in partnerships

76. Against the arguments in paragraphs 72 to 75 above, there is much to suggest that the present model of self-employment provides a cost-effective and attractive way for individuals to offer specialist legal services. The chambers structure provides many of the advantages of partnership without what some would perceive as the disadvantages. There has been no significant demand from the Bar for a relaxation of the rules. This suggests that such a relaxation would not result in a headlong rush into partnerships.
77. In addition, there would be substantial disadvantages to barristers in entering into partnerships, and they would tend to militate against any adverse effects on access to justice. If specialist chambers did form partnerships it is likely that the amount of work that they would be able to take on would be

¹⁴ See, for example, the report of the Kentridge Committee in 2001.

substantially reduced, so that it would be unlikely to be in their commercial interests to do so.

78. Against this, however, it must be noted that partnership (or incorporation) can provide advantages for those offering services. It is likely to be easier to raise finance, and there are tax advantages. The Board considers that there must be strong reasons to justify preventing individuals availing themselves of these advantages if they wish to do so. If the rules are relaxed, barristers will have to weigh up the advantages and disadvantages of each form of business structure and consider which will suit them best. It is not clear to the Board that the answer is obvious in every case.

The Board's conclusions

79. Since the 1990s it has been possible for barristers to go into partnership by qualifying as solicitors without any reduction in their rights of audience and with, indeed, an increase in the sort of work that they are entitled to do. A number of barristers have taken advantage of this (and a number of solicitors have transferred to the Bar) but, overall, the self-employed Bar has continued to grow. This does not suggest that there is any strong market incentive for barristers to become partners.
80. As to the argument that self-employment makes barristers more independent, the Board is not aware of any evidence of significant harm to the public interest arising from the fact that solicitors, who have duties to their partners, are permitted to exercise rights of audience.
81. Paragraph 68 suggests that unless strong arguments to the contrary based on the public interest can be advanced barristers should be permitted to practise while acting as managers of ABSs. The Board's present view is that if barristers are permitted to practise in ABS firms, then participation in LDPs should be similarly allowed. It is difficult to see any justification for permitting barristers to co-manage firms with solicitors and non-lawyers in an ABS firm, but not with solicitors alone, or solicitors and non-lawyers, in a LDP.
82. The Board therefore considers that it is likely to be in the public interest for the prohibition on barristers practising in such partnerships to be abolished.
83. If barristers are allowed to practise as members of partnerships which also have solicitor members -that is LDPs - consequential questions will be whether the prohibition in paragraph 307(f) against handling clients' money or other assets and the restrictions in paragraph 401(b) should be extended to barrister members of LDPs. Paragraph 401(b) forbids self-employed barristers from, among other things:
- (a) undertaking the management of a lay client's affairs;
 - (b) conducting litigation;
 - (c) investigating or collecting evidence for use in court;
 - (d) taking any proof of evidence in a criminal case.

It could be argued that the present restrictions should be maintained since the solicitor member or members of the LDP will be able to deal with the relevant matters. On the other hand, it may be difficult or impractical to require that this should happen in all cases, especially as regards the management of a lay

client's affairs; and the regulatory requirements likely to be imposed on the LDP by the SRA would provide substantial safeguards for clients¹⁵. Part V of this paper asks whether these restrictions should be maintained for barristers in self-employed practice, and the issues are considered further there. If removed for self-employed barristers, the restrictions should obviously not be extended to barristers practising in LDPs.

- Q. 7 Should the Code of Conduct be amended to allow barristers to provide legal services to the public while acting as a manager of an LDP?**
- Q. 8 Should the Code of Conduct be revised so as to permit a barrister to provide legal services to the public while a member of a partnership? If so, in what kinds of partnership?**
- Q. 9 As regards barristers who are members of Legal Disciplinary Practices with at least one solicitor member should the restrictions in paragraph 307(f) and paragraph 401(b) be maintained? Or should some or all be removed?**

¹⁵ It might be appropriate to endorse the Practising Certificate of any barrister participating in a LDP to the effect that he or she was obliged to observe such regulatory requirements.

Part IV: Issues relating to regulation of business entities and their members

Business and professional regulation

84. The Board considers that there is an important distinction to be drawn between two types of regulatory issue:
- (a) Those which relate to the actions or management of a business entity as a business (business regulation); and
 - (b) Those which relate to the professional conduct (within the entity or elsewhere) of the barrister as a barrister¹⁶ (professional regulation), such as the obligation not to mislead the court or to “invent” a client’s case for him.
85. The same set of circumstances may, of course, raise matters relevant to both business and professional regulation. For instance, if a firm were guilty of systematically defrauding its clients, and a barrister in that firm were aware of it, the business regulator could be expected to take action against the firm, and the professional regulator to take action against the barrister, since it can be taken for granted that condoning or collaborating with dishonest behaviour to the detriment of clients would be an offence under the Code of Conduct or any successor to it.
86. However, matters engaging the attention of the business regulator will not necessarily require action by the professional regulator. To continue with the example in the previous paragraph, if the barrister, so far from being aware of any wrongdoing, had taken all reasonable steps to satisfy him or herself that all persons handling clients’ money were properly qualified, and were believed on what seemed to be good evidence to be honest, and that the firm’s financial systems were sound and had been inspected by qualified internal and external auditors, it is hard to see how he or she could be regarded as guilty of professional misconduct. But the business regulator could still be expected to take action against the firm.
87. This distinction between business and professional regulation is well understood and practised without difficulty in many areas. For example, a NHS Trust in England will be regulated, as a Trust, by the Department of Health or one of its subsidiary organisations and the Healthcare Commission. Its directors may well include a medical practitioner, a solicitor, a nurse and an accountant, all of whom will be accountable for their actions as professionals to their professional regulator. There are four such regulators, each of which is concerned solely with the actions of the professional who is regulated by it and not with the actions of the other professionals or with the conduct of the Trust as a Trust.

¹⁶ Some forms of personal activity may also engage professional regulation, for instance if they suggest that a barrister is not fit to be a member of the Bar or are likely to bring the Bar into disrepute. However, it is unnecessary to consider that point further in the present context.

Which barristers should the Board regulate as professional regulator?

88. The Board believes that it should be the prime regulator of the professional conduct of barristers in whatever organisation they may practise. In particular, it believes that it should be the prime regulator of the professional conduct of barristers in ABS or LDP firms, whether as managers or employees. This because:
- (a) the professional conduct of barristers is regulated by the Code of Conduct. The Board is the sole authority as regards the terms of the Code, and it and the disciplinary bodies under its aegis are (subject to the control of the Courts) the only bodies with expertise in interpreting and applying the Code. It would be wrong to fragment this system;
 - (b) even if it were in principle acceptable to allow another regulatory body to apply the Code of Conduct to members of the Bar, it is far from clear that any alternative body would be willing, or have the legal power, to do so.

