

**BAR
STANDARDS
BOARD**

REGULATING BARRISTERS

**Bar Standards Board
Consultation Paper**

**New Handbook and
Entity Regulation:
Part One**

March 2012

This consultation will close on Monday 28 May 2012

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Executive summary

Part A: Introduction

1. This consultation paper draws together a number of strands of the Bar Standards Board's (BSB) regulatory reform agenda. We have consulted previously on a number of separate, but related, issues:
 - a. The review of the BSB's Code of Conduct;
 - b. The introduction of an entity regulation regime; and
 - c. The relaxation of the current prohibition on the conduct of litigation by barristers.
2. This consultation draws these different elements together into one piece of work (the BSB Handbook) because we believe that there is a public interest in having one clear publication that summarises our new approach across the board. We have prepared a separate consultation addressing the compliance and enforcement aspects of our proposed entity regulation regime.

Part B: The new BSB Handbook

3. The overall approach to the new Handbook is summarised in the introduction to that document. Part 2 (the Code of Conduct) in particular has changed significantly in structure and presentation since the January 2011 consultation. It has also been extended to apply to all BSB regulated persons, wherever appropriate adopting the same approach as is applied to barristers.
4. The Code of Conduct has been broken down into the following sections:
 - a. You and the court;
 - b. Your behaviour towards others;
 - c. You and your client;
 - d. You and your regulator; and
 - e. You and your practice.
5. This part also specifies the outcomes that we are seeking to achieve. The outcomes are intended to be descriptive rather than mandatory. They explain the rationale for and aid the understanding of the rules. We do not propose to bring misconduct charges against barristers, or to impose administrative fines, for breach of outcomes alone (these will continue to be for breaches of core duties or rules, although an adverse impact on an outcome will be relevant).
6. We have reviewed all the rules in the Code of Conduct, retaining only those we consider to be necessary to achieve the regulatory objectives. Where appropriate, more detailed rules have been converted into guidance, leaving more freedom for

barristers and authorised entities to determine how best to comply with the remaining rules and Core Duties.

7. The main substantive changes since the last consultation relate to:
 - a. Core Duties: The new Handbook contains two additional core duties: CD9 – You must be open and co-operate with your regulators; and CD10 – You must manage your business effectively and in such a way as to achieve compliance with your legal and regulatory obligations.
 - b. Unregistered Barristers: It is proposed that all Core Duties be applied to unregistered barristers in order to increase protection for clients.
 - c. Associations with others and outsourcing: The current prohibition on barristers practising in association with non-barristers has been removed. The old rule was designed to restrict who could participate in a chambers of self employed barristers. In devising the new rules and guidance on associations with others and outsourcing the BSB has had a clear policy objective in mind. Business arrangements for the purpose of outsourcing, or sharing premises or costs, or using a common vehicle for obtaining or distributing work (including the use of ProcureCos or other outsourcing models) should be allowed as long as they do not result in barristers circumventing regulatory requirements that apply to them and do not confuse clients as to who is liable for the services or whether the services are regulated and by whom. We have therefore proposed new outcomes focused provisions in the Handbook. Subject to meeting the requirements set out in the Handbook, barristers and BSB authorised bodies will be able to practise in association with anyone (including non-lawyers) subject only to notification to the BSB.
 - d. Reporting misconduct: The BSB has previously decided that the new Code will include a positive duty on barristers to report serious misconduct. This duty has been retained in the new Handbook, but it is proposed that the duty should be extended to place a duty on barristers to report any personal failure to comply with the rules applicable to them.
 - e. Dual authorisation: The BSB has reconsidered the necessity for the current prohibition on barristers practising with dual authorisation (eg as a solicitor as well as a barrister) in the context of entity regulation and the widening and flexibility of the legal services market brought about by the 2007 Act. The BSB considers that this prohibition is no longer justified.
 - f. Insurance: The new Handbook contains a general provision stating that a practising barrister or BSB authorised body must ensure they have adequate insurance in place covering all their regulated activities. Having such insurance will be a condition for continued authorisation. Guidance explains that an employed barrister supplying legal services to people other than their employer should consider whether they need insurance themselves, having

regard to the arrangements made by their employers for insuring against claims in respect of the barrister's services.

- g. International Practising Rules: The International Practising Rules were consulted on in May 2011. Since the publication of the consultation, further revisions have been made to the rules. The main changes are that the public access rules will apply to foreign work as well as to domestic work and that the cab rank rule will be extended to apply only to instructions relating to work in England and Wales from professional clients in Scotland, Northern Ireland and countries in the European Economic Area, and not from other foreign lawyers.
- h. Application of the cab rank rule to entities: For entities and authorised persons working for them, it is proposed that the cab rank rule would mirror the rule as it applies to self-employed barristers as far as possible. The normal exclusions will apply and those relating to conflicts of interest will sometimes mean that instructions have to be refused.
- i. Management of Chambers and entities: As proposed in the earlier consultation, all members of Chambers will have some responsibility for the management of Chambers. What those responsibilities are will depend on the position of individuals in Chambers. For entities, the entity itself, its managers and all authorised persons working in it will be responsible for ensuring that proper arrangements are in place for the management of the entity and compliance with applicable rules. Again the responsibilities of each individual will depend on their personal role.

Part C: Conduct of litigation

- 8. Following consultation during 2010, the BSB took the policy decision in principle to permit self-employed barristers and BSB regulated entities to conduct litigation, provided that they apply for and meet the criteria for an extension to their practising certificates or authorisation. This consultation sets out the BSB's key proposals for authorisation to conduct litigation, and for ongoing BSB supervision of litigation services.
- 9. The BSB is considering carefully whether or not this new permission can, and should, be brought into effect prior to the intended introduction of the regulation of entities (possibly with other non-entity elements of the Handbook). If the BSB went down this route, it might be in a position to authorise the conduct of litigation by January 2013.

Client money and third party payment service

- 10. The BSB proposes that it should continue to prohibit all barristers (except those who are practising as managers of recognised bodies regulated by other approved regulators) from holding client money. It will, however, consider authorising a third party to provide a payment service for self-employed barristers and BSB regulated entities, subject to being satisfied about the proposed arrangements. The BSB's role

in this scheme will involve setting criteria with which suppliers will need to comply and then monitoring compliance. It would not be our role to design the scheme (operationally, that will fall to the prospective supplier). Any scheme would be monitored by the BSB via a contractual relationship with the supplier(s) and as part of the supervision of the barristers and entities using the scheme.

Part D: The BSB approach to entity regulation

11. The proposition behind the BSB approach to regulating entities is that the public interest and the wider regulatory objectives of the Legal Services Act 2007 are best served by the BSB offering regulation for some types of entity. The BSB's policy is to operate as a specialist entity regulator. The scope of services that a BSB regulated entity can offer should be similar to the scope of service that the self-employed Bar offers.
12. The draft Handbook introduces duties for BSB regulated entities and the managers and BSB regulated persons who work in them. In addition there are specific duties provided for in relation to the Head of Legal Practice (HOLP) and/or the Head of Finance and Administration (HOFA)¹, which all entities, not just ABSs, will be required to have. We will also impose a duty on the entity to ensure that all employees are appointed under a contract of employment which requires them to comply with the requirements of the Code insofar as it is applicable to them and do nothing which causes or substantially contributes to a breach of the Code by the entity, its managers or the BSB regulated persons employed by it. We propose that the same requirement should apply to self-employed barristers.
13. The BSB envisages regulating a variety of entity structures, including for example partnerships, limited liability partnerships or companies, all of which would be able to employ other authorised persons and non-lawyers. The three types of entity that the BSB proposes to regulate are:
 - a. Barrister only entities, which are entirely owned and managed by barristers (including single person entities);
 - b. Legal disciplinary practices, all of whose owners and managers are authorised persons; and
 - c. Alternative business structures, which must have at least one manager who is an authorised person, an authorised person as Head of Legal Practice and at least one non-lawyer manager. Otherwise, they can have any proportion of lawyers and non-lawyers as owners and managers (subject to the BSB's approval criteria).
14. The BSB's policy is that there must be at least one barrister manager in a BSB regulated entity, who is also an owner. The BSB will not regulate entities that have owners with a material interest who are not also managers and will require all owners and managers to be natural (i.e. not corporate) persons. This is because we are

¹ The duties of a HoLP and HoFA are specified in ss 91 and 92 of the Legal Services Act 2007

designing a relatively simple and efficient regime for entities that are relatively low risk and/or where the risks posed are similar to those posed in regulating chambers of self-employed barristers. For similar reasons, we propose (subject to the exercise of our discretion) to limit non-lawyer management of a BSB regulated entity. We also propose that a majority of the managers of a BSB regulated entity would normally be qualified to exercise rights of audience in the higher courts (whether as barristers or as HCAs).

15. The BSB therefore proposes (subject to threshold criteria determining eligibility to be considered for BSB regulation) to have a power to exercise discretion over whether to approve entities, based on whether the entity is one which would, having regard to a number of factors, be appropriate for regulation by the BSB.
16. Building on our current chambers monitoring regime, we propose to move towards a risk-based supervision system for entities. In addition to requiring entities to submit information annually (and requiring them to do so in answer to ad hoc BSB requests), we propose to risk assess each entity by reference to the likelihood and impact of any risk to the regulatory objectives that the entity presents.
17. An appeals process will be established for all decisions made in relation to the authorisation and ongoing licensing of entities. For all entities, it is proposed that all decisions be subject initially to an internal review (perhaps by the BSB's Qualifications Committee in the first instance). It is proposed that there would be a further appeal to the General Regulatory Chamber of the First Tier Tribunal in relation to authorisation and licensing decisions (however, we propose that appeals on disciplinary matters should be heard via the process that currently exists for self-employed barristers).
18. We are consulting separately on the disciplinary arrangements and related appeal processes for entities and those within them. Our intention is that broadly these should mesh coherently with our arrangements for self-employed barristers.
19. This consultation sets out the principles that we expect to apply in determining the fees for entity regulation. Entities will pay a one off fee for authorisation and will remain authorised unless and until the BSB removes their authorisation, but will need to supply specified information and pay a fee annually. The method of calculation of annual fees should be simple to use and based on reliable information. We therefore propose that the annual fee for entities should be calculated on a banded turnover model.

Part E: The BSB's approach to risk assessment

20. Our approach to risk is fundamental to our work as a regulator. Not only will it inform decisions about who we regulate and the standards we expect them to meet, it will also directly influence our approach to supervision and enforcement. Our general approach to risk assessment consists of two stages. In the first instance we need to analyse the potential impact of a risk on the regulatory objectives if that risk materialised and then go on to consider the probability of that impact occurring. That

means the level of supervision of an entity will be directly linked both to the potential impact if something goes wrong and to the likelihood that it will go wrong.

21. It is proposed that the potential impact on the regulatory objectives will be measured through an assessment of the following factors:

- a. Size;
- b. Services offered to the public;
- c. Vulnerability of client base; and
- d. Availability of other (non-regulatory) remedies for clients.

22. Once the potential impact has been measured consideration turns to how likely it is that the impact will occur. In large part, this is a measure of what steps entities have taken to mitigate the risks. An assessment of probability will determine the intensity of the supervision that is adopted. In assessing probability of failure we will take into account the following general factors:

- a. Systems that assist in the delivery of services;
- b. Governance and business model;
- c. First tier complaints;
- d. People and training;
- e. Regulatory history;
- f. Novelty of the work undertaken or the business model;
- g. The availability of outside assistance;
- h. Client satisfaction; and
- i. Quality accreditation.

PART A: Introduction

A1. This consultation paper draws together a number of strands of the Bar Standards Board's (BSB) regulatory reform agenda. We have consulted previously on a number of separate, but related, issues:

- a. The review of the BSB's Code of Conduct;
- b. The introduction of an entity regulation regime; and
- c. The relaxation of the current prohibition on the conduct of litigation by barristers.

A2. Over the last year, a number of developments (in addition to many detailed responses to the aforementioned consultations) have influenced our thinking. The Board has been considering its strategic approach to regulation. At the same time, the Legal Services Board (LSB) has published its regulatory standards framework. The LSB believes that there are four constituent parts to good regulatory practice²:

- a. An outcomes-driven approach to regulation that gives the correct incentives for ethical behaviour and has effect right across the increasingly diverse market;
- b. A robust understanding of the risks to consumers associated with legal practice and the ability to profile the regulated community according to the level of risk;
- c. Supervision of the regulated community at entity and individual level according to the risk presented;
- d. A compliance and enforcement approach that deters and punishes appropriately.

A3. These developments are relevant to all three of the work strands outlined above. The BSB has therefore taken the opportunity to draw these different elements together into one piece of work (the BSB handbook), because we believe that there is a public interest in having one clear publication that summarises our new approach across the board. This will enable consumers to better understand what to expect from barristers within the full range of business structures that will be possible in the future and there will be greater clarity for barristers about the regulatory regime with which they must comply.