Even where the barrister does not provide legal services, and so is not “practising” or supplying legal services for the purpose of the Code, he will be subject to the provisions of the Code regulating the conduct of non-practising barristers, including the restrictions on the use of the title “barrister”.

89. However, under the Act all ABS regulators will have power over managers and employees, including barristers, of regulated firms. It is possible that such a regulator may decide that a barrister’s conduct makes him or her unsuitable to work in a regulated firm, but only the Board will be able to remove a barrister’s practising certificate. In practice this will need to be governed by protocols between regulators, subject to the supervision of the LSB. Similarly, it will be necessary to deal with situations in which there is a divergence between the rules imposed by different regulators. For instance, the business regulator might allow a type of conduct forbidden by the professional regulator. In practice, this is unlikely to create serious problems. Certainly it has not done so in the case of barristers working in solicitors’ offices.

Q. 10 Is the Board right in its view that, subject to the point mentioned in paragraph 89 above, it should be the prime regulator of the professional conduct in ABS firms of barristers in England and Wales? If not, who might alternatively or additionally exercise that role?

Q.11 Do you foresee any serious problems arising if there is a divergence between the rules of different regulators? If so, what might they be?

What business structures should the Board regulate as business regulator?

Alternative Business Structures

90. Should the Board seek in future to become a licensing authority for ABS firms? The main arguments in favour of its doing so are as follows.
- (a) issues of business regulation raised by the conduct of a firm, especially in the provision of advocacy services and possibly in the provision of specialist legal advice, are likely to have much in common

with issues of professional regulation relevant to such activities, which are substantially the province of the Bar. There would be advantages in having the two types of issues dealt with by a single body whose experience and expertise would be relevant to both;

- (b) for somewhat similar reasons, adverse findings in this sort of area by the business regulator are likely to raise issues for the Board as the professional regulator of barristers. To have a single body responsible for both business and professional regulation would reduce the risks that a barrister will face a type of “double jeopardy”, and that the professional regulator will reach conclusions which either are or seem to be at variance with findings by the business regulator;
- (c) clients who wished to complain both about the conduct of litigation or the provision of advice by a firm and about the actions of a barrister manager or employee of that firm would find it more difficult to pursue their complaint effectively if they had to deal with two regulatory authorities with respect to what was essentially the same set of actions. The creation of a new complaints authority under the Act will reduce this problem, but is unlikely to remove it;
- (d) there may not be an alternative regulator, apart from the LSB itself, for ABSs consisting only of barristers and non-lawyers.

91. The main arguments against are as follows:

- (a) the Board does not believe that it would be satisfactory to regulate an ABS firm as a business by applying the rules of the Code of Conduct to its members. Although there is a significant overlap between matters that raise issues of professional regulation and those that raise issues of business regulation the two, as pointed out in paragraph 86 above, are not coterminous. Moreover, even if reliance on the Code of Conduct were adequate to deal with the business regulatory aspects of acts and omissions by barristers involved with the firm, it would be unlikely to be adequate to deal with the acts or omissions of members of other professions, or none, who were involved with the firm. The Board would therefore have to develop a substantial new expertise in the formulation, application and enforcement of rules of business regulation. It does not at present have the ability or the resources to do that on any significant scale;
- (b) in particular, it does not have the accountancy and financial expertise that would allow it to exercise effective supervision over the financial health of a firm or the proper conduct and control of its financial affairs, including the handling of clients’ money. There would therefore be significant cost implications for the regulation of certain types of business. Although the Board could, in time, provide this kind of regulation, the cost would be likely to be disproportionately great unless either the majority of barristers wished to be regulated in this way (and were willing to pay for it) or all barristers, including those who did not wish to be regulated, were willing to pay for it, or unless the Board could effectively draw on the SRA’s monitoring arrangements in relation to handling clients’ money;
- (c) ABSs will be able to take on many different forms and to carry on many different activities in addition to providing legal services. It would be a major undertaking to seek to regulate all types of entity in which a practising barrister might be a manager;
- (d) it seems inevitable that several regulators will often have an interest in the conduct of a firm, or of its managers and employees. It seems

likely, for instance, that not only barristers and solicitors but also accountants, actuaries and financial advisers will be involved in the activities of ABS firms. There is thus a possibility of conflict between the relevant rules of professional conduct and the decisions of the Board as business regulator. However, it should be possible to deal with such conflicts by such devices as memoranda of understanding allowing one regulatory body to act as the agent or delegate of another, or rules providing that findings of fact by one regulatory body are to be treated as conclusive as to those facts (but not of the consequences to be founded on them) by others¹⁷. Moreover, the problem, if such it is, will arise whichever body is the business regulator: it affects the Board no more seriously than any other body.

Q. 12 Should the Board seek to become a licensed regulator of ABS firms? If so, should it confine that role to the regulation of firms wholly or mainly engaged in the provision of advocacy services, or advocacy services and legal advice, as the arguments above may suggest would be appropriate?

Legal Disciplinary Practices with both barrister and solicitor members

92. The SRA has no power to regulate LDPs that do not include at least one solicitor, registered European lawyer or approved body member. Hence if LDPs consisting only of barristers come into existence the natural business regulator would be the Board. Indeed, the Board would appear to be the only available business regulator. As regards LDPs consisting of barristers and non-lawyers, they will come under the ABS regulatory regime when that takes effect. However, it is possible that such LDPs could be formed before then; if so, the Board would again be the natural (and only) business regulator.
93. In the Board's view, the regulatory issues raised by LDPs in which barristers but not other lawyers participate are essentially the same as those raised by partnerships of barristers. They are discussed in paragraphs 97 to 101 below. The transitional period is discussed in Part VIII below.
94. An LDP with both barrister and solicitor managers might in principle be regulated by either the Board or the Solicitors' Regulation Authority (SRA). There appear, at least in theory, to be five options:
 - (a) all should be regulated by the SRA;
 - (b) all should be regulated by the Board;
 - (c) those in which solicitors were in the majority would be regulated by the SRA, and those in which barristers were in the majority should be regulated by the Board;
 - (d) the Board should regulate LDPs undertaking only the type of work currently undertaken by the self-employed Bar: in practice, these would probably be largely confined to LDPs of both barristers and solicitors specialising in advocacy/litigation work;
 - (e) the LDP should have the choice.

¹⁷ The medical profession, among others, already has such rules.

Whichever option is preferred, the Board considers that it should remain responsible for the professional regulation of the barrister members and the SRA for that of the solicitor members of a LDP.