A4. We have issued a separate consultation alongside this one addressing the compliance and enforcement aspects of our proposed entity regulation regime. In the meantime, this consultation invites views on our new Bar Standards Board Handbook and the principles that we propose to apply to the authorisation and supervision of entities. It also provides further proposals in relation to the

² Developing Regulatory Standards: Summary of responses to the consultation on developing regulatory standards and decision document, Legal Services Board

authorisation and supervision of barristers to conduct litigation. We have summarised our proposals and highlighted those areas where the Board's thinking has changed since we last consulted on these matters. Our responses to the previous consultations have been published separately and we do not propose to re-consult on those areas where policy is settled. We do, however, welcome comments on the draft rules giving effect to these policies.

The risks in the market

A5. This is an opportunity for the Board to begin to articulate its approach to risk-based regulation, which will be at the core of our approach to regulating entities and the wider regulated community. In redrafting the Handbook we have re-examined the justifications for each rule to ensure that the rule remains necessary in the light of the risks that the BSB is seeking to address and the outcomes that it is seeking to achieve. We have also considered the available evidence relating to the legal services market more generally and will continue to do so as we develop our proposals³. The key types of risk that we are seeking to address are:

- a. Risks that the legal services market does not function efficiently or effectively, to the detriment of clients; and
- b. That the public interest is not served because the justice system does not have all the information before it that is necessary to reach correct decisions.

A6. We believe that the approach taken to each of these categories of risk should be slightly different. The former group lends itself to a more outcomes based approach, however the latter arguably requires a more prescriptive approach, not least because it restricts the rights of clients and it is therefore essential that they have absolute clarity about where they stand.

Outcomes focused regulation

A7. This version of the Code moves further in the direction of outcomes focused regulation, by clearly articulating the outcomes we are seeking to achieve in each section (these outcomes are derived from the regulatory objectives and the risks that we are seeking to address in the legal services market). However, the Board considers that it remains necessary to retain an element of prescription in the rules. This is because many of the provisions in the Handbook relate to the conduct of barristers towards the courts, or situations where they must take action which would be potentially contrary to the interests of their client. These are rules designed to address low probability / high impact scenarios (such as a potential miscarriage of justice) or to balance access to justice and other principles. Barristers need clarity about the conduct required of them, so that decisions can if need be made in tight timeframes, and clients need to be clear about what they can and cannot expect of their barrister. This justifies retaining a prescriptive approach in a number of areas,

³ See for example the Oxera Report 'A framework to monitor the legal services sector' prepared for the Legal Services Board, September 20th 2011

in particular where a barrister's conduct in court is concerned or as to the circumstances where a barrister is obliged to act or return instructions.

A8. In this version of the Code, the outcomes are intended as justifications for and aids to purposive construction of the rules but not the basis for charges of misconduct – the intention is that charges would continue to be for breaches of Core Duties and/or rules (albeit that the outcomes will have a significant role in our future enforcement strategy). We expand on this further in our enforcement consultation.

Removal of unnecessary restrictions

A9. The BSB has already removed some of the traditional restrictions on the way barristers conduct their practice. It has permitted barristers to work as managers and employees of authorised bodies regulated by other Approved Regulators; it has relaxed some of the restrictions on what self-employed barristers can do; it has widened the scope of the public access rules and it is consulting on a further extension of the rules. This version of the Code seeks to go further and to move away from some of the remaining traditional restrictions on the way barristers conduct their practice, where these restrictions are no longer in the interests of clients or the wider regulatory objectives. Examples of where we seek to do this are:

- a. Liberalising the outdated rules on sharing premises, moving instead to an outcomes-based approach where barristers can work with others to deliver services in innovative ways (including via outsourcing arrangements) as long as clients' interests are protected;
- b. Removing the restrictions on dual authorisation, allowing individuals to practise as a barrister and as a solicitor at the same time if they wish to do so;
- c. Removing the prohibition on self-employed barristers conducting litigation, in order to open up the market and provide greater choice for consumers;
- d. Whilst maintaining the prohibition on holding client money, allowing for the development of a payment service provided this can be done in a way that protects clients' interests; and
- e. Establishing a BSB entity regulation regime, which will offer both barristers and consumers additional choice in the marketplace, including for one stop advocacy and litigation services, without seeking to replicate other regulators' schemes.

PART B: The New Bar Standards Board Handbook

Introduction

- B1. The overall approach to the new Handbook is summarised in the introduction to that document. The intention is to include in the Handbook all the rules which will apply to barristers, to BSB authorised entities and to those who work in such entities. We have not included the rules relating to QASA at this stage, as these are still under development. We have also not included the section on Qualification Requirements in this document as the Bar Training Requirements are not being amended at this time and the CPD rules will be amended when the CPD review concludes. We have also omitted the rules on Fitness to Practise as they will be the subject of a forthcoming separate consultation, and the Hearings before the Visitors rules which will be amended when final decisions have been taken on arrangements for appeals..
- B2. This section of the consultation document summarises the approach taken to the Code of Conduct section in particular, which has changed significantly in structure and presentation since the January 2011 consultation. In addition, this section highlights a number of substantive changes in policy since the last consultation, on which we are seeking views.

The Code of Conduct: overview

- B3. The structure of the Code of Conduct (Part 2 of the Handbook) has been amended in order to make it more user friendly and to specify more clearly the regulatory outcomes that the BSB is seeking to achieve. The Code of Conduct will apply not only to individual barristers but also to BSB authorised bodies, their managers (whether authorised persons or not) and all authorised persons (barristers or others) working in them (whether as managers or as employees). This has required some amendment to the rules but the basic approach has been to apply the same rules with only the minimum necessary differences to all those the BSB regulates. This approach is intended to achieve regulatory consistency and provide clients with the same degree of protection irrespective of whether their legal adviser is an individual or an entity
- B4. The Code of Conduct has been broken down into the following sections:
- a. You and the court;
 - b. Your behaviour towards others;
 - c. You and your client;
 - d. You and your regulator; and
 - e. You and your practice.

To simplify the structure of the Handbook, the Code of Conduct now incorporates both the conduct and the practising rules sections of the previous draft

B5. This section also specifies the outcomes that we are seeking to achieve. As discussed above, the outcomes are intended to be descriptive rather than mandatory. They explain the rationale for and aid the understanding of the rules. As such, barristers, BSB authorised entities and their clients should have the outcomes in mind when interpreting the rules, but we do not propose to bring misconduct charges, or to impose administrative fines, for breach of outcomes alone. Charges and fines will continue to be for breaches of core duties or rules, as this will provide greater clarity for barristers, entities and clients, especially in situations where the barrister or entity owes conflicting duties. Our consultation on enforcement issues specifies the role that the outcomes will play in our enforcement policy.

B6. Since the previous consultations, the Board has critically examined the balance between core duties, rules and guidance. Core duties continue to underpin the entirety of the BSB's regulatory framework and pervade the whole Handbook. As before, compliance with the core duties will be mandatory and they define the core elements of professional conduct. Rules are intended to supplement core duties where a core duty alone is considered insufficient to address the perceived risk or where experience suggests that additional, but mandatory, rules are needed to achieve the required end. In some cases rules are necessary in order to clarify the nature of competing duties owed by barristers. Our general approach has been to express all requirements that are genuinely mandatory as rules, whilst providing further information or examples of behaviour that would breach rules in guidance. We have endeavoured to use prescription in rules only where this is necessary to achieve a desired outcome. In general, we have sought to remove or minimise rules which seek to dictate how barristers or entities organise their business. That should normally be a matter for them unless any of the regulatory objectives, especially the interests of clients, might be adversely affected.

QUESTION 1: Do you have any comments on the presentation of the new Handbook?

QUESTION 2: Is the relationship between outcomes, core duties, rules and guidance sufficiently clear?

QUESTION 3: Is the balance between rules and guidance about right?

QUESTION 4: Are any of the rules unnecessarily prescriptive (please give details)?

Substantive changes since the last consultation

Core Duties

B7. The new Handbook contains two additional core duties:

- a. CD9 – You must be open and co-operate with your regulators; and
- b. CD10 – You must manage your business effectively and in such a way as to achieve compliance with your legal and regulatory obligations.

B8. The Core Duties were included in the previous consultation, however with the introduction of entity regulation the duties have been re-examined. Core Duties 1-8 remain the same.

B9. The BSB considers that an additional Core Duty is required in relation to running or managing a business. The last version of the Code that was consulted on in January 2011, contained rules on the administration of Chambers. The BSB is of the view that similar provisions would be required for managers of BSB authorised bodies. Furthermore, it is desirable that the BSB should in appropriate cases be able to take regulatory action against those who fail to manage their businesses in such a way as to comply with other legal and regulatory obligations that apply to them. To underpin these provisions a new Core Duty has been introduced (CD10) which provides that you must manage your business effectively and in such a way as to achieve compliance with your legal and regulatory obligations. The wording of this Core Duty means it will equally apply to the management of an individual's professional practice, the management of Chambers and of entities.

B10. Similarly a new section is included in the Code of Conduct, entitled 'you and your regulator' (section D4 of the Handbook) and CD9 will underpin this section.

QUESTION 5: Do you agree with the addition and purpose of the two new Core Duties?

Unregistered Barristers

B11. Unregistered barristers are barristers who do not have practising certificates and hence are not allowed to practise as barristers and do not appear in the Register of practising barristers. As they may not practise as barristers, they are not subject to the rules which apply only to practising barristers. But as barristers, they have a duty to uphold professional standards. The BSB previously decided to apply Core Duty 4 to all unregistered barristers ('you must not behave in a way which is likely to diminish the trust and confidence which the public places in you or the profession'). The January 2011 Code Review consultation further proposed that Core Duty 2 ('you must act with integrity and honesty') should also apply. It was thought that this was necessary to ensure that appropriate standards would be maintained when unregistered barristers were working for employers or clients. Making them subject to this Core Duty would mean that they would be liable to disbarment in the event of serious breach.

B12. Respondents to the last consultation broadly agreed with this approach, however two consultees⁴ expressed strong disagreement, feeling that unregistered barristers should be subject to full BSB regulation. In the context of developing the new entity regulation regime and the changing legal services market, in which there are ever greater numbers of unregistered barristers, we have reviewed the application of Core Duties to unregistered barristers.

⁴ The Bar Association for Commerce, Finance and Industry and an individual, unregistered barrister

B13. The BSB has concluded that it would be disproportionate to apply the entire Code of Conduct to unregistered barristers but that, especially as the numbers of those providing legal services in that capacity have grown and this seems likely to continue, the public should have the protection of knowing that fundamental standards apply to unregistered barristers and that individuals who fall seriously short of meeting these standards will have sanctions imposed on them. It is therefore now proposed that all the Core Duties should apply to unregistered barristers (as should those rules that deal with priorities as between conflicting Core Duties). We believe that applying all Core Duties to unregistered barristers will increase protection for their clients. Unregistered barristers will also be subject to rules about not misleading their clients about their status and co-operating with the regulator. They will be subject to disciplinary action if they breach the core duties or the rules which apply to them.

QUESTION 6: Do you agree that all Core Duties should be applied to unregistered barristers?

Associations with others and outsourcing (Rules 46 – 53, section D5.1)

B14. The current Code, and the version consulted on in January 2011, contain prohibitions on sharing premises and practising in associations with others along with a detailed list of exemptions. The BSB has concluded that these prohibitions impose unnecessary restrictions on how barristers structure their business and they have therefore not been replicated in the new Handbook. We have instead adopted a more outcomes focused approach on associations with others and added a provision to deal with outsourcing.

B15. With the introduction of Alternative Business Structures, legal service providers are becoming more innovative in their working arrangements, which could potentially include novel ways of working and more outsourcing of any operational functions that are necessary for the delivery of legal services. Where an entity itself supplies reserved legal services, it requires to be authorised under the Legal Services Act 2007 (and our proposals for entity regulation set out what we will offer in that regard) but we have already seen examples of new forms of collaboration that do not involve setting up entities that have to be authorised (ProcureCo is an example) or may not involve establishing any form of entity.

B16. The effect of the existing rules on associations is to prevent sharing of premises or costs with non-barristers (subject to some overly complex carve-outs). In devising the new rules and guidance on associations with others and outsourcing the BSB has had a clear policy objective in mind. Forming novel business arrangements (including the use of ProcureCos or other outsourcing models) must not enable barristers to circumvent regulatory requirements, nor must it create confusion in the eyes of clients as to who is liable for the service and which services are regulated by the BSB and/or other regulators and those which are not. Therefore, the new outcomes focused provisions in the Handbook require barristers to ensure that any involvement in other businesses, or associations with others, must not:

- a. Cause confusion about the extent to which activity is regulated by the BSB or by another regulator;
- b. Cause confusion as to who is responsible for the service provided;
- c. Compromise integrity or independence or involve referral fees;
- d. Compromise client confidentiality;
- e. Risk a breach of Core Duty 4;
- f. Participate in any activity that would constitute a breach of the Legal Services Act; or
- g. Circumvent the ban on BSB regulated persons holding client money.