95. The second option, (b), can be dismissed. Parliament had already conferred regulatory power on the SRA and the Board could not in practice compel all LDPs of this kind to be regulated by the Board. The SRA is far more experienced and better equipped to act in relation to firms that predominantly do solicitors' work and handle clients' money. The same arguments are relevant to the third option, (c), this solution is not within the gift of the Board. Moreover, such a solution could lead to transitional difficulties after a change in the balance of membership in the LDP.
96. In principle, the Board is inclined to favour the fourth option, (d), for reasons analogous to those advanced in paragraph 81 above. However, the Board currently may have no legal power to regulate LDPs. If such powers are not conferred on the Board, the only feasible option is that all LDPs with both solicitor and barrister members should be regulated by the SRA.

Q. 13 Do you consider that the Solicitors' Regulation Authority should be the business regulator for all LDPs with solicitor and barrister members? Or should the Board seek to power to regulate LDPs? If so should the powers be confined to regulation of LDPs undertaking the type of work currently undertaken by the self-employed Bar? Within what timescale should the power be available to be exercised by the Board?

Partnerships of barristers

97. The thrust of earlier parts of this paper is to suggest that it would be right in future to permit barristers to supply legal services in association with other lawyers and non-lawyers, or with other lawyers only. If that is right it is hard to see grounds for preventing them from providing such services in association solely with other barristers and more particularly in partnership with other barristers. In future, a firm of barrister managers with a non-lawyer who holds a 1% (or smaller) shareholding will be an ABS firm. Any barristers wishing to form a partnership will therefore be able to evade without difficulty any restriction in the Code by selling a small share in their business. Paragraphs 102 to 106 below consider certain regulatory issues relevant to such partnerships. They assume that other forms of business association involving barristers and providing legal services would be regulated either as ABS firms or as LDPs. Other possible forms of business association between barristers and others that do not amount to ABSs or LDPs are considered under Part V below.
98. Although the arguments of principle for permitting barristers to provide legal services as members of a partnership are similar to those for permitting them to do so by participation in an ABS firm or a LDP, many of the considerations relating to the appropriate regulatory regime for barristers providing legal services in an ABS firm or a LDP do not necessarily apply to the provision of legal services as a member of a barrister only partnership. In particular:
- (a) it can be argued that there is no reason why such partnerships should offer services other than the advisory and advocacy services already

offered by sole practitioners: indeed, a partnership of barristers would not normally have the expertise to do so;

- (b) it would be much easier to found the business regulation of partnerships of barristers on the professional regulation of the individual partners than it would be so to found the business regulation of an association including not only barristers but also persons subject to different professional regulation or to none.

99. The Board therefore suggests that partnerships of barristers should in future be permitted, but that their activities should be required to be confined to the provision of services which are provided by the self-employed Bar - essentially, advocacy and the provision of legal advice – or which will in the future be provided by the self-employed Bar¹⁸.

100. If that suggestion is correct, it follows that the Code of Conduct will not need radical changes in order to regulate partnerships of barristers. However, it may be considered that some extension and strengthening of the rules of conduct would be appropriate with a view to ensuring that the governance of such partnerships was of a high standard in order to safeguard the interests of clients. The rules might, for example, require:

- (a) the designation of individual partners as responsible for finance and administration; compliance with professional and regulatory standards; avoidance of unlawful discrimination against partners, staff or clients; effective complaints handling;
- (b) engaging suitably qualified and experienced staff in such areas;
- (c) making satisfactory arrangements for avoiding conflicts of interest and breaches of client confidentiality.

101. A further consideration is that a partnership with more than a few members might well employ significant numbers of staff. There is nothing in the present rules of conduct to prevent barristers from employing staff (though they must take responsibility for anything that goes out in their name): equally there is nothing in the rules that lays down positive requirements regarding the employment or management of staff. It is arguable that there should be such provision in future.

Q. 14 Do you agree that partnerships of barristers to supply legal services should be permitted?

Q. 15 If partnerships of barristers to supply legal services are permitted, should the activities of such partnerships be restricted to providing the types of service provided by sole practitioners, that is, essentially advisory and advocacy services? If not, what additional types of service should be permitted?

Q.16 Would it be sufficient to rely on the rules of professional conduct to regulate such partnerships, subject only to possible additional rules to strengthen the requirements related to governance of the partnership? If not, what alternative or additional rules would be needed?

¹⁸ See Part V below.

Q. 17 What measures, if any, do you consider would be appropriate to strengthen the requirements related to the governance of such partnerships?

Q. 18 Is there a need for rules relating to the employment of staff by partnerships of barristers?

Part V: The structure of self-employed practice

102. Although the Act has no direct implications for the self-employed Bar, the relaxation of current restrictions on the supply of legal services that it will encourage makes it appropriate to consider whether current restrictions relating to the supply of such services by the self-employed Bar should also be relaxed. Paragraph 403.1 of the Code prohibits self-employed barristers from practising from the office of or in any unincorporated association involving sharing the administration of his practice with any person other than a self-employed barrister and a limited number of other, mostly foreign, lawyers. This rule prevents barristers from entering into arrangements with other professionals, such as accountants or solicitors, whereby a group of people could provide, on a self-employed basis and not as partners, related services from the same office and refer to each other problems within their expertise. Depending on the exact nature of the arrangements, it is possible that such a group could fall outside the definition of an ABS in the Act. In any case, it would be possible for the Board to relax these arrangements before the implementation of the Act.
103. Such arrangements could have the following advantages:
- (a) they would enable barristers and those working with them, particularly in specialist fields, to provide a wider range of services to the public;
 - (b) they would enable barristers to compete more effectively with other organisations providing similar advice;
 - (c) these arrangements could provide the services considerably more cheaply.

There are, however, a number of dangers:

- (a) provision for mutual referral on this basis might mean a loss of independence – barristers might be reluctant to criticise colleagues or might refer work to colleagues even though they were not the most suitable people for the client;
 - (b) the Board would have limited regulatory control over the people who were not barristers;
 - (c) there might be scope for conflicts of rules or interests and for the confusion of consumers over who was offering particular services;
 - (d) the costs needed to provide a suitable regulatory regime might be prohibitive.
104. If paragraph 403.1 were to be relaxed, this could be done in a number of ways:
- (a) barristers could be permitted to share office facilities with another person where there was a complete business separation;
 - (b) barristers could be permitted to practise in association with people who were approved by the Board where (a) the number of non-barristers in the arrangement did not exceed 25%, (b) the services involved were limited to those usually performed by barristers and (c) no clients' money was handled;
 - (c) barristers could be permitted to practise in association with people undertaking the full range of work permitted to those people so that individuals in the association might provide a mixture of litigation,

advocacy and other services and even, if permitted and protected by the relevant regulatory bodies, handle clients' money.