Subject to meeting these requirements, barristers and BSB authorised bodies will be able to share premises or practise in association with anyone (including non lawyers) subject only to notification to the BSB.

- B17. When functions are being outsourced, it will be necessary to ensure that the outsourcing:
- a. Does not adversely affect the ability to comply with any obligations in the Handbook; and
 - b. Is subject to contractual arrangements to ensure that all obligations in the Handbook are complied with and that the BSB will have the right to obtain information from or inspect the provider of the services where necessary.

QUESTION 7: Do you agree with replacing the current prohibitions on sharing premises and associations with a more outcomes focused rule and guidance?

QUESTION 8: Do you think the rules and guidance on sharing premises, associations and outsourcing will provide adequate protections for clients and users of legal services?

Separate businesses

- B18. We have considered whether it is necessary to introduce a 'separate business rule' in order to ensure that clients are protected when accessing services provided by another business owned by BSB regulated persons but not itself regulated by the BSB or another approved regulator. The Solicitors Regulation Authority, for example, in Chapter 12 of its Handbook, regulates the separate businesses connected with SRA regulated firms.
- B19. We believe that the key risks are:
- a. That clients may be confused or misled about the extent to which an activity is regulated;

- b. That BSB regulated persons might seek to hive off into separate businesses certain activities that would be regulated by the BSB if performed in the business regulated by the BSB. These separate businesses could involve handling client money;
- c. That clients might therefore be offered less protection;
- d. That integrity, independence or client confidentiality might be compromised.

B20. In the light of our proposals in relation to criteria for authorisation, associations with others and outsourcing, we believe that the new Handbook includes sufficient safeguards to mitigate these risks. We welcome views, however, on whether this is sufficient.

QUESTION 9: Do you think we need to include a separate business rule in the Handbook?

Managing client affairs

B21. In the context of broadening the scope of practice of barristers potentially to include litigation, the BSB has considered whether it should also withdraw the current prohibition on managing clients' affairs. The risks of doing so are that:

- a. A barrister's independence might be compromised;
- b. There might be a greater risk of conflicts of interest;
- c. There is a greater risk that the barrister might undertake work for which he is neither trained nor competent; and
- d. The scope of practice of the barrister might go beyond what the BSB had the capacity to regulate.

B22. For these reasons, we are not convinced that the prohibition should be relaxed, however we welcome views on whether this continues to be appropriate.

QUESTION 10: Do you agree that the current prohibition on managing clients' affairs should be retained? If not, how do you think the risks could be mitigated?

Referral fees

B23. The BSB has reviewed the prohibition on referral fees in its current Code of Conduct and concluded that a prohibition continues to be in the public interest. We believe that relaxing the prohibition would lead to the following risks:

- a. That referrals will be made on the basis of willingness to pay a referral fee rather than the best interests of clients;
- b. That client choice will be correspondingly reduced; and
- c. That the independence of the barrister will be compromised.

B24. We therefore propose to maintain a prohibition on referral fees, but we welcome any views on whether this remains appropriate.

QUESTION 11: Are there any situations in which you think it would be in clients' best interests to allow referral fees?

Reporting misconduct (Rules 34-35, Section D4)

B25. The BSB has previously decided that the new Code will include a positive duty on barristers to report serious misconduct. This duty has been retained in the new Handbook, but it is proposed that the duty should be extended to place a duty on barristers to report any personal failure to comply with the rules applicable to them. The duty to report will now therefore arise in the following circumstances:

- a. Where the barrister himself has failed to comply with applicable rules;
- b. Where the barrister is reporting serious misconduct in relation to another barrister; or
- c. Where a Head of Legal Practice or Head of Chambers becomes aware of serious misconduct in his entity or chambers.

B26. The 2007 Act imposes a requirement on the Head of Legal Practice (HoLP) of an ABS to report any failings to comply as are specified in the Licensing Authority's Rules. In devising our rules, the BSB is proposing that a barrister should be responsible for reporting his own non-compliance with rules to the HoLP. As the BSB is aiming to create a consistent regime of regulation, the BSB is also proposing that rule apply to all practising barristers, including those in self-employed practice. It is therefore proposed that any failure to comply should be reported to the HoLP or Head of Chambers in the first instance, who will have responsibility for informing the regulator (unless client confidentiality requires the matter to be reported direct to the regulator). If the matter is serious, the HoLP or Head of Chambers will be required to report to the BSB immediately. In less serious matters, it will be adequate to keep a record to be shown to the BSB on request or at the next monitoring visit. In the case of an employed barrister who does not work for a BSB authorised body or a sole practitioner, their duty will be to inform the Bar Standards Board of the failure to comply.

B27. The BSB realises that this is an extension of what was previously proposed but guidance will define what amounts to serious misconduct and the circumstances in which a barrister is obliged to report such conduct by another barrister. There will also be a rule that barristers must only report serious misconduct by another barrister where it is in the public interest to do so and such reporting (or the threat to do so) should never be used as a litigation tactic or to please a client or other person.

B28. This subject is one that has provoked strong views in previous consultations, however, the BSB believes that such provisions are now a normal part of regulatory regimes and are necessary to achieve the regulatory objectives. The interests of

clients and the public can only be protected effectively if breaches of the rules are brought to the attention of the regulator.

QUESTION 12: Do you think that a barrister should be obliged to report his own failure to comply with applicable rules?

QUESTION 13: Do you agree that failure to comply with rules should be reported to the Head of Legal Practice or Head of Chambers in the first instance with an obligation on them to report material breaches to the BSB (with the exception that barristers employed other than in BSB authorised bodies and sole practitioners should report any failure to comply to the Board)?

Dual authorisation

- B29. The BSB previously proposed that the prohibition on dual authorisation should remain, meaning those qualified, for example, as both a solicitor and barrister would not be able to practise in both capacities at the same time. The BSB has reconsidered the necessity of this provision in the context of entity regulation and the widening and flexibility of the legal services market brought about by the 2007 Act. The BSB considers that this prohibition is no longer justified.
- B30. Such individuals would in fact be regulated by both the SRA and BSB, which could arguably increase protections for clients. Barristers are already permitted to become managers or employees of entities regulated by the SRA and would therefore already be subject to the SRA's rules as well as those of the BSB (with the SRA in effect becoming the lead regulator, as the entity's regulator). Therefore the impact would be minimal if such individuals also choose to practise as a solicitor.
- B31. The situation for self-employed barristers is rather different. If they wanted to practise also as solicitors, they would have to be insured as both a barrister and a solicitor and would be subject to monitoring by both the SRA and the BSB and make returns to both organisations. There would no doubt also be complications as regards internal Chambers administration. Dual authorised barristers would be allowed to undertake litigation but that will be an option for all practising barristers in future. For these reasons we believe that, in practice, it is unlikely that self-employed barristers would want to incur the additional costs and administrative burdens of dual authorisation, but the BSB is of the view that that is not a justification for retaining the prohibition.
- B32. In proposing to remove the prohibition the BSB has considered whether this would pose any risk to clients or cause confusion. The BSB is of the view that clients would be protected by the various rules and enforcement regimes and the removal of the prohibition would not affect their right to complain to the Legal Ombudsman if there was a problem. As clients would be able to approach the Legal Ombudsman in the normal way this is likely to minimise any confusion as the complainant would not have to ascertain which regulator to approach.

QUESTION 14: Do you agree that the prohibition on dual authorisation should be removed?

QUESTION 15: Do you think that the removal of the prohibition is likely to pose any risk to clients?

Insurance (Rule 44, Section D5.1)

B33. The current Code and the version of the Code consulted on in January 2011 contain provisions stating that a practising barrister may supply legal services to the public provided that he is covered by insurance against claims for professional negligence arising out of the supply of his services in such amount and upon such terms as are currently required by the Bar Council.

B34. In the case of employed barristers who provide legal services to the public or a barrister practising as a manager or employee of an authorised body the employer or body needs to be covered by insurance in such amount and upon such terms as are required by the Approved Regulator of the employer or body, or in the absence of a Approved Regulator, in such amount and on such terms as are currently required by the Bar Council⁵. The requirement to have insurance in place does not apply to employed barristers who are providing legal services to their employer only.

B35. The new Handbook contains a general provision stating that a practising barrister or BSB authorised body must ensure they have adequate insurance in place covering all the legal services they provide to the public. Having such insurance will be a condition for continued authorisation. Guidance explains that an employed barrister supplying legal services to people other than their employer should consider whether they need insurance themselves, having regard to the arrangements made by their employers for insuring against claims in respect of the barrister's services. This is akin to previous Bar Council guidance issued on the subject. Although employed barristers are not eligible for cover by the BMIF, they should consider whether they need to take up appropriate cover available on the open market.

B36. Guidance also replaces the current rule for those working in an authorised body regulated by another Approved Regulator.

QUESTION 16: Do you agree that rules on insurance for employed barristers should be replaced by guidance as historically no requirements have been set in relation to this?

International Practising Rules

B37. The International Practising Rules were consulted on in May 2011. Since the publication of the consultation, further revisions have been made to the rules. The main changes are that:

⁵ The Bar Council has not currently set any amounts or terms for insurance of employed barristers or barristers working for bodies authorised by another Approved Regulator

- a. The public access rules will apply to foreign work as well as to domestic work. but with waivers from the training requirement being available for those barristers who already have experience of working with foreign lay clients without a professional client;
- b. The cab rank rule will be extended to apply only to instructions relating to work in England and Wales from professional clients in Scotland, Northern Ireland and countries in the European Economic Area, and not from other foreign lawyers.

B38. The consultation issued in May 2011 proposed changes to the definition of foreign work and/or the rules which would have meant that for foreign work, no professional client was required, even for clients in England and Wales. Respondents commented that this would sit unhappily with the Public Access Rules. On re-consideration, the BSB reached the view that the proposed rules did create inconsistencies with the Public Access Rules, making protections for clients inconsistent. The policy and rules as proposed would have implied that protections which are considered necessary for clients in England and Wales in relation to legal services provided in England and Wales are not necessary for either foreign clients or clients in England and Wales in relation to foreign work. The BSB considers that such a policy would be difficult to justify. In particular it might cause confusion for clients in England and Wales, if they were required to use a solicitor when employing a particular barrister to carry out certain types of work but not for other types. The BSB therefore proposes that the public access rules should apply to foreign work.

B39. We have considered the impact this proposal would have on barristers carrying out foreign work, and have concluded it would be relatively small, with little additional burden being placed on such barristers. Some 60% of practising barristers are already qualified to do public access work. For the others, in the majority of cases, a one day public access training course would be necessary to qualify. Those who already have experience of working directly with foreign lay clients may be eligible for a waiver.

B40. The application of the cab rank rule was the subject of much debate in previous consultation responses. The May 2011 consultation proposed that the application of the cab-rank rule should be extended to all proceedings in England and Wales, whether instructions come from English, Welsh or foreign lawyers in order to ensure access to justice for all, including any foreigners who may seek it in our legal system. Conversely it was proposed that the rule should not apply to matters outside England and Wales, which ought logically to be governed by the professional rules of the country administering the local justice system, where the cab rank rule is largely unknown and its application is therefore not expected.

B41. On considering the responses the BSB has concluded, that on balance, it would be a step too far to apply the rule to instructions from any foreign lawyer. It will, of course, still be open to a barrister to take on the work if he so wishes. In forming this view the BSB understood and shared concerns expressed by respondents that requiring barristers to act for foreign lawyers about whom nothing may be known and

who may be subject to regulatory regimes of varying standards, could place barristers in difficult situations were they to be obliged to accept the work under the cab rank rule. Barristers in such circumstances might not be able to obtain reliable information on which to base their advice or might come under pressure to act in unprofessional ways. The cab rank rule restricts a barrister's normal commercial freedom to decide for whom they are prepared to act, and should apply only where such a restriction is reasonable.

B42. However, not all foreign lawyers are unknown quantities. In particular, foreign lawyers who are authorised by other Member States of the European Economic Area or who practise in Scotland or Northern Ireland, are subject to familiar regulatory regimes of an appropriate standard. Indeed, it would be incompatible with EU law for the BSB to distinguish between instructions from lawyers authorised in different Member States. The BSB therefore proposes to extend the cab rank rule only to instructions from lawyers authorised in another Member State of the European Economic Area, Scotland or Northern Ireland, and not to other foreign lawyers.

B43. The Bar Council is a signatory of the Code of Conduct for European Lawyers. This Code is a statement of common rules which apply to all lawyers within the European Economic Area when conducting cross-border activities within that Area. This Code is incorporated into the Bar's current Code of Conduct by virtue of being included as Annex Q of the Code. The Bar Council is required to continue to implement the Code's provisions. The new Code of Conduct will anyway incorporate most of those provisions but there are a few additional points, primarily concerning recovery of fees, which are not of general application. An additional section will therefore be incorporated into the final version of section D of the Code of Conduct dealing with these additional requirements.