105. The Board's provisional view is that the rule should be relaxed (in so far as this is necessary) to allow the first option. It also considers that, if regulatory difficulties can be resolved, the second and third may be worth exploring. There may, on the other hand, be much to be said for allowing business associations of these kinds to be allowed only in the context of more formal ABS or LDP regulatory structures. In considering whether to relax the rules, the Board will need to consider the following questions.
- (a) should there be mechanisms for establishing whether non-barristers working in such arrangements are fit and proper people to do so? The Board's preliminary view is that, if such associations are permitted, there should be such mechanisms because, even in relatively loose associations there would be scope for members of the public to assume that they could trust all members;
 - (b) should there be mechanisms for prohibiting barristers from working with individuals who have acted dishonestly? The natural inference from a positive answer to the question posed immediately above is that there should be;
 - (c) should there be any rules governing conflicts between the rules of the various professions? In particular, how should these rules govern the different approaches taken to confidentiality and conflicts of interest? The Board's preliminary view is that, if such associations are permitted, provided that it is clear that (a) each professional is working to their own professional rules, (b) they are not in partnership or other form of incorporated association and (c) there are adequate administrative arrangements to manage conflicts and confidentiality, then it should be possible to rely on appropriate rules to protect the public;
 - (d) should people who are not regulated by other professions be permitted to be involved in such arrangements? The Board's preliminary view is that if such involvement is permitted (a) the arrangements should not involve the handling of clients' money; and (b) should provide consumers with absolute clarity about the regulatory status of the individuals involved;
 - (e) what information should be required to be given to the consumers of the services of such associations, if permitted? The Board's view is that the minimum should be (a) a clear description of the nature of the relationship between the individuals; (b) identification of those practitioners who are subject to professional regulation; (c) a clear description of the work that can and cannot be carried out by each; (d) a clear description of how fees are charged; (e) clear information about complaints mechanisms and remedies. It may be appropriate in the first instance for the Board to approve such information;
 - (f) how should the costs of the additional regulation be borne? The Board will need to undertake further work on this; but if heavy initial investment is needed it may prove impractical to permit new arrangements if it is decided that only those taking advantage of the new arrangements should pay for the costs of regulation.
106. If the Board decides to take this option forward, it is likely that a further consultation will be needed on these proposals.

- Q. 19 Should the rules about the persons with whom barristers can share the administration of their practice be relaxed?**
- Q. 20 Should associations short of ABSs or partnerships be considered as described in paragraph 104 above?**
- Q. 21 Is there any demand from barristers or consumers for such associations?**
- Q. 22 Are the considerations set out in paragraph 105 the ones that the Board should consider? Are there others?**

Prohibited Work

107. The Code currently prohibits self-employed barristers from undertaking a number of types of work on behalf of clients. These are:
- (a) the management administration or general conduct of a lay client's affairs;
 - (b) conducting litigation or other *inter partes* work, including corresponding with another party or instructing an expert witness;
 - (c) investigating or collecting evidence for use in any court;
 - (d) taking proofs of evidence in criminal cases;
 - (e) attending at police stations without a solicitor to provide advice to a suspect or interviewee;
 - (f) holding clients' money (other than fees).

These rules do not apply to employed barristers. Indeed, the Board has the power to grant rights to conduct litigation and has exercised that power in respect of employed barristers.

108. The prohibitions exist for a number of reasons. Broadly, these fall under the following headings.
- (a) barristers are not trained to carry out the prohibited activities.
 - (b) self-employed barristers do not have the resources or support to carry them out adequately;
 - (c) there are ethical reasons why it is inappropriate for barristers to carry them out eg to maintain the independence of the barrister;
 - (d) the cost of regulating the activity would be disproportionate given that very few barristers are likely to wish to carry it out;
 - (e) by not carrying out these largely administrative tasks, barristers are better able to concentrate on their core skills and are able to keep their overheads low.

The Board considers that the first four of these reasons are legitimate considerations and intends to examine the proposals in the light of them. It does not consider that the final reason is legitimate. While it may well be the case that barristers will choose not to do particular types of work for that reason, the Board considers that this is a decision best left to the individual barrister rather than one on which the Board should take a view.

Management of a lay client's affairs and conducting *inter partes* work

109. The relevant prohibitions effectively prevent barristers from dealing with much of the day-to-day work that solicitors undertake in administering property, dealing with third parties and conducting negotiations with third parties. In many cases, it will also involve handling clients' money. The majority of self-employed barristers are unlikely to wish to undertake such work because they do not have the resources or desire to undertake it properly. However, the prohibition on conducting *inter partes* work has caused considerable difficulty when barristers take work on a public access basis and find it difficult to negotiate effectively on behalf of their client. Similar difficulties arise in the field of collaborative law in family work.
110. The Board's preliminary view is that it is unlikely that additional training is needed to undertake this work and that, apart possibly from issues about the barrister's independence, there are no ethical reasons why barristers should not do this work if they wish. However, if barristers are to undertake this work then:
- (a) there should be a rule requiring them to have the right resources to undertake the work;
 - (b) insurance to cover the work must be held; and
 - (c) no clients' money, securities or other property should be held.

Conducting litigation

111. Conducting litigation is a reserved activity and the Board is able to grant the rights to undertake this activity: at present they are granted only to employed barristers. The rules of conduct (Annex I to the Code) require that those who wish to gain the rights must have spent 12 weeks under the supervision of a qualified litigator and a further year (or three years if supplying services to the public rather than to an employer) in the office of a qualified litigator. There is also a substantial Continuing Professional Development (CPD) requirement for the first three years.
112. It is unclear exactly what activities are covered by the phrase "the conduct of litigation". However, it clearly covers issuing proceedings, being the address for service and being responsible to the court for the conduct of those proceedings.
113. Many self-employed barristers will not wish to undertake this work because they will not have the time or resources to do so. However, those who undertake public access work or who are not regularly in court may find this a useful additional service that they can provide.
114. The Board therefore proposes to consider:
- (a) whether there should be a module providing training for litigation work in the Bar Vocational Course;
 - (b) how far it is appropriate to modify the training requirements to enable self-employed barristers to undertake this work if they wish; and
 - (c) whether other requirements should be imposed – these would include those set out in respect of managing a client's affairs.

Investigating and taking proofs of evidence

115. Except in limited circumstances, barristers are not permitted to collect evidence (particularly taking witness statements). This is because it is considered that their duty of independence to the court might be compromised either because evidence which they have collected is questioned or because there might be a perception that they have coached the witness.
116. The Board agrees that these are compelling reasons why barristers presenting a case in court should not also collect the evidence. However, this should not prevent barristers who are not involved in the advocacy or, possibly, employees in Chambers carrying out this work. It will consider whether these rules should be amended to allow barristers to undertake this work if they are not advocates in the case or to delegate it to employees. The Board would be grateful for views on whether there are particular safeguards needed in respect of this.