QUESTION 17: Do you agree that the public access rules should apply to foreign as well as domestic work?

QUESTION 18: If so, do you agree that the impact of this proposal would be minimal?

QUESTION 19: Do you agree that the cab rank rule should be extended to apply only to instructions relating to work in England and Wales from professional clients in Scotland, Northern Ireland and countries in the European Economic Area, and not from other foreign lawyers?

Application of the cab rank rule to entities

B44. It is proposed that there should continue to be a 'non-discrimination rule', that a barrister must not withhold his services on the ground that:

- a. The nature of the case is objectionable to him or any member of the public;
- b. The conduct, opinions or beliefs of the prospective client are unacceptable to him or any section of the public; or

- c. On any ground relating to the source of financial support which may properly be given to the prospective client for the proceedings in question.

B45. Currently this rule applies only to advocacy services but there is no obvious justification for excluding other legal services. It is therefore proposed that in future this rule should apply to the provision of all legal services provided by practising barristers or BSB authorised bodies.

B46. The 'cab-rank' rule would apply to self-employed barristers in the normal way, including in relation to litigation if the barrister is authorised to do it, but only on a referral basis. For entities and authorised persons working for them, it is proposed that the cab rank rule would mirror the rule as it applies to self-employed barristers as far as possible. That is to say, it would apply only to referral work and only to instructions naming a particular authorised person who is to do the work. The normal exclusions would apply and that relating to conflicts of interest would sometimes mean that instructions had to be refused.

B47. Even with these restrictions, there may still be opportunities for those giving instructions to seek to conflict out an entity by instructing it to act on some minor aspect of a major case thus preventing it from providing the major advocacy services. It is therefore proposed to put in place provisions to prevent deliberate misuse of the cab rank rule, given that if this is not controlled it could be highly detrimental to access to justice. We would envisage allowing entities to apply for a waiver in such circumstances.

QUESTION 20: Do you agree with our proposals for the application of the cab rank rule to entities?

QUESTION 21: Do you agree that there should be a waiver process?

Management of Chambers and entities

B48. As proposed in the earlier consultation, all members of Chambers will have some responsibility for the management of Chambers. What those responsibilities are will depend on the position of individuals in Chambers and whether they have any specific duties, for example in relation to pupillage. The Head of Chambers and members of management committees will normally be expected to be able to ensure that all requirements are met, while junior members of Chambers may only be required to draw attention to concerns and not obstruct the implementation of suitable arrangements.

B49. For entities, the entity itself, its managers and all authorised persons working in it will be responsible for ensuring that proper arrangements are in place for the management of the entity and compliance with applicable rules. Again the responsibilities of each individual will depend on their personal role.

B50. The proposed rules for the management of Chambers and of entities list the systems and arrangements which they will need to have in place but do not seek to prescribe how those systems and arrangements should work. That will be a matter

for decision by those responsible in the Chambers and entity to suit their own particular circumstances. The BSB will need to be satisfied that adequate systems and arrangements are in place. It will produce some good practice guidance but Chambers and entities will be free to develop alternative arrangements provided they manage the relevant risks effectively.

B51. As with entities, we will expect Chambers to ensure that all employees are appointed under a contract of employment which requires them to comply with the requirements of the Code insofar as it is applicable to them and do nothing which causes or substantially contributes to a breach of the Code. The second part of this consultation considers acquiring a power to disqualify named individuals whose behaviour has shown it to be undesirable for them to be allowed to work for BSB authorised persons. The Handbook defines employees as including any person who is employed by a non-authorised person that in turn is owned or controlled by one or more BSB authorised persons and therefore this wider range of people would fall within the scope of the disqualification power.

QUESTION 22: Do you have any comments on the proposed arrangements for the management of Chambers and entities?

Public Access Rules and Licensed Access Rules

B52. Section E2 of the Code of Conduct incorporates the rules on public and licensed access in their current form apart from including the proposed changes to the former on which the BSB is currently consulting. The Licensed Access regulations will not be included in the Handbook as they apply to clients not to regulated persons but they will continue to appear on the BSB website

B53. The Public and Licensed Access rules are more detailed than the rest of the new Code of Conduct. The BSB will be reviewing these rules as part of the next stage of its work on modernising the rules. When these rules were introduced, public access was new and the necessary administrative and other arrangements which needed to be put in place were unfamiliar to barristers. Now that there have been several years' experience of public access without evidence of detriment to clients or any significant problems, it may well be that less detailed rules are needed.

B54. A more radical step would be to abolish the concept of Licensed Access Clients and to treat all clients who have not also instructed a solicitor or other professional client as public access clients.

QUESTION 23: Do you consider that the Public and Licensed Access rules could in principle be made less detailed without detriment to clients?

QUESTION 24: Do you consider that the BSB should review whether the category of Licensed Access client should be retained?

Duty to disclose clients' previous convictions

B55. Section D1 of the new Code of Conduct outlines a barrister's duty to the Court, and the accompanying guidance deals with situations where there may be a conflict between the barrister's duty to the Court and their duty to the client. In particular, if a client informs the barrister that he has a previous conviction of which the prosecution is not aware, the barrister must not disclose this without the client's consent. However, the court will have been misled if it sentences on the basis of an incomplete record of previous convictions. The barrister should therefore advise the client in these circumstances that if consent is refused he will have to cease to act. This is a change from current BSB guidance on disclosure of previous convictions, which suggests that a barrister may continue to act even if the convictions are not disclosed subject to not saying anything to the court implying that the client has no other convictions. The BSB's view is that in these circumstances the public interest in an appropriate sentence being passed outweighs the interests of the client and the barrister should not personally be a party to a failure to disclose relevant information (much as he also cannot disclose the information to the Court without his client's consent). This situation differs from that where a client has confessed guilt to his barrister but the barrister can continue to act as long as he says nothing which is misleading. There, irrespective of the confession, the barrister is doing no more than is proper in putting the prosecution to proof of its case. In contrast, once the Court reaches the point of sentencing, if the barrister is silent as to the correct position in respect of previous convictions (all of which have been established against the client after allowing him the presumption of innocence) the Court will be misled as to the basis for sentencing, whether or not the barrister actually says something implying there are no other convictions. Silence in such a situation brings the system of justice into disrepute.

QUESTION 25: Do you agree that this revised guidance is appropriate, in order to ensure that the court is not misled?

Acceptance of instructions

B56. The new Handbook proposes that when a barrister accepts new instructions, they must be accepted in writing (although email confirmation would be sufficient to meet this requirement) setting out the terms on which the barrister will be acting. We believe that it would be disproportionate to require written confirmation in every case of subsequent or supplementary instructions in the same matter, therefore the barrister will be deemed to have accepted further instructions once the work has been commenced. Guidance will, however, require the barrister to consider whether written communication with the client is appropriate in order to avoid a lack of clarity about whether subsequent or supplementary instructions have been accepted. We do not consider it necessary to be prescriptive about the content of the written communication informing clients of terms at the point of first accepting instructions. However, we specify as an outcome that clients must be adequately informed as to the terms on which work is to be done and Guidance draws attention to the requirements imposed by the Provision of Services Regulations 2009.

QUESTION 26: Are the proposals for when and how acceptance of instructions are to be confirmed and for informing clients of terms appropriate and proportionate or are there changes you would suggest?

Other consultations

B57. The BSB is currently consulting on, or considering the results of consultations on, several subjects which will affect the final version of the Code of Conduct:

- a. Equality and diversity: We have recently consulted on changes to the equality and diversity duties in the Code of Conduct. Alongside the diversity data collection requirement introduced by the LSB's statutory guidance in July 2011, we propose to introduce these amendments into the current Code from September 2012. The proposed changes, apart from those required by the LSB's guidance, are included in the Code;
- b. Standard contractual terms: We have applied to the LSB for approval of standard contractual terms, which would form the basis of a barrister's obligation to accept instructions under the cab-rank rule. These proposed changes have been incorporated into the Code but at the time of publication, the application has not yet been approved by the LSB;
- c. Public access rules: We are currently consulting on changes to the public access rules, which would allow public access authorised barristers to represent lay clients directly in cases where they were entitled to (but had chosen not to accept) public funding. We are also consulting on removing the requirement that a barrister must have practised for at least three years before being allowed to undertake public access work. If these changes are approved, they will be replicated in the new Handbook, however we propose to undertake a fuller review of public and licensed access in due course;
- d. Chambers monitoring: Following this consultation there will be a separate consultation on the development of the BSB's wider risk-based monitoring strategy, focusing on how that will apply to barristers' chambers.
- e. Legal Advice Centres: The Bar Standards Board is reviewing the Code provisions relating to Legal Advice Centres and will consult separately on them.

Other issues

B58. We would welcome any other comments on the draft Code of Conduct.

QUESTION 27: Do you have any other comments on the draft Code of Conduct?

PART C: Conduct of litigation

C1. Following consultation during 2010, the BSB took the policy decision in principle to permit self-employed barristers and BSB regulated entities to conduct litigation, provided that they apply for and meet the criteria for an extension to their practising certificates or authorisation. This chapter sets out the BSB's key proposals for authorisation to conduct litigation, and for ongoing BSB supervision of litigation services. The BSB is therefore now inviting comment only on the detail of its proposed regulatory framework and not on the question of principle.

Background

C2. By way of background, the following paragraphs briefly summarise the BSB's main reasoning behind permitting entities and self-employed barristers to conduct litigation, however respondents should look at the following sources for more detailed discussion:

- The 'Regulating Entities' (September 2010) consultation paper explored the regulatory issues involved in the conduct of litigation, at pages 22-35 [\[link\]](#).
- The Consultation Report [\[link\]](#) discussed the arguments contained in responses received to the consultation, and the BSB's responses to those, at pages 15-23.

Permitting entities to conduct litigation

C3. The BSB believes that the regulatory risks posed by entities conducting litigation are not sufficient to justify a prohibition. The BSB already faces a number of challenges in beginning to regulate businesses as well as individuals, but it believes that permitting businesses to conduct litigation in addition to other legal services will be manageable in that context.

C4. The BSB has also been persuaded by arguments that BSB entities must be competitive in what is a strongly competitive market for legal services, so as to promote choice for consumers of legal services, and effective access to justice for the public more widely. In order to be competitive, BSB entities should be allowed some flexibility in the combination of legal services they can provide. It is likely that some clients will benefit from a 'one stop shop' which includes advice, advocacy and litigation services. This sort of service could be a cost-effective and easy to use alternative to the services provided by traditional law firms.

C5. Furthermore, the BSB would not require any entities to conduct litigation – this would be a permissive, rather than mandatory, addition to practice. Entities would be free to make commercial choices about which services they decide to provide, and how they provide them. They need not decide to make litigation a significant, or any, part of their practice.

Removing the prohibition on self-employed barristers conducting litigation

C6. The BSB believes that self-employed barristers should also be permitted to conduct litigation where they are able to meet its authorisation requirements. This would be consistent from a regulatory perspective, and also in terms of allowing the self-employed

Bar to compete effectively with entities and enhancing consumer choice. Many will no doubt choose to continue to provide only advocacy services, on a referral basis, but those who wish to be able to expand their services in this way should be permitted to do so.

C7. Some of the greatest risks to the client arising from litigation relate to the management of client money. The BSB proposes to mitigate these risks by maintaining a prohibition on holding client funds, subject to arrangements below. Apart from these, risks also arise from a litigator's administrative practices and knowledge of litigation procedure. In practice, however, there are comparatively few remaining litigation-related tasks which self-employed barristers are prohibited from undertaking. Such tasks include: issuing any claim, process or application note; signing off on a list of disclosure; and any other 'formal steps' in litigation of a sort currently required to be undertaken by the client personally or by the solicitor on the record. The BSB has little reason to think that barristers would be unable to undertake these relatively straightforward tasks. Indeed they are already often closely involved in them albeit without taking the final responsibility for them. It believes that any risks arising can be met satisfactorily by ensuring that barristers have an appropriate level of training in procedure, appropriate administrative systems in their place of practice, and appropriate insurance.

Summary of the BSB's policy position

C8. Employed barristers have for some time been allowed to conduct litigation subject to complying with the requirements in Annexe I of the current Code, the Employed Barristers (Conduct of Litigation) Rules. The BSB's provisional position in its Regulating Entities consultation paper was that protections for conducting litigation would include at least the same requirements and that it might in addition impose further training or accreditation requirements. On further consideration, the BSB now proposes to remove and alter some of the requirements in *Annexe I* and also to impose further requirements.