Attending at police stations

117. The prohibition on attending police station interviews is relatively recent (coming into effect in 1999). It arose from concerns that barristers would find themselves unable to appear as advocates in cases if a client's account of events changed. The Board considers that this is not a sufficient reason to apply the prohibition to all barristers. It is not necessarily the case that the barrister attending at the station will be the advocate. It proposes to amend the rule to provide that a barrister should not act in both capacities. This will bring it into line with the proposed policy on collecting evidence.

Holding clients' money

118. Holding clients' money presents particular problems. It presents an obvious opportunity for fraud and, for this reason, the solicitors' rules require adherence to detailed accounts rules and membership of a compensation fund. The SRA employs a substantial staff to monitor compliance and identify risks. The Board could not responsibly adopt a less rigorous approach.
119. The Board considers that it is highly unlikely that self-employed barristers will wish to hold clients' money under these terms. The costs of establishing a compensation fund for the profession are likely to be considerable (see paragraphs 125 to 127 below); and it would be widely regarded as unfair to impose them on members of the profession who will not cause a call to be made on the fund. The costs of establishing the appropriate monitoring arrangements would also be considerable.
120. For this reason, the Board proposes that it will continue to prohibit barristers from handling clients' funds unless they are involved in an ABS firm or LDP which permits such funds to be handled and has appropriate protection which covers the barrister.

Q. 23 Is the Board's approach set out in paragraph 109 – 120 to "prohibited work" activities correct?

Q. 24 Are there further considerations that the Board should consider?

Q. 25 Are there other safeguards (e.g. monitoring) that need to be imposed if the rules are relaxed?

Employees

121. At the moment barristers generally only employ staff to administer their practices. They provide the legal advice themselves and are required by the Code (paragraph 306) to exercise their own personal judgement in their professional activities.
122. This rule, however, does not prohibit barristers from engaging other barristers to do research or drafting for them and it is well established that pupil barristers and junior tenants undertake a good deal of such work for their colleagues.
123. If barristers form partnerships or other corporate structures it is likely that they may wish to employ staff specifically to provide them with legal research or as trainees. They may wish them to undertake work of the sort described above (attending police stations or collecting evidence). Such firms may also wish to employ other barristers. Chambers may well also wish to employ any such people.
124. The Board sees no reason to prohibit such employment provided that:
 - (a) there is proper supervision of the employees;
 - (b) barristers continue to take responsibility for the work of the employees;
 - (c) chambers has appropriate mechanisms for ensuring that it complies with employment law and good practice.

Q. 26 Is the approach to handling clients' money outlined in paragraphs 118 to 120 correct?

Q.27 If it is, are further amendments needed to the Code to give it effect?

Part VI: Compensation arrangements

125. Many of the possibilities considered in this paper would allow barristers to become involved either as individuals or as participants in a business organisation in the handling of clients' money or other assets. Clearly such clients must be protected against loss resulting from the incompetence or misconduct of a barrister in this situation.
126. As regards barristers in ABS firms or LDPs it is reasonable to assume that the requirements imposed by the relevant regulatory authorities would include the maintenance of adequate indemnity insurance and insurance against loss resulting from professional negligence by business organisations, those who participate in them, or both. No doubt, too, organisations and professional participants in them would be required to contribute to the maintenance by their profession of any general fund set up to compensate clients suffering losses occasioned by misconduct or incompetence in the management of their money or business affairs and not otherwise covered.
127. However, the Bar does not maintain such a fund - in present circumstances there has been no need for it to do so. If the view were taken that under the new regulatory regime such a need might arise:
- (a) barristers whose activities were capable of giving rise to a need for compensation for losses occasioned by impropriety or incompetence in the handling of clients' money or business affairs might participate in the funding of compensation arrangements maintained by other professions. This would, of course, depend on the willingness of other professions to allow such participation. They might be unwilling to do so, especially in respect of organisations consisting solely of barristers.
 - (b) the Bar could establish a compensation fund to protect clients who sustained losses due to the incompetence or misconduct of a barrister in the handling of a client's money or business affairs. The question would then arise whether such a fund, if set up, should be financed by the profession as a whole, or only by those members of the profession who were engaged in activities that might result in such losses. Essentially that would mean activities involving the handling of clients' money or other assets.

Q. 28 Is there likely to be a need under the new regulatory regime to set up a fund to compensate clients who have sustained financial loss as a result of the misconduct or incompetence of a barrister? In what circumstances might such compensation be appropriate?

Q. 29 If such a fund were set up, how should it be financed?

Part VII: Other possibilities

128. This paper does not set out to consider every type of business organisation that could involve barristers: indeed, it would be impracticable to try to do so. However, it may be that respondents can foresee the emergence of organisations not dealt with by this paper and raising issues not considered in it. In particular, some forms of business structure such as limited liability partnerships and companies would have limited liability. How would this affect the interests of clients?

Q. 30 Do you consider that there is a likelihood that types of business organisation involving barristers will emerge that are not considered in this paper? If so, what might they be? And what regulatory issues would they raise?

Part VIII: Transitional issues

129. If changes are made to the Code of Conduct in response to the regulatory regime established by the Act, the questions will arise whether some or all of those changes should be brought into effect before the regime is in force, and whether transitional provisions are required. The Board considers that it will be better to consult on these matters when the position for the longer term is clearer. However, if the Board's provisional views are confirmed, changes will have to be brought into effect to allow barristers to practise in LDPs regulated by the SRA, assumed to be in early 2009.

130. Apart from this, there is one particular point on which the Board would be grateful for views at this stage. Partnerships of barristers, without solicitors but with some managers who are non-lawyers will eventually fall to be regulated as ABS firms. But before then they could be regulated by the Board and could come into existence as soon as the Code of Conduct is amended to allow barristers to practise in partnership with solicitors, other barristers and non-lawyers, in late 2008 or early 2009. Without solicitors, the SRA will have no power to regulate them. Hence there will be a regulatory gap before the ABS regime comes into force unless either the Board is given power to regulate such LDPs or barristers are forbidden to practise in them. Similarly, although the SRA would have power to regulate a firm with many barristers and few solicitors and non-lawyer managers, it might not wish to do so. The Board would be grateful for comments on this issue, in particular on what kinds of firm might be expected to be formed should the Code allow barristers to practise in such firms and within what timescale

Q. 31 Should the Board seek power to regulate LDPs consisting of barristers and non-lawyers? Or should barristers continue to be forbidden to supply legal services in such partnerships until the regulatory regime for ABS firms is in force? If the Board should seek such power, by when should that power be available to the Board?

Part IX: Summary of questions

This paper poses the following questions.

The General Approach and the “cab-rank” rule

- Q. 1 Do you agree with the general approach set out in paragraphs 16 to 20 above?
- Q. 2 How effective in practice, in your experience, is the “cab-rank” rule in securing for clients the Counsel of their choice? Do you consider that the adverse consequences mentioned above are likely to occur if the rule is abolished? If so, how could they be reduced or avoided?
- Q. 3 Do you agree that it will not be possible to apply the “cab-rank” rule to barristers practising in ABS or LDP firms?
- Q. 4 Should the "cab-rank" rule, as set out in paragraph 602 of the Code of Conduct, be abolished as regards barristers who are members of a partnership of barristers?
- Q. 5 If the "cab-rank" rule is abolished as regards barristers practising in ABS firms and partnerships, should it also be abolished as regards sole practitioners?

Issues relating to practice in the new business structure and partnership

- Q. 6 Should the Code of Conduct be revised so as to permit a barrister to supply legal services to the public while acting as manager of an ABS firm or LDP? If not, what are the arguments that would justify retaining the present restrictions (or something closely akin to them)?
- Q. 7 Should the Code of Conduct be amended to allow barristers to provide legal services to the public while acting as a manager of an LDP?
- Q. 8 Should the Code of Conduct be revised so as to permit a barrister to provide legal services to the public while a member of a partnership? If so, in what kinds of partnership?
- Q. 9 As regards barristers who are members of Legal Disciplinary Practices with at least one solicitor member should the restrictions in paragraph 307(f) and paragraph 401(b) be maintained? Or should some or all be removed?

Regulation of business entities and their members

- Q. 10 Is the Board right in its view that, subject to the point mentioned in paragraph 89 above, it should be the prime regulator of the professional conduct in ABS firms of barristers in England and Wales? If not, who might alternatively or additionally exercise that role?
- Q. 11 Do you foresee any serious problems arising if there is a divergence between the rules of different regulators? If so, what might they be?
- Q. 12 Should the Board seek to become a licensed regulator of ABS firms? If so, should it confine that role to the regulation of firms wholly or mainly engaged in

the provision of advocacy services, or advocacy services and legal advice, as the arguments above may suggest would be appropriate?

- Q.13 Do you consider that the Solicitors' Regulation Authority should be the business regulator for all LDPs with solicitor and barrister members? Or should the Board seek to power to regulate LDPs? If so should the powers be confined to regulation of LDPs undertaking the type of work currently undertaken by the self-employed Bar? Within what timescale should the power be available to be exercised by the Board?
- Q. 14 Do you agree that partnerships of barristers to supply legal services should be permitted?
- Q. 15 If partnerships of barristers to supply legal services are permitted, should the activities of such partnerships be restricted to providing the types of service provided by sole practitioners, that is, essentially advisory and advocacy services? If not, what additional types of service should be permitted?
- Q. 16 Would it be sufficient to rely on the rules of professional conduct to regulate such partnerships, subject only to possible additional rules to strengthen the requirements related to governance of the partnership? If not, what alternative or additional rules would be needed?
- Q. 17 What measures, if any, do you consider would be appropriate to strengthen the requirements related to the governance of such partnerships?
- Q. 18 Is there a need for rules relating to the employment of staff by partnerships of barristers?

The structure of self-employed practice

- Q. 19 Should the rules about the persons with whom barristers can share the administration of their practice be relaxed?
- Q.20 Should associations short of ABSs or partnerships be considered as described in paragraph 104 above?
- Q. 21 Is there any demand from barristers or consumers for such associations?
- Q. 22 Are the considerations set out in paragraph 105 the ones that the Board should consider? Are there others?
- Q. 23 Is the Board's approach set out in paragraph 109 -120 in respect of "prohibited work" correct?
- Q. 24 Are there further considerations that the Board should consider?
- Q. 25 Are there other safeguards (e.g. monitoring) that need to be imposed if the rules are relaxed?
- Q. 26 Is the approach to handling clients' money outlined in paragraphs 118 to 120 correct?
- Q. 27 If it is, are further amendments needed to the Code to give it effect?

Compensation arrangements

Q.28 Is there likely to be a need under the new regulatory regime to set up a fund to compensate clients who have sustained financial loss as a result of the misconduct or incompetence of a barrister? In what circumstances might such compensation be appropriate?

Q. 29 If such a fund were set up, how should it be financed?

General and transitional

Q. 30 Do you consider that there is a likelihood that types of business organisation involving barristers will emerge that are not considered in this paper? If so, what might they be? And what regulatory issues would they raise?

Q. 31 Should the Board seek power to regulate LDPs consisting of barristers and non-lawyers? Or should barristers continue to be forbidden to supply legal services in such partnerships until the regulatory regime for ABS firms is in force? If the Board should seek such power, by when should that power be available to the Board?

Annex 1 – List of consultees

Bar Standards Board Committees/Panels

Consumer Panel
Complaints Committee
Education and Training Committee
Qualifications Committee
Quality Assurance Committee
Diversity Sub-group

Bar organisations

Chairman of the Bar
All members of the Bar Council
Access to the Bar Committee
Alternative Dispute Resolution Committee
Bar Human Rights Committee
Employed Barristers' Committee
Equality and Diversity Committee
European Committee
Fees Collection Committee
Information Technology Committee
International Relations Committee
Law Reform Committee
Legal Services Committee
Professional Practice Committee
Public Affairs Committee
Remuneration Committee
Training for the Bar Committee
Young Barristers' Committee

All Circuit Leaders
All Heads of Chambers
All Chairs of Specialist Bar Associations

Inns of Court

Association of Women Barristers

Other bodies

Advocacy Training Council
Architects Registration Board
Association of District Judges
Association of Muslim Lawyers
Attorney General
Bar Council of Northern Ireland
Bar Mutual Indemnity Fund
Chancellor of the High Court
Chartered Association of Certified Accountants
Chartered Institute of Patent Attorneys
Chartered Institute of Taxation

Chartered Insurance Institute
Council of HM Circuit Judges
Council of the Inns of Court
Council for Licensed Conveyancers
Citizens' Advice
Crown Prosecution Service
Department for Business, Enterprise and Regulatory Reform
Faculty of Advocates
Faculty of Actuaries
Federation of Small Businesses
Institute of Barristers' Clerks
Institute of Chartered Accountants of England and Wales
Institute of Chartered Secretaries and Administrators
Institute of Legal Executives
Institute of Paralegals
Institute of Trade Mark Attorneys
Justices Clerks Society
Law Centres Federation
The Law Society
Legal Action Group
Legal Complaints Service
Legal Practice Management Association
Legal Services Consultative Panel
Legal Services Commission
Legal Services Ombudsman
Lord Chief Justice
Master of the Rolls
Ministry of Justice
National Consumer Council
Office of Fair Trading
Office of the Immigration Services Commissioner
President of the Family Division
President of the Queen's Bench Division
Revenue and Customs Prosecutions Office
Royal Institute of British Architects
Society of Asian Lawyers
Society of Black Lawyers
Solicitor General
Solicitors Regulation Authority
Which?