Current requirements for employed barristers

C9. The current requirements for employed barristers in *Annexe I* can be summarised as follows:

Pre-authorisation:

- 12 weeks supervision by a qualified person (all employed barristers)

Post-authorisation (for barristers less than 3 years' standing with litigation rights):

- Guidance from a qualified person in place of practice
- 6 hours of CPD annually on 'an approved litigation course'

Proposed requirements for all practising barristers

C10. The BSB proposes to introduce the following requirements for authorising individual barristers:

Pre-authorisation:

- Self-certification that a barrister has appropriate level of training and knowledge of litigation procedure and dealing direct with clients
- Self-certification that a barrister has in his place of practice appropriate systems to manage the conduct of litigation, and appropriate insurance

Post-authorisation (barristers less than 3 years' standing only):

- Guidance from a qualified person in place of practice

Post authorisation (general)

- Paragraph 1(d) of the current Employed Barristers (Conduct of Litigation) Rules requires employed barristers of less than three years' standing to complete at least six hours of CPD on 'an approved litigation course'. However, this requirement will become redundant because the BSB no longer proposes to approve courses
- Under current proposals for the new CPD regime, barristers will be expected to identify CPD which is appropriate to their practice. It follows that a barrister, who is planning to or has newly taken up a litigation practice, should consider undertaking relevant CPD in litigation in the same way that they should arrange CPD relating to other relevant practice areas. Therefore, the obligation to undertake compulsory CPD in litigation will not be carried into the new rules

Proposed requirements for BSB entities

Pre-authorisation:

- (Mandatory) at least one employee or manager who is individually authorised to conduct litigation
- (Discretionary) BSB assessment of the proportion of employees and managers who are individually authorised to conduct litigation and act as qualified persons, and overall levels of experience
- Self-certification that the entity has appropriate systems to manage the conduct of litigation, and appropriate insurance

Post-authorisation:

- Provision of adequate supervision and systems

Authorisation to conduct litigation

Appropriate knowledge of litigation procedure

C11. The BSB has considered pre-authorisation training and has concluded that barristers at the point of qualification as barristers already have a level of procedural knowledge which is broadly comparable to that of newly qualified solicitors (all of whom are

authorised to conduct litigation). Knowledge of civil and criminal procedure is a compulsory part of the Bar Professional Training Course. The Education and Training Department will keep under review whether there is a sufficient component of litigation procedure in barristers' current training, or whether this component should be reviewed and possibly altered. In many cases, a barrister's initial training will have been supplemented by years of experience of advising on issues concerning litigation.

C12. Barristers are under a duty not to undertake work for which they do not have the necessary training and experience. This applies equally to litigation. Before applying to be authorised, they will need to review whether their knowledge is adequate and up-to-date before signing the self-certification which the BSB will require (see paragraph C20 below).

Appropriate systems to manage the conduct of litigation

C13. The BSB will require all barristers and entities to self-certify that their practice has in place adequate administrative procedures, when applying for authorisation to conduct litigation. The BSB will develop guidance on best practice and a checklist to assist the self-certification process. This will be an 'add on' to the general authorisation requirements for entities seeking BSB authorisation. A description of what might be included in the checklist is discussed below.

Discretion to authorise an entity to conduct litigation

C14. The BSB proposes that entities must have a manager or employee who is an authorised individual in respect of each reserved legal activity that the entity proposes to undertake. Therefore an entity wishing to conduct litigation would need at least one manager or employee who is individually authorised to conduct litigation. There will be no absolute rule on the composition of managers and employees in respect of litigation, but in granting authorisation the BSB will take into account the:

- Proportion of managers and employees who are already authorised to conduct litigation
- Proportion of managers and employees who could act as qualified persons (if necessary)
- Overall level of experience of managers and employees

C15. In theory the BSB would have the discretion to authorise an entity where the relevant individual, or individuals, are newly authorised to conduct litigation. In these circumstances, the BSB would consider the general circumstances and factors including the robustness of the systems put in place to manage litigation and the wider experience of managers and staff. In addition, there will be a number of general authorisation checks that are relevant, including the quantity and proportions of activities that the entity intends to undertake.

C16. The BSB will have in place as part of its wider authorisation scheme, powers of revocation, suspension and subsequent restrictions on practice (with appeal processes), which will apply to conducting litigation as well as other permissions.

Practising certificate

C17. An individual barrister's authorisation to conduct litigation will be additional to their existing authorisation to practice and will be separate from rights of audience. Their practising certificate and entry in the register will show that they are entitled to conduct litigation.

Self-certification checklist

C18. In order to be authorised all individual barristers will have to self-certify that they have:

- Appropriate knowledge of litigation procedure
- Appropriate systems in place to manage the conduct of litigation
- Appropriate insurance

C19. The BSB will develop guidance and a checklist to assist barristers in returning relevant information for the BSB to assess.

Knowledge of litigation procedure

C20. Barristers will be asked to confirm that they have adequate knowledge and experience of litigation procedure. This will include confirmation of having completed:

- Relevant components of the BPTC, BVC, or in the case of individuals who have transferred to the Bar, other vocational courses that contain litigation components
- Relevant CPD
- Any relevant experience (including during pupillage, in practice, or prior to qualification)
- Public Access training

C21. The BSB would normally expect barristers seeking authorisation to conduct litigation to have undertaken the training requirements for Public Access and to be registered with the Bar Council as being ready to undertake such work.

Appropriate systems in place (individuals)

C22. Individual barristers will be asked to confirm that they have available in their place of practice appropriate systems to manage the conduct of litigation (a modified version of the list will apply to entities). Information on the checklist will include details of:

- Diary management –

One of the main risks to clients stems from deadlines missed by those responsible for conducting litigation, for example where the Court has set a date for submitting a specific document. The consequences of poor diary management can often be of very serious detriment to clients. Barristers will therefore need to confirm that they have put in place appropriate systems for diary management and the giving, monitoring and discharge of undertakings.

- Holidays and absence from practice

Holidays and absences are important to manage in any practice, but they may give rise to greater risks to the client where the responsibilities of conducting litigation include more continuous project management and client contact. This risk may be heightened where a self-employed or individual barrister is working alone on a piece of litigation. Barristers will need to confirm that cover for holidays and other absences is in place.

- Case management and recording systems

Barristers will need to confirm that they have procedures for recording the progress of litigation cases in which they are instructed. This may include procedures for: identifying and dealing with conflicts of interest; issuing and acknowledging proceedings; track allocation and case management; disclosure, and processes to check files for inactivity.

- Filing systems

Barristers will need to confirm that they have effective filing system in their place of practice, including procedures for archiving and for destroying files.

- Available software and IT systems

Barristers will need to confirm that they have appropriate chambers or practice management software to manage litigation casework.

- Financial systems

Barristers will need to ensure that they have appropriate financial management systems in place.

- Accepting instructions, litigation costs and client money

Rules will apply as they do in relation to other work. In the light of the Provision of Services Regulations barristers will have to make clear their terms, in particular as they relate to fees and client money.

QUESTION 28: Do you have any comments on the proposed self-certification procedure?

Supervision by a qualified person

C23. Under the present rules for employed barristers, a barrister has to work from the same place as a qualified person until he has had three years' experience of conducting

litigation as well as practising as a barrister. As very few barristers are currently authorised to conduct litigation, it would be very difficult for self-employed barristers to comply with such a rule. More importantly, the BSB does not consider that this degree of supervision is necessary for experienced barristers who will anyway have considerable experience of litigation related matters. More recently called barristers will not have equivalent experience. It is therefore proposed that a barrister of less than three years' standing as a practising barrister will be authorised to conduct litigation only if any place of practice where he intends to conduct litigation is also the principal place of practice of a 'qualified person' who is able to provide guidance to the barrister. This will allow barristers in the early years of practice to undertake a full range of work, whilst still keeping some further protection in place to ensure that clients can rely on receiving a high standard of service.

Status of a qualified person

C24. The BSB has reviewed the current status of a qualified person for employed barristers. It proposes that most of the conditions that currently have to be met should be applied to qualified persons for self-employed barristers. That means that a qualified person will have to be a practising barrister, or a person authorised by another approved regulator, who has practised for a period of at least six years in the previous eight years; for the previous two years has made such practice his primary occupation; and is personally authorised to conduct litigation.

C25. Unlike the current position, however, the BSB proposes that a qualified person will not have to have had several years previous years' experience of conducting litigation. Otherwise, barristers of less than three years' standing would effectively have to wait for more senior colleagues to gain experience in conducting litigation before seeking authorisation, or would need another authorised person such as a solicitor to be part of the practice. The relaxation of the rule will provide greater scope for self-employed barristers to find a qualified person within chambers or a barrister only entity.

C26. The BSB believes that a barrister or other authorised person who has practised six years out of the previous eight, and has personally met the requirements to be authorised to conduct litigation, will have a sufficiently high level of understanding of how litigation is conducted to be able to provide appropriate guidance to a barrister of less than three years' standing.

QUESTION 29: Do you agree with the proposed requirements for qualified persons to supervise barristers under three years' standing?

No supervision prior to authorisation

C27. Current conduct of litigation requirements for employed barristers of all years' standing include a period of twelve weeks during which they are supervised by a qualified person before they can be authorised. The BSB requires the Employed Barristers (Conduct of Litigation) Rules Checklist for Supervised Practice to be completed during the period of supervision and returned to the BSB. The BSB proposes to remove this requirement.

C28. Since 2002, when the checklist was introduced, 75% of employed barristers who have applied for authorisation have been granted a waiver from the period of supervision, on grounds of relevant experience. The checklist is not assessed and to date no applications for authorisation to conduct litigation have been refused. The BSB believes that this procedure should be replaced by the general self-certification process discussed above which will be subject to a greater level of assessment prior to authorisation.

QUESTION 30: Do you agree that a period of supervision prior to authorisation is not necessary given the other proposed safeguards?

Second six pupils

C29. The BSB proposes that pupils in the second six months of pupillage will be authorised to conduct litigation where their pupil supervisor is authorised to conduct litigation. Provided that 'second six' pupils conduct litigation under the guidance of an authorised supervisor, there is no reason to suppose that litigation should pose a greater regulatory risk than advocacy work. Although there is potentially a greater client-facing aspect to litigation, which could lead to greater risks than those arising from the simpler advocacy, research and drafting tasks which currently form the staple diet of pupils, these risks can be mitigated by ensuring that pupils are supervised appropriately, and that due regard is paid to the obligation only to take on work that is within a pupil's competency. If the proposals in current consultation on public access are accepted, clients will also have the protection of a professional client as the BSB has proposed that pupils should not be allowed to do public access work.

C30. There is also a possible risk that pupillage providers could exploit pupils by tasking them to undertake routine litigation tasks at the expense of gaining experience in advocacy. However pupils will still have to satisfactorily complete the required advocacy courses and satisfy any relevant quality assurance requirements for the cases they do. Furthermore, the client contact and procedural experience that pupils would gain could lead to a better holistic understanding of litigation which would be valuable in future advocacy practice.

QUESTION 31: Do you agree that pupils in the second six months should be able to apply to be authorised to conduct litigation provided that their pupil supervisor is also authorised to conduct litigation?

When to introduce authorisation to conduct litigation

C31. The BSB has already taken the decision in principle to permit individual self-employed barristers to apply to be authorised to conduct litigation. It is therefore considering carefully whether or not this new permission can, and should, be brought into effect prior to the intended introduction of the regulation of entities (possibly with other non-entity elements of the Handbook). The process for obtaining approval for the BSB to become a licensing authority for ABSs is a long one. It is unlikely that approval could be obtained before mid-2013 at the earliest so we are considering asking the LSB to approve other elements of the new Handbook in a shorter timescale. If the BSB went

down this route, it might be in a position to authorise the conduct of litigation by January 2013.

QUESTION 32: Do you think the BSB should authorise barristers to conduct litigation and introduce other elements of the new handbook for individual barristers prior to the regulation of entities?

Fees for the conduct of litigation

C32. Allowing barristers to apply to be authorised to conduct litigation will incur additional cost in the BSB's regulation of the Bar, both in relation to the administration of the approval process and the additional regulatory risks associated with regulating litigation. The BSB believes that these additional costs should be recovered from those seeking to undertake litigation. This would be done via a fee for initial application and/or a continuing higher annual fee once authorised.

QUESTION 33: Would it be appropriate to charge an additional fee for the litigation extension to the Practising Certificate fee to take account of (a) the additional administrative costs and (b) the additional risks associated with regulating litigation?

QUESTION 34: Should there be an ongoing annual fee for those authorised to undertake litigation?

Client money

C33. The BSB proposes to regulate entities and self-employed barristers that are permitted, subject to authorisation, to conduct litigation. In order to conduct litigation, it is necessary to have arrangements in place to allow for the payment of fees and disbursements, as well as for managing settlements and court awards.

C34. The BSB wishes to ensure that the regulatory framework allows barristers and BSB regulated entities sufficient scope to provide services that are competitive with those legal services offered by other providers. It is in the interests of consumers, and the public more widely; to ensure that BSB regulated entities and barristers authorised to conduct litigation can provide competitive services. This includes ensuring that the means to pay for litigation is attractive to clients.

C35. Other Approved Regulators permit the persons they authorise to hold client money. This facilitates payments but introduces risks that the money will be dishonestly used or handled incompetently with resultant risks to clients. To mitigate these risks, the regulator has to implement and enforce detailed handling rules, and operate a proactive monitoring system. Self-employed barristers have never been allowed to hold client money and this has permitted the Bar Standards Board to adopt a less interventionist approach.

C36. The previous consultation paper set out a number of different options not involving BSB authorised persons holding client money for payments associated with litigation which included:

- a. reimbursement and payment in arrears;
- b. fixed fees in advance (the public access scheme currently provides model contractual terms which enable barristers to receive fees in advance of their performance of the contract) and;
- c. escrow or third party arrangements.

C37. Respondents to the previous consultation generally supported the BSB's proposition that it should continue to prevent all barristers (except those who are practising as managers of recognised bodies regulated by other approved regulators) from holding client money. A number of respondents agreed that a payment service that could be used for holding court awards and settlements would be a sufficient alternative to permitting entities to hold client money.

QUESTION 35: Do you agree that the BSB should continue to prevent all barristers (except those who are practising in authorised bodies regulated by other approved regulators) from holding client money?

Payment service

C38. The BSB proposes to consider authorising a third party to provide a payment facility for self-employed barristers and BSB regulated entities, subject to being satisfied about the proposed arrangements. The BSB's role in this scheme will involve setting criteria suppliers will need to comply with and then monitoring compliance, it would not be our role to design the scheme (operationally, that will fall to the prospective supplier). Any scheme would have to be regulated by the Financial Services Authority (FSA) under the Payment Services regulations 2009.

C39. The underlying purpose of the payment service is to remove responsibility for the management of money from barristers or entities and to give that responsibility to a third party, which could be the subject of close regulatory control. Money would at no point pass through the hands of any barristers or entities regulated by the BSB, other than the provider of the payment service. This would transfer most of the risks associated with money holding, and concentrate those risks in one place, with those acting as trustees and managers of the accounts. This arrangement should make it easier to ensure effective oversight of financial transactions, minimising the risk of funds being lost or stolen. The payment account provider may need to take out insurance to cover residual risks.

C40. It is likely to be cost-effective for those running the payment service to purchase a banking product and related software designed to manage litigation payments. A number of relevant products already exist and are used by solicitors' firms and the Paris Bar.

C41. The situations where an entity or a self-employed barrister may want to be able to manage client money are as follows:

- a. Payment of Fees;

- b. Payment of Disbursements;
- c. Settlement Monies.

C42. It is anticipated that the payment service provider would create a team that would be responsible for liaising with the entities/chambers and the banks/financial institutions in respect of the handling of client money. For example, a bank might operate a pooled bank account in the name of the service. Entities or self-employed barristers would then instruct clients or the courts to pay funds into that bank account. The key is that barristers and entities would not themselves have control over moving the money. For example, the monies might only be permitted to be moved out on receipt of joint instructions from those interested (with any dispute as to whether a payment was due being resolved at the expense of the losing party) or the payment account holder might pay out on evidence that a pre-agreed condition had been satisfied. The detail of how unauthorised access to the funds would be prevented will be for the designer of the scheme to come up with.

C43. One or a series of banks might be engaged by the service to operate a pooled account. Individual entities/chambers would be given an individual reference number and clients of that entity/chambers would be given a similar sub-reference number. Software exists which allows money within a pooled account to be allocated to virtual sub-accounts in the names of individual clients and the amounts standing to the credit of each to be viewed. It may be possible to adapt this so that users of the service could see what was standing in their own accounts but not those of others. The bank will, in any event, need to supply statements to the payment service which in turn will need to provide statements to users of the service in relation to transactions relating to their clients..

C44. In the previous consultation paper, we mentioned that we were in discussions with the Bar Council as to whether it would be possible for the Bar Council to provide a payment service for BSB regulated entities and barristers authorised to conduct litigation. The BSB understands that the Bar Council is considering whether to seek to develop such a scheme

C45. There are a number of potential advantages of having a single (not-for profit) payment service run by an organisation such as the Bar Council. Numerous smaller schemes may not be cost effective and may prove difficult and costly to monitor. Additional costs involved in running a number of smaller schemes may be passed on to the client. However, it could also be argued that competition amongst providers may drive down costs for users of the service and improve the quality of the service. The draft handbook does not limit the number of third parties that could provide such a service but we would be interested to hear views on whether we should only authorise one provider.

QUESTION 36: Would you find a payment service useful?

QUESTION 37: Are there any risks associated with such a service that we have not identified?

QUESTION 38: Should there be just one payment service or should the BSB be prepared to approve a number of schemes?

Criteria for Approval

- C46. It is proposed that any third party (whether the Bar Council or another provider) wishing to provide a payment service would require approval by the BSB. The BSB believes that the following are the key requirements to address the regulatory risks:
- a. The provider will be required to properly account to the BSB for the funds and ensure that usage of funds is explicitly for the purpose intended.
 - b. The provider will be required to keep adequate records of all transactions handled including itemisation of all receipts and disbursements of each transaction. The records shall be maintained for a period (for example for six years from completion of the transaction). These records shall be open to inspection by the BSB or its authorised representatives.
 - c. Background checks. All officers, directors, managers and employees must have background checks performed by the BSB. These background checks will include, among other things, CRB checks and civil court checks for activities that would indicate previous involvement in fraud, embezzlement, fraudulent conversion, or misappropriation of property or client money.
 - d. The provider will be required to keep a separate fund account or accounts in a high street bank authorised to receive funds, which shall be kept separate and apart and segregated from the provider's own funds, for all funds received pursuant to the service (other than any fee which may be specifically agreed to be deductible for the service). These segregated funds will be protected in the event of insolvency of the provider.
 - e. The provider will need insurance in place to protect against negligence and crime. This is likely to include professional indemnity insurance, fidelity insurance and vicarious liability insurance. The costs of insurance will need to be factored into the overall costs of the service, to be covered by the entities taking part in the scheme, and ultimately passed on to the client. However, insurance may be relatively inexpensive, provided that the scheme has a robust cash handling structure, which is properly audited and risk-managed.
 - f. The BSB will need to be satisfied that the fund holder has properly considered the checks that will need to be made about the funds it intends to hold, before the funds are received. For example the provider should have regard to anti-money laundering requirements and should also consider whether it would be appropriate to conduct Customer Due Diligence measures on all those on whose behalf it is holding the funds.
 - g. The BSB will need to be satisfied that the fund holder has appropriate systems and checks in place to verify instructions to release funds and to deal with instructions relating to the payment account.

- h. The provider should not make disbursements without first receiving deposits directly relating to the account in amounts at least equal to the disbursements. The provider shall not make disbursements until the next business day after the business day on which the funds are deposited unless the deposit is made in cash, by interbank electronic transfer, or in a form that permits conversion of the deposit to cash on the same day the deposit is made.
- i. The fund should be audited annually by an auditor approved by the BSB, who would also need to have access to the accounts of the barristers and entities using the facility.

QUESTION 39: Do you have any comments about the criteria for approval of the payment service provider?

QUESTION 40: What further criteria for approval should the BSB consider including?

Interest payments

C47. Any payment service will earn interest on the money that is held on behalf of clients. In approving any scheme we may have to consider what will be done with the interest. There are broadly three options:

- a. Interest earned should be retained by the provider in order to subsidise the costs of operating the scheme, which otherwise would be passed to clients;
- b. All interest should be returned to the client;
- c. A 'commercial' rate of interest should be paid to the client, using any surplus to go towards providing the scheme (assuming the rate of interest earned by the whole fund would be greater than the rate that an individual would normally expect to receive).

C48. The BSB could set a requirement as part of the approval process, or simply judge each application for approval on its merits.

QUESTION 41: Do you have any views as to how interest should be treated within the payment scheme?

Compensation fund

C49. In the light of our continued prohibition on holding client money and the proposed approval criteria (in particular the insurance requirements) for any payment service, we do not believe that there is sufficient risk in the proposed regulatory arrangements to necessitate a compensation fund, since all money would have to be paid direct to the payment service rather than via the entity or barrister, the monies will be segregated from the payment service's own funds and protected in the event of its insolvency and any residual risks relating to acts and omissions of the providers of the service should be insurable.

QUESTION 42: Are there any risks not addressed by the arrangements described above that would require us to establish a compensation fund?

PART D: The BSB approach to entity regulation

Introduction:

D1. The proposition behind the BSB approach to regulating entities is that the public interest and the wider regulatory objectives of the Legal Services Act 2007 are best served by the BSB offering regulation for some types of entity. The BSB has concluded, in the light of the responses to the last consultation on entity regulation [\[link\]](#), that doing so better serves the public interest than the alternative, whereby barristers and others are left to look to other regulators if they want to form entities in order to provide the same services that the self employed Bar can provide. The BSB approach is firmly grounded in its assessment of the risks in the marketplace and the capacities and capabilities of the BSB to regulate those risks:

- a. The BSB's regime, with its emphasis on making individuals answerable for their conduct, is well suited to regulation of advocacy and litigation. The responsibility of the individual advocate to the Court and to the client should remain at the heart of regulation of advocacy regardless of whether that advocate is operating within an entity or on a self-employed basis. We believe it to be in the public interest that we should maintain our influence over standards of advocacy as a specialist regulator of that service and, as far as possible, extend that influence to those types of entity whose structure, services and risks are such as to make them suitable candidates for our type of regulation, and to those who choose to work within such entities.
- b. By doing so, we broaden the range of choice available to those barristers who want to work within entities (for example, because this better enables them to share the risks of providing services on a CFA basis, or the burden of investment in premises, people or infrastructure). From the perspective of the public, our proposed regime (precisely because it does not mirror the SRA's regime and does not, for example, permit the holding of client money) may encourage the Bar to come up with new business models that do not replicate what is already on offer from SRA-regulated firms, thereby broadening the public's choice as to the ways they access legal services.
- c. By restricting the types of entity we will regulate (whilst still permitting individuals regulated by us to work in the full range of entities regulated by other Approved Regulators), we can keep our regime more streamlined (and less burdensome for our regulated community) than if we were to regulate all possible structures under the Legal Services Act 2007 and the full range of services (including client money handling and commoditised, bulk services of a sort that are likely to require a very different regulatory approach).
- d. The existing regime puts at its centre the duty the individual advocate owes the Court and the client. That should not and will not change just because the advocate (or, in future, other authorised person) happens to be operating within

an entity. The BSB's regulatory regime for entities will remain, to a significant degree, focused on holding the individuals (not just authorised bodies) within them to account for their conduct.

D2. The BSB's policy is therefore to operate as a specialist entity regulator. Imposing restrictions on the types of entities we will regulate enables us to:

- a. maintain our specialist focus on our distinct capacities and capabilities as a regulator;
- b. encourage the Bar to develop businesses that add to the range of choices available to the public, without diluting the Bar's expertise or duplicating the regimes of other regulators;
- c. avoid disproportionate cost; and
- d. reduce the risk of a regulatory failure because we are operating in areas where we lack sufficient know how and resource to regulate well.

Scope of permitted services:

D3. The BSB's policy is that the scope of services that a BSB regulated entity can offer should be similar to the scope of service that the self-employed Bar offers:

- a. The maintenance of an advocacy focus will come, not from a narrow definition of permitted services, but from the fact that the other restrictions we propose are likely to be compatible with that type of business and incompatible with the needs of businesses that lack that focus.
- b. We will regulate non-reserved legal services that are provided by those whom we regulate (individuals or entities).
- c. We do not propose to let BSB regulated entities operate as multi-disciplinary practices (for example combining accountancy and legal services, or patent agent work and legal services). In substance, their activity should be limited to "legal activities" as defined by Part 6 of the Handbook, subject to any minor or incidental examples of other activities which are carried on in the course of supplying the main service and do not materially detract from the focus being legal activities.

D4. The BSB's policy is that BSB regulated entities and the self-employed Bar may not hold client money. We will (if this is confirmed as a feasible solution) facilitate and regulate a central payment service for the Bar and for BSB regulated entities but that service should be provided as a business service by others not by the BSB itself. This issue is discussed fully in the previous chapter.

D5. The BSB's policy is to permit self-employed barristers and BSB regulated entities to conduct litigation, provided that they apply for, and meet the criteria for, a litigation extension to their practising certificate or entity authorisation for advocacy. It is proposed that entities will be authorised to conduct litigation provided they employ at

least one authorised litigator and the BSB is satisfied that the risks are manageable, given its discretionary authorisation factors. A condition specifying the level required could be included in their licence or authorisation if they intend conducting litigation. These proposals are intended to help open up the market for litigation services and provide greater consumer choice, whilst ensuring that safeguards are in place to protect clients. Our proposals in relation to authorisation to conduct litigation are discussed more fully in the previous chapter.