Annex 2 - Glossary

This glossary aims to provide definitions for some of the terms used in this Consultation Paper.

Term	Definition
Access to justice	The ability of citizens to obtain advice on their legal rights and to enforce those rights.
Accounts rules	Rules governing how clients' money should be held and accounted for.
Advice deserts	Areas of the country where there are no solicitors willing to provide advice in particular areas of the law – notably publicly funded work
Alternative Business Structures (ABSs)	As defined by the Legal Services Act 2007 (see Part V), an ABS is a body which provides reserved legal services where at least one of the owners or managers is entitled to provide such services and another is not – examples could include a firm of solicitors with their IT Director as a partner or a firm of lawyers owned by an insurance company.
Approved Regulator	A body entitled to regulate people undertaking Reserved Legal Activities (see section 20 of the Act). The Bar Council, the Law Society, the Council for Licensed Conveyancers, the Institute of Legal Executives, the Chartered Institute of Patent Attorney and the Institute of Trade Mark Agents are all Approved Regulators (see schedule 4 to the Act).
Bar Standards Board (BSB)	The Board, established by the Bar Council, to carry out the Council's regulatory functions.
Bar Vocational Course (BVC)	The course that people are required to take following their degree studies in order to qualify as a barrister.
Barrister	An individual who has been called to the Bar by one of the four Inns of Court and who is trained, in particular, to exercise rights of audience in the courts.
Business regulator	The body responsible for regulating the firm or entity in which lawyers offer reserved legal services, but which may not, necessarily, regulate the professional conduct of individual lawyers in the firm.
"Cab-rank" rule	A rule set out at paragraph 602 of the Bar's Code of Conduct, requiring barristers to accept instructions in any case within their expertise and appropriate to their experience and is at an appropriate fee, irrespective of the client, the nature of the case or any belief the barrister may have formed about the client. This rule does not apply where a barrister is already instructed by another party in the case, has special knowledge about the case or the client or where there are other good reasons why it would be wrong for the barrister to take it on.
Clients' money	Money belonging to a client which has been given to a lawyer to finance the costs of the case (for example the instruction of an expert) or for the lawyer to hand on to a third party (for example, the purchase price of a house). It is different from fees owed to a lawyer. Barristers are not permitted to hold clients' money.
Code of Conduct	The rules of professional conduct and standards which barristers are required to obey.

Compensation Fund	A fund to which members of a profession contribute and which provides compensation for clients who have lost money through the dishonesty of their professional adviser. The SRA runs such a fund. The Bar Council does not because barristers are not permitted to hold clients' money.
Conflict of interest	Where a barrister cannot act in the best interests of one client without acting against the interests of another client – the Code of Conduct prohibits barristers from acting where there is such a conflict (thus a barrister could not advise opposing parties in the same case).
“Conflicted out”	Where a barrister is prevented from taking a case because he or she is acting for the other side. In a partnership, a partner would be conflicted if a fellow partner or employee were acting on the other side.
Continuing Professional Development (CPD)	The compulsory further training that barristers (and other professionals) are required to undertake in order to ensure that they remain up to date.
Employed barristers	Practising barristers who are employed to offer legal services. Such barristers may currently offer legal advice to their employers only or, if they are employed by a firm of solicitors, to clients of that firm. Assuming that they have undertaken appropriate training they may exercise full rights of audience and conduct litigation.
Full rights of audience	The right to present a case as an advocate before all courts. Some employed barristers and solicitors only have rights to appear in the county court and below.
Legal Disciplinary Practices (LDPs)	A precursor to ABSs, an LDP is a firm offering reserved legal services up to 25% of the owners are not entitled to provide reserved legal services. These firms may be regulated by the SRA
Legal services	Defined in the Code of Conduct (paragraph 1001) as giving legal advice, providing representation and drafting or settling a legal document.
Legal Services Act 2007	The Act which establishes the new regulatory regime for legal services. The Act sets out the regulatory objectives for the new era, establishes the Legal Services Board and the Office for Legal Complaints and facilitates the establishment of Alternative Business Structures. The Act is not likely to come into force completely until 2010.
Legal Services Board (LSB)	The Board which oversees the work of Approved Regulators and designates licensing authorities.
Licensing Authority	An authority which is also an Approved Regulator and has been designated by the LSB to license ABS firms.
Practising Barrister	A barrister who holds a practising certificate and is thus entitled to appear in court and use the title “barrister” when offering legal services.
Practising certificate	The annual certificate that barristers are required to hold as evidence that they are entitled to practise as barristers.
Professional regulator	The body responsible for regulating the professional conduct of an individual lawyer and, in the event of misconduct, for removing that lawyer’s right to practise.
Proof of evidence	A statement given by a litigant or witness which sets out for a court their recollection of events.
Publicly funded work	Legal work financed by the taxpayer through the Legal

	Services Commission – usually to people who are unable to afford a lawyer. The bulk of publicly funded work is in the fields of criminal and family law.
Pupil barrister	A trainee barrister. Barristers must have undertaken a year's pupillage before they may practise in their own right.
Registered European Lawyer	A lawyer, qualified in one of the EU states, who is registered with the Law Society or the Bar Council. Such a lawyer is entitled to offer legal services in England and Wales using the home qualification and may undertake reserved legal activities. After three years of regular and effective practice, such a lawyer is entitled to become a barrister or solicitor.
Reserved Legal Activities	Under section 12 of the Legal Services Act, reserved legal activities are activities which may only be carried out by people who are granted the right to do so by an Approved Regulator. They are: exercising rights of audience, conducting litigation, conveyancing, probate, notarial activities and the administration of oaths
Rights of audience	The right to present a case as an advocate before a court.
Right to conduct litigation	The right to undertake work ancillary to litigation – for example, issuing proceedings, acting as the address for service. All solicitors have rights to conduct litigation.
Self-employed barristers	Practising barristers who work as self-employed practitioners, usually from Chambers and who form the bulk of practising barristers. All self-employed barristers are entitled to exercise full rights of audience.
Solicitor	A lawyer regulated by the SRA who usually provides initial legal advice to clients and is responsible for managing litigation and other legal transactions. A number of solicitors appear regularly in court.
Solicitors Regulation Authority (SRA)	The body established by the Law Society to carry out the Society's regulatory functions in respect of solicitors.