D6. BSB regulated entities will also be authorised to carry on the other reserved legal activities which practising barristers may undertake (reserved instrument activities, probate activities and the administration of oaths) but the BSB will expect such activities normally to be ancillary to advocacy, advice and litigation and not to form a major part of the entity's activities. If the BSB is concerned that the focus of an entity's business is on such activities, and that it might not be an appropriate regulator for that entity, it will have a discretion to refuse to authorise it (see paragraph D13 below)

Management of entities:

D7. The draft Code of Conduct introduces duties for BSB regulated entities and the managers and BSB regulated persons who work in them. In addition there are specific duties provided for in relation to the Head of Legal Practice (HOLP) and/or the Head of Finance and Administration (HOFA). The Legal Services Act requires ABSs to appoint a HOLP and HOFA and we have decided that a similar requirement should apply to other BSB authorised bodies. The HOLP will in particular be required to take all reasonable steps to:

- a. Ensure compliance with the terms of the entity's authorisation (and report to the BSB any failure to do so);
- b. Ensure that the entity and all of the employees and managers who are BSB regulated persons comply with duties imposed by s176 of the Legal Services Act 2007 and that any non-authorised persons comply with their duties under s90 (and report any failure to do so to the BSB)

D8. We will also impose a duty on the entity to ensure that all employees are appointed under a contract of employment which requires them to comply with the requirements of the Code insofar as it is applicable to them and do nothing which causes or substantially contributes to a breach of the Code by the entity, its managers or the BSB regulated persons employed by it. The Handbook defines employees as including any person who is employed by a non-authorised person that in turn is owned or controlled by one or more BSB authorised persons and therefore this wider range of people would fall within the scope of the disqualification power. The enforcement consultation explores in more depth how the enforcement regime will apply to entities, their owners and managers and the authorised and non-authorised persons employed by them.

Authorisation and structure of entities:

D9. The BSB envisages regulating a variety of entity structures, including for example partnerships, limited liability partnerships or companies, all of which would be able to employ other authorised persons and non-lawyers. The three types of entity that the BSB proposes to regulate are:

- a. Barrister only entities, which are entirely owned and managed by barristers
- b. Legal disciplinary practices, all of whose owners and managers are authorised persons and
- c. Alternative business structures, which must have at least one authorised person as Head of Legal Practice and at least one non-lawyer manager. Otherwise, they can have any proportion of lawyers and non-lawyers as owners and managers (subject to the BSB's approval criteria)

D10. In relation to each of the above, the BSB proposes that, in substance they can only undertake "legal activities" as defined by Part 6 of the Handbook, subject to any minor or incidental examples of other activities which are carried on in the course of supplying the main service and do not materially detract from the focus being legal activities. Legal activities means any activity which is a reserved legal activity and any other activity which consists any of the following:

- a. The provision of legal advice or assistance in connection with the application of the law or with any form of resolution of legal disputes;
- b. The provision of representation in connection with any matter concerning the application of the law or any form of resolution of legal disputes;
- c. Activities of a judicial or quasi-judicial nature (including acting as a mediator); and
- d. Undertaking legal academic work, such as lecturing, where this is ancillary to other legal activities.

QUESTION 43: Is this definition of legal activities sufficiently broad to encompass all the main activities that a BSB-regulated entity is likely to undertake?

D11. The BSB's policy is that there must be at least one barrister manager in a BSB regulated entity, who is also an owner. There can be, but there are not required to be, other managers and owners. This structure would permit a self-employed barrister to incorporate a company wholly owned by them as a vehicle through which to supply their own services. The BSB will not regulate entities that have owners with a material interest who are not also managers and will require all owners and managers to be natural (i.e. not corporate) persons. This is because we are designing a relatively simple and efficient regime for entities that are relatively low risk and/or where the risks posed are similar to those posed in regulating chambers of self-employed barristers. Complex ownership arrangements which lack

transparency impose greater demands on the regulator and therefore impose greater cost on the regulated community as a whole. The risks posed by external ownership are significantly different in nature, especially in the context of advocacy and litigation services, where the duty to the Court may run counter to the profit principle and has to be safeguarded. For similar reasons, we propose (subject to the exercise of our discretion) to limit non-lawyer management of a BSB regulated entity. The strength of our regulatory regime lies in its strong hold over individuals whose ability to practise their professional calling depends on remaining in good standing. Entities predominantly owned and managed by non-lawyers present regulatory challenges which are different. We also propose that a majority of the managers of a BSB regulated entity would normally be qualified to exercise rights of audience in the higher courts (whether as barristers or as HCAs). This is a mechanism for matching entities to our specialist niche.

D12. Our approach, as a relatively small specialist regulator, is to concentrate on managing efficiently risks that are similar to those we are familiar with, and are suited to managing, rather than attempting to be a jack of all trades. There are other available regulators for those whose business plans cannot be accommodated within our proposals.

D13. The BSB therefore proposes to have a power to exercise discretion over whether to approve entities. Where an entity satisfies the minimum eligibility criteria, the BSB will go on to consider whether the entity is one which it would be appropriate for the BSB to regulate taking into account its analysis of the risks posed by the entity, the regulatory objectives of the Legal Services Act 2007 and the published policy of the BSB. . Guidance would identify common factors the BSB is likely to take into account when making that assessment, including:

- a. The services that the entity intends to provide and the nature and extent of any non-reserved activities;
- b. The proposed proportion of managers to employees;
- c. The extent to which managers are involved in advocacy and litigation services; and
- d. Whether the entity intends to undertake legal transactional services direct to lay clients and the extent to which this represents a significant part of the business.

D14. This discretion will enable exclusion of entities unsuited for BSB regulation, dealing with possible regulatory arbitrage and preserving the BSB's specialist remit.

D15. Proposed limits on structure will not be operated as rigid limits but rather as indicative factors, as part of an overall assessment of risk and suitability for BSB regulation. For example, the following factors would indicate that BSB regulation would be appropriate (with the converse suggesting that BSB regulation might not be appropriate):

- a. 50% or more of owners and managers have rights of audience in the Higher Courts;
 - b. A substantial part of the services to be provided comprise the provision of advocacy or litigation services or related advice;
 - c. At least 75% of owners and managers are authorised individuals.
- D16. It will be open to the BSB to decide to authorise an entity but to impose conditions on the activities or scale of certain kinds of activity it undertakes, or to inform it if the entity makes significant changes in its activities. All such decisions will be subject to appeal.
- D17. The decision to adopt a discretionary approach represents a change from our previous position on authorisation of entities. On reflection, the Board felt that it would be inappropriate to impose rigid criteria and that discretion exercised by reference to an assessment of suitability and risk, guided by published policy, would provide an element of flexibility, whilst maintaining the safeguards needed in the BSB's niche regime.
- D18. Where the BSB concludes that an entity is appropriate to be regulated by it, it may still refuse authorisation if it is not satisfied that:
- a. the managers and owners individually meet the relevant suitability criteria;
 - b. the managers and owners are suitable as a group to operate or control a practice providing services regulated by the BSB;
 - c. management or governance arrangements are adequate to safeguard the regulatory objectives of the Legal Services Act or the policy objectives of the Bar Standards Board;
 - d. if the authorisation is granted, the entity will comply with the Bar Standards Board's regulatory arrangements;
- D19. The BSB may also refuse the application for authorisation if:
- a. inaccurate or misleading information has been provided in the application or in response to any requests by the BSB for information;
 - b. the application is to become a barrister only entity or a legal disciplinary practice and the BSB concludes that intervention powers that it has under the Legal Services Act in respect of ABSs would be necessary if the entity ran into difficulties (we will discuss these issues further in the second part of our consultation);
 - c. for any other reason, the BSB considers that it would be against the regulatory objectives of the Legal Services Act or the policy objectives of the BSB to grant authorisation.

QUESTION 44: Do you agree that the proposed authorisation criteria are appropriate?

Supervision of entities:

D20. The BSB's policy is that authorisation, once granted to an entity, will continue unless or until revoked, suspended or subjected to conditions. However, the introduction of entity regulation provides a useful opportunity for the BSB to review its overall approach to supervision/monitoring and enforcement (enforcement issues are explored in the other consultation paper). Building on our current chambers monitoring regime, we propose to move towards a risk-based supervision system. In addition to requiring entities to submit information annually (and in answer to ad hoc BSB requests), we propose to risk assess each entity against a transparent set of criteria related to the likelihood and impact of any risk to the regulatory objectives that the entity presents. This framework is outlined in more detail in the next section.

D21. The risk factors will be linked to those being proposed for risk assessment at authorisation stage and will aim to ensure that the entities have sufficient systems in place to manage risk, given the nature of the work undertaken. This analysis will determine the level of supervision that the BSB requires of the entity. We envisage in due course developing self-assessment in order to incentivise compliance by giving entities some control over the level of risk that they present and therefore the level of supervision by the BSB. The BSB may impose conditions when granting authorisation or subsequently. High risk entities may be subject to more regular monitoring with a request for action plans to address perceived issues. Disciplinary action against the entity or individuals working in them or the imposition of conditions on (or ultimately revoking) licences or authorisation, would only be undertaken if satisfactory progress were not made or the breaches of rules or conditions were serious. Aside from disciplinary matters, circumstances in which the BSB may need to take regulatory action include:

- a. The BSB may need to give notice if the entity is no longer considered suitable for authorisation by the BSB. There will be a period of grace where an entity whose structure and services (having been appropriate when authorised by us) later departs from our criteria. This might happen for a number of reasons, for example because the entity has decided to change its structure or business model, or because of an unpredictable event such as the death of its HOLF or its only barrister owner/manager. The BSB will allow reasonable time to rectify the position or switch to another regulator where appropriate, or it may require the entity to undergo a reauthorisation process (for example if it proposes to change from a BOE to an ABS).
- b. The BSB could impose conditions if it considers it necessary to do so in the light of the regulatory objectives, whether on initial authorisation, as a result of changed circumstances, or during a period of grace (see above).

D22. The rules on revoking, suspending and imposing conditions on authorisations will provide for an appeal process.

QUESTION 45: Do you agree with these principles and Section E of Part 3 of the Handbook?

Appeal processes:

D23. An appeals process will be established for all decisions made in relation to the authorisation and ongoing licensing or authorisation of entities. For all entities, it is proposed that all decisions be subject initially to an internal review (perhaps by the BSB's Qualifications Committee in the first instance). It is proposed that there would be a further appeal to the General Regulatory Chamber of the First Tier Tribunal⁶.

D24. The other part of this consultation deals with the disciplinary arrangements and related appeal processes for entities and those within them. Our intention is that broadly these should mesh coherently with our arrangements for self-employed barristers.

QUESTION 46: Do you have any concerns about the proposed route of appeal?

Special Bodies

D25. Section 106 of the Legal Services Act envisages that licensing authorities for ABS entities may make rules allowing them to modify their normal licensing rules in relation to certain 'special bodies', which would include for example trade unions or not-for-profit bodies. Such bodies are currently benefiting from a transitional period during which they are not required to be licensed under the Act. However, once these transitional arrangements end, it is possible that some may seek to be regulated by the BSB, such as not-for-profit organisations offering pro bono services.

D26. We have reviewed our draft rules for approving and supervising entities and we do not think there is likely to be a need for us to amend our rules for special bodies and it would be disproportionate to operate a special regime for these organisations alone. They would of course be able to apply to be regulated by the BSB in the normal way, providing that they fit our profile as a specialist regulator.

QUESTION 47: Do you think that any requirement in our draft rules is inappropriate for special bodies? If so, what type of modification do you think would be appropriate?

The fee structure for regulating entities:

D27. A key principle that the BSB has adopted for the development of the regulatory framework for entities is that consumers of legal services, whether from individual barristers or entities, should experience the same levels of service and regulation. The general principles that apply to the fee structure for BSB regulated entities, and also to individuals and entities who are authorised to conduct litigation, are that the fee structure should:

⁶ This will require secondary legislation and is subject to confirmation that the tribunal could have jurisdiction over LDPs and BOEs in addition to ABSs

- a. Be fair to fee payers;
- b. Be efficient and economical to administer;
- c. Ensure a predictable income to meet the costs of regulation;
- d. Be stable - charges should not vary considerably year on year;
- e. Be as simple as possible – to enable the regulated community to predict likely fees;
- f. Be based on data that can be verified;
- g. Ensure that – wherever possible – costs of particular processes that are not of general application should be borne by those using such processes on, as far as possible, a cost recovery basis;
- h. Take some account of ability to pay, in particular, in relation to small and new businesses – fees should not be a deterrent to new entrants.

D28. Initially, uncertainties about for example the number of entities which will seek authorisation may make it difficult reliably to fulfil all these principles but this is the direction in which we would seek to move as more information becomes available

QUESTION 48: Do you agree with the general principles outlined above?

Set up costs

D29. The previous consultation paper proposed that set up costs (which are estimated to be in the range of £400k) should be borne by the Bar as a whole, as the impact on the practising certificate fee is likely to be small (less than £30 per practising barrister) and any barrister now in practice may at some time take advantage of the changes (whether in respect of entities or extending services to litigation). The process of building the BSB's capacity and capabilities in relation to entity regulation will also contribute significantly to the wider capabilities of the organisation as it works towards the LSB's regulatory standards framework across other areas. The Board and the Bar Council agreed this approach in April 2011 and it was agreed that set-up costs would be paid from current Bar Council reserves.

Application fees for the authorisation of entities

D30. Entities will pay a one off fee for authorisation and will remain authorised / licensed unless and until the BSB removes their authorisation/licence⁷, but will need to supply specified information and pay a fee annually. The BSB proposes to charge a standard application fee to entities applying for authorisation. It is proposed that fees for parts of the application process that are not of general application should be

⁷ This is an LSB requirement in respect of ABSs and we recommend taking the same approach to LDPs and BoEs rather than having differences in treatment as between different types of entity.

borne by those making the application on a cost recovery basis. For example the BSB will reserve the right to charge amounts in addition to the standard fee for complex applications, for data verification and if external advice on an application is required. The intention is that fees for the initial authorisation process will be fully borne by entities and will not be recovered from the rest of the regulated community.

QUESTION 49: Do you agree that there should be a standard application fee for entities subject to the right to charge more if more in depth investigations are needed? If you disagree, please specify what different basis should be used.

Annual fees for entities

D31. The costs of regulating entities will vary depending on the nature of their activities, their regulatory history and their size. Although there is an argument for basing annual fees on risk, the BSB does not have enough information, at least at this stage, to be able to relate particular kinds of risk to increased costs of regulation. An alternative approach to determining fees is therefore required. In accordance with the principles outlined above, the method of calculation should be simple to use and based on reliable information. We therefore propose that the annual fee for entities should be calculated on a banded turnover model. The process will involve requiring entities to notify the BSB of a turnover figure for a completed accounting year (by the end of the practising year). That turnover figure could then be used to calculate the fee payable for the next accounting year. For the first year for a new entity, the BSB would need to base the fees on estimated turnover figures. Basing fees on estimated turnover figures increases the risk of charging an inappropriate amount but there could be a power to make an adjustment, up or down, at the end of the year. However, basing the annual fee on turnover would support the principle that the fee structure takes ability to pay into account.

D32. It is also proposed to charge fees for applications to the BSB such as approvals for new managers or the appointment of HOLP or HOFA. These fees will be set a level to cover the costs of dealing with the applications. We may also charge for additional monitoring visits if these are necessary.

D33. The ongoing development of risk based regulation may in future have an impact on the fee structure for BSB regulated entities. However at present the BSB does not have sufficient data to adapt the fee structure to take risk into account and will have to learn from its experience of outcomes-focused regulation.

QUESTION 50: Do you agree that the annual fee for entities should be based on turnover? If you disagree, please specify what different basis should be used.

PART E: The BSB's approach to risk assessment

Introduction:

- E1. Our approach to risk is fundamental to our work as a regulator and is a core requirement of the Legal Services Board's regulatory standards framework. Not only will it inform decisions about who we regulate and the standards we expect them to meet, it will also directly influence our approach to monitoring and enforcement.
- E2. The BSB is currently reviewing its monitoring strategy in the light of the LSB's regulatory standards framework. The intention is to set up a central monitoring unit, which will be responsible for monitoring chambers and entities. This will in time inform the approach to regulating individuals.
- E3. The focus of this part of the consultation is on the role that risk assessment might play in our monitoring of entities. Following this consultation there will be a separate consultation on the development of the BSB's wider risk-based monitoring strategy as it relates to chambers monitoring.
- E4. Entities will be monitored for compliance with the new Handbook. The intensity and level of monitoring activity to which they will be subjected will depend upon the level of risk that they pose. Our general approach to risk assessment consists of two stages. In the first instance we need to analyse the potential impact of non-compliance with the Handbook on the regulatory objectives and then go on to consider the probability of non-compliance occurring. That means the level of supervision of an entity will be directly linked both to the potential impact if something goes wrong and to the likelihood that it will go wrong.
- E5. It is important to emphasise that the purpose of risk assessment is to help in correctly identifying and then mitigating risks. It is not a sanction but a diagnostic tool. Entities will be expected to collaborate in assessing and addressing risks.

Assessing the potential **impact** on the regulatory objectives:

- E6. It is proposed that the potential impact on the regulatory objectives will be measured through an assessment of the following factors:
- a. Size;
 - b. Services offered to the public;
 - c. Vulnerability of client base; and
 - d. Availability of other (non-regulatory) remedies for clients.
- E7. **Size** – This factor reflects the basic assumption that larger entities have a greater potential to affect the regulatory objectives than those of a modest size. Size will not only be measured with reference to the actual number of people working at the entity but also in terms of turnover and the number of clients.

E8. **Services offered** – This will be a combined assessment of both the type of services offered and the method of delivery. This factor is based on the assumption that entities which offer a limited range of services via traditional referral instructions pose less risk to the regulatory objectives than those offering a wide range of services direct to the public.

E9. Although the BSB regulated community will be prohibited from holding client funds, those entities that choose to make use of a third party payment service will be assessed as posing a greater risk than those which do not.

E10. **Vulnerability of client base** – This factor reflects the assumption that some clients are more vulnerable than others and therefore any adverse events have a greater impact. Because it is difficult to measure vulnerability directly, proxy measurements will be used depending on the area of law in question. For example entities with predominantly immigration, family, personal injury and/or criminal practices have an inherently more vulnerable client base than those which concentrate on high end civil clients like banks and other financial institutions.

E11. **Availability of other remedies** – Potential impact will be reduced if there are other satisfactory remedies available to the client from outside the regularly regime. For example failures towards commercial clients can, in most instances, be remedied through appropriate professional indemnity cover. However, failures towards clients whose liberty, health or family life is in issue are, inherently, not likely to be adequately compensated by after the event financial redress.

QUESTION 51: Do you agree that these factors are appropriate for assessing potential impact on the regulatory objectives?

Assessing the **probability** of the impact occurring:

E12. Once the potential impact has been measured consideration turns to how likely it is that an entity will not comply with regulatory requirements set out in the Handbook. In large part, this is a measure of what steps entities have taken to mitigate the likelihood of non-compliance. As mentioned above, an assessment of probability will determine the intensity of the supervision that is adopted.

E13. In assessing probability of non-compliance we will take into account the following general factors:

- a. Systems that assist in the delivery of services;
- b. Governance and business model;
- c. First tier complaints;
- d. People and training;
- e. Regulatory history;
- f. Novelty of the work undertaken or the business model;

- g. The availability of outside assistance;
 - h. Client satisfaction; and
 - i. Quality accreditation.
- E14. **Systems that assist in the delivery of services** – It is important that the entity can demonstrate it has proper systems in place to manage compliance. Failure to demonstrate proper systems are in place suggests the probability of the regulatory objectives being adversely affected is enhanced. For example, the BSB will require systems to be in place to ensure;
- a. Proper conduct of services provided,
 - b. Financial management and risk management,
 - c. Client confidentiality,
 - d. Conflicts are avoided,
 - e. Compliance with the dual capacity rules, the recruitment and supervision of pupils, the equality and diversity rules, the money laundering regulations etc.
- E15. **Governance and business model** – The entity will need to demonstrate that there are good governance structures in place and a coherent business plan. Generally, the BSB will check that these factors have been considered, and will conduct a high level review of the quality of the governance structures and business plans. However, the BSB may submit applications to more detailed review by external experts in order to cross check its own internal assessments.
- E16. **First tier complaints** – The BSB will wish to see that the entity has a robust first tier complaints system and that the public is informed of their right to complain to the Legal Ombudsman. An inability to demonstrate compliance with first tier complaints requirements means the probability of the regulatory objectives being adversely affected is enhanced.
- E17. **People and training** – The probability of the regulatory objectives being adversely affected will be increased if the entity cannot demonstrate that there are properly qualified people providing the legal services and properly qualified people running the business. The BSB will want to be satisfied that there is an appropriate HoLP and HoFA (or equivalent) in place, individuals/managers have the right skills and experience for the type of services being delivered, the ratio of managers to employees is appropriate and that those offering legal services can demonstrate relevant experience, competence, CPD and general regulatory compliance.
- E18. **Regulatory history** – Where an entity has had difficulty in the past in complying with its regulatory requirements, we may treat this as an indication that it may continue to encounter difficulty in the future, potentially leading to an adverse

effect on the regulatory objectives. There will, of course, be no historic information relevant to entities because the BSB has hitherto only regulated individuals. The entity's regulatory history will therefore be assessed initially by examining the regulatory history of the owners, managers and authorised persons within it.

- E19. **Novelty** - The possibility of the regulatory objectives being adversely affected may be enhanced if the services being offered by the entity are novel (such as litigation) and/or the structure of the business and governance arrangements are new. Entities that can demonstrate a proven track record with the appropriate skills will therefore be assessed as less likely to pose risks.
- E20. **Outside assistance** – Risk to the regulatory objectives can be mitigated by demonstrating an ability to access high quality outside support. Such support could be offered by SBA's, the circuits, professional support companies or by demonstrating an ability to access the advice and assistance of respected senior advisors.
- E21. This factor may be of particular relevance to smaller entities and sole practitioners acting as an entity. Demonstrating that they have the ability to access quality outside assistance, should the need arise, demonstrates that the likelihood of the regulatory objectives being adversely affected is reduced.
- E22. **Client satisfaction** – Whilst most clients will not be in a position to give informed feedback on the accuracy and completeness of the legal services provided, they will be able to provide valuable information on some of the softer more client focused skills.
- E23. Entities that can demonstrate high levels of client satisfaction (through a properly vetted satisfaction survey or otherwise) will be assessed as less likely to negatively affect the regulatory objectives than those who cannot.
- E24. **Quality accreditation** - Assuming the criteria for judging quality marks can be aligned to what the BSB perceives to be the greatest areas of risk, then an entity with an appropriate accreditation could be given credit for demonstrating effective risk management. Appropriate use of quality accreditations would mean that the BSB's limited resources can be more effectively targeted on entities that pose the greatest risk. This would require the approval by the BSB of certain third party quality assurance processes in due course.

QUESTION 52: Do you agree that these factors are appropriate for assessing the probability of an adverse regulatory impact occurring?

Other considerations for the BSB risk framework:

- E25. **Method of assessment** – The BSB recognises that a model based heavily on mathematical algorithms, with defined scores and weightings, would likely produce more consistent risk assessment results. However, because the quality of our current data is relatively poor and because an assessment of legal services does not lend itself easily to an overly quantitative approach, the BSB will likely favour a

qualitative approach to risk assessment. However, wherever possible the BSB will assess objective factors and will seek to achieve a high level of consistency through strict adherence to the framework, appropriate training of staff and proportionate quality control. More detail on the method of assessing a risk rating is set out in the separate consultation on risk and enforcement.

- E26. **Review** – Once an entity has been given a risk score the BSB will have to keep this under review. For low and medium risk scorers an annual review following receipt of the annual return will probably be appropriate unless concerns are raised. High risk scorers might need to be reviewed more frequently.
- E27. Reviews will also need to take place on an ad hoc basis when significant changes occur to the ownership or management structure (i.e. where there has been a merger or acquisition). The new arrangements will have to be re-assessed using the above criteria and the entity may be assigned a different risk score.
- E28. **Confidentiality** – The BSB’s general approach to risk scoring and the criteria and factors it will make use of will be publicly available. However, specific risk scores will be confidential. We would, however, provide feedback to ‘high’ risk entities to enable the development of a constructive working relationship and to help them to start managing their own risk better.
- E29. **Self-assessment** – In an attempt to incentivise compliance, entities will be required to undertake a self-assessment of their business.
- E30. **Data collection and use** – The data the BSB currently holds on the regulated community is limited. However, over time the expectation is that the BSB will be able to build up a large databank that can then be analysed and used to better inform our position on all areas of risk analysis. Alongside this consultation, we are exploring further the evidence base that is currently available.
- E31. Data will be received by the BSB via four main routes:
- a. Authorisation applications;
 - b. Annual returns;
 - c. Ad hoc information;
 - d. Intelligence (complaints and other sources)
 - e. Monitoring visits.
- E32. Over time we will establish more robust and more reliable data and our regulatory approach may be adapted in light of that.

QUESTION 53: Do you have any comments on the issues raised above?

QUESTION 54: Do you have any views on the applicability of the principles outlined above to individual barristers and the chambers model?

PART F: Equality and diversity impact of the proposals in this consultation

F1. The BSB has produced an interim equality analysis, which accompanies these consultations. The focus so far has been on entity regulation and the key changes that are proposed to the Code of Conduct in the consultations, with a view to getting feedback from respondents on the likely impact on groups with protected characteristics. During the consultation period we will undertake a more extensive analysis of the new Handbook as a whole, which will be published following our analysis of consultation responses.

QUESTION 55: Do you have any comments on the issues raised in the attached interim equality analysis?

QUESTION 56: Are there any other potential impacts on Equality and Diversity from the new Code as a whole which you wish to draw to our attention at this stage? (As noted above, further work is to be done in this area.)