Annex 3 - Extracts from the Code of Conduct

Prohibition on practising in partnership

205 A practising barrister must not supply legal services to the public through or on behalf of any other person (including a partnership company or other corporate body) except as permitted by paragraph 502.

Prohibition on holding clients' money

307 A barrister must not:

- (a) permit his absolute independence integrity and freedom from external pressures to be compromised;
- (b) do anything (for example accept a present) in such circumstances as may lead to any inference that his independence may be compromised;
- (c) compromise his professional standards in order to please his client the Court or a third party;
- (d) give a commission or present or lend any money for any professional purpose to or (save as a remuneration in accordance with the provisions of this Code) accept any money by way of loan or otherwise from any client or any person entitled to instruct him as an intermediary;
- (e) make any payment (other than a payment for advertising or publicity permitted by this Code or in the case of a barrister in independent practice remuneration paid to any clerk or other employee or staff of his chambers) to any person for the purpose of procuring professional instructions;
- (f) receive or handle client money securities or other assets other than by receiving payment of remuneration or (in the case of an employed barrister) where the money or other asset belongs to his employer.

Prohibitions on self-employed barristers

401 A self-employed barrister whether or not he is acting for a fee:

...

- (b) must not in the course of his practice:
 - (i) undertake the management administration or general conduct of a lay client's affairs;
 - (ii) conduct litigation or inter-partes work (for example the conduct of correspondence with an opposite party, instructing any expert witness or other person on

behalf of his lay client or accepting personal liability for the payment of any such person);

- (iii) investigate or collect evidence for use in any Court;
- (iv) except as permitted by paragraph 707, or by the Public Access Rules, take any proof of evidence in any criminal case;
- (v) attend at a police station without the presence of a solicitor to advise a suspect or interviewee as to the handling and conduct of police interviews.
- (vi) act as a supervisor for the purposes of section 84(2) of the Immigration and Asylum Act 1999.

...

403.1 A self-employed barrister must not practise from the office of or in any unincorporated association (including any arrangement which involves sharing the administration of his practice) with any person other than a self-employed barrister or any of the following:

- (a) a registered European lawyer;
- (b) subject to compliance with the Foreign Lawyers (Chambers) Rules (reproduced in Annex H) and with the consent of the Bar Council a foreign lawyer;
- (c) a non-practising barrister
- (d) a person who is:
 - (i) a lawyer from a jurisdiction other than England and Wales;
 - (ii) a retired judge;
 - (iii) an employed barrister

to the extent that that person is practising as an arbitrator or mediator.

Employed barristers

501 An employed barrister whilst acting in the course of his employment may supply legal services to his employer and to any of the following persons:

- (a) any employee, director or company secretary of the employer in a matter arising out of or relating to that person's employment;
- (b) where the employer is a public authority (including the Crown or a Government department or agency or a local authority):
 - (i) another public authority on behalf of which the employer has made arrangements under statute or otherwise to supply any legal services or to perform

any of that other public authority's functions as agent or otherwise;

- (ii) in the case of a barrister employed by or in a Government department or agency, any Minister or Officer of the Crown;
- (c) where the barrister is or is performing the functions of a justices' clerk, the justices whom he serves;
- (d) where the barrister is employed by a trade association, any individual member of the association.

502 An employed barrister may supply legal services only to the persons referred to in paragraph 501 and must not supply legal services to any other person save that whilst acting in the course of his employment:

- (a) a barrister employed by a solicitor or other authorised litigator or by an incorporated solicitors' practice may supply legal services to any client of his employer;
- (b) a barrister employed by the Legal Services Commission may supply legal services to members of the public;
- (c) a barrister employed by or at a Legal Advice Centre may supply legal services to clients of the Legal Advice Centre;
- (d) any employed barrister may supply legal services to members of the public free of charge (to any person).

503 A barrister employed to supply legal services under a contract for services may be treated as an employed barrister for the purpose of this Code provided that the contract is:

- (a) in writing;
- (b) (subject to any provision for earlier termination on notice) for a determinate period; and
- (c) the only contract under which the barrister is supplying legal services during that period (unless the Bar Council grants a specific waiver of this requirement).

504 An employed barrister shall have a right to conduct litigation in relation to every Court and all proceedings before any Court and may exercise that right provided that he complies with the Employed Barristers (Conduct of Litigation) Rules (reproduced in Annex I).

Acceptance of instructions and the 'Cab-rank rule'

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

- (a) on the ground that the nature of the case is objectionable to him or to any section of the public;
- (b) on the ground that the conduct opinions or beliefs of the prospective client are unacceptable to him or to any section of the public;
- (c) 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).

602

A barrister in independent practice 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:

- (a) accept any brief to appear before a Court in which he professes to practise;
- (b) accept any instructions;
- (c) 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.

603

A barrister must not accept any instructions if to do so would cause him to be professionally embarrassed and for this purpose a barrister will be professionally embarrassed:

- (a) if he lacks sufficient experience or competence to handle the matter;
- (b) if having regard to his other professional commitments he will be unable to do or will not have adequate time and opportunity to prepare that which he is required to do;
- (c) if the instructions seek to limit the ordinary authority or discretion of a barrister in the conduct of proceedings in Court or to require a barrister to act otherwise than in conformity with law or with the provisions of this Code;
- (d) if the matter is one in which he has reason to believe that he is likely to be a witness or in which whether by reason of any connection with the client or with the Court or a member of it or otherwise it will be difficult for him to maintain professional independence or the administration of justice might be or appear to be prejudiced;

- (e) if there is or appears to be a conflict or risk of conflict either between the interests of the barrister and some other person or between the interests of any one or more clients (unless all relevant persons consent to the barrister accepting the instructions);
- (f) if there is a significant risk that information confidential to another client or former client might be communicated to or used for the benefit of anyone other than that client or former client without their consent;
- (g) if he is a barrister in independent practice in a privately funded matter where the instructions are delivered by a solicitor or firm of solicitors in respect of whom a Withdrawal of Credit Direction has been issued by the Chairman of the Bar pursuant to the Terms of Work on which Barristers Offer their Services to Solicitors and the Withdrawal of Credit Scheme 1988 as amended and in force from time to time (reproduced in Annex G1) unless the instructions are accompanied by payment of an agreed fee or the barrister agrees in advance to accept no fee for such work or has obtained the consent of the Chairman of the Bar;
- (h) if the barrister is instructed by or on behalf of a lay client who has not also instructed a solicitor or other professional client and the barrister is satisfied that it is in the interests of the client or in the interests of justice for the lay client to instruct a solicitor or other professional client.