New Handbook and Entity Regulation & Supervision and Enforcement: Consultation Report

December 2012

INTRODUCTION

1. This report summarises the responses to the Bar Standards Board's (BSB) consultation paper 'New BSB Handbook' published in March 2012. It also responds to some of the comments made by respondents and explains how the Board's policy position has evolved in light of the consultation and recent developments in the BSB's overall regulatory strategy.

2. The consultation closed on 29 June 2012 and responses have been given careful consideration by members of the BSB's Professional Practice Team, Standards Committee (including smaller working groups composed of Standards committee members), Entity Regulation Programme Board and by members of the Board.

3. 38 responses were received to the consultation. A list of respondents is at annex 1 and the full comments are available on our website. The original consultation report is available at:

http://www.barstandardsboard.org.uk/media/1393768/consultation_part_2_-_final.pdf

4. The Legal Services Board (LSB) Regulatory Standards Framework sets out what they view as regulatory best practice. In the light of this, the BSB has taken the opportunity to revise its rules based on the four cornerstones of legal regulation. These are:

    - Outcomes-focused regulation;
    - A risk identification framework
    - Proportionate supervision; and
    - An appropriate enforcement strategy

5. Since the consultation was published, the BSB has been further considering the implications of this new framework. The proposed draft of the Code of Conduct already took account of the new framework and represented a move towards higher level rules and the inclusion of desired outcomes. The BSB reviewed in light of the responses to the consultation whether the right balance has been achieved and where appropriate has removed unnecessary detail from the rules. Detailed prescriptive rules still exist in parts of the Handbook but only where it is absolutely necessary in order to provide clarity to the Court, public and profession. The BSB has also been reviewing its approach to enforcement and this is covered in Part II of this report.

6. In informing policy positions and the redrafting of the Handbook the BSB has also engaged with the profession in other ways. For example while the consultation was running the BSB embarked on a number of road show events across the country, giving practitioners the opportunity to ask questions about the proposed new regime.

The BSB also took part in a debate examining how BSB-regulated entities may or may not benefit the administration of justice. The BSB also met with its own Consumer Panel and received comments from the Legal Services Consumer Panel.

NEXT STEPS

7. Since the close of the consultation the BSB has been considering consultation responses in detail and revising the drafting of the Handbook as appropriate. The revised Handbook will be presented to the Board, following which it will be submitted to the LSB for approval. There will be two separate but related applications submitted to the LSB. The first will be a rule change application for the new Handbook and the second will be an application to become a licensing authority for ABSs under Part 5 of the Legal Services Act 2007 (LSA 2007). The BSB will be entering into discussions with the LSB with the aim of submitting both applications in the spring of 2013. The next stage will be for the LSB to consider both applications, however the timeframes for approval vary. For the Handbook application we would aim to liaise with the LSB and gain approval in 3 months, but this process may take longer. We would then anticipate the new rules coming into force in the autumn of 2013 or shortly thereafter. For the licensing authority application the LSB has up to a year to reach a decision.

8. The rule change application will include the necessary rule changes for the introduction of barrister only entities (BoEs) and legal disciplinary practices (LDPs) and will permit barristers to conduct litigation. As a decision on the licensing authority application could take up to a year, it is likely that BoEs and LDPs will be introduced in advance of ABSs. There is also a possibility that some rules, like the new Interim Suspension Rules, may be fast tracked and become operational by autumn 2013.

9. ABSs require an extended approval process and we would aim to introduce these in early 2014.

PART 1: SUMMARY OF MAJOR POLICY DECISIONS

Core duties (paras 18-27)

- Two new core duties (you must be open and co-operate with regulators and manage your business effectively) to remain.
- Additional guidance on core duties will be inserted in the core duties section of the Handbook.

Unregistered barristers (paras 28-35)

- All the core duties will be applied to unregistered barristers when they are providing legal services.

Sharing premises (paras 36-45)

- The existing rules on sharing premises will be replaced with more outcomes-focused rules on associations and outsourcing.
- The main policy intention behind these rules is to ensure that barristers do not use associations or outsourcing as a means to circumvent BSB regulation.
- Guidance will be added to clarify that the outsourcing rule will not apply to devilling. Additional guidance on devilling has been inserted into the "you and your client" section in relation to the rules on misleading clients.

Separate business rule (paras 46-51)

- There will be no rule preventing a BSB-regulated entity supplying unreserved legal services in a separate business (reserved legal activities can only be provided in an entity if it is also authorised). However, all entities will need to inform the BSB if they propose to operate a separate business so this information can be built into their overall risk profile.
- Individual barristers will continue to be permitted to supply legal services to the public as either (a) a self-employed barrister (b) an employed barrister or (c) an owner, manger or employee of another authorised body (i.e. SRA regulated law firm).
- The BSB will consider in future relaxing the current prohibition that prevents employed barristers in entities that are not authorised from supplying legal services to clients of their employer.

Managing client affairs (paras 52-58)

- The prohibition on managing client affairs will remain.
- The BSB is seeking to become a niche specialist regulator focussing on advocacy and ancillary services and to regulate beyond this more widely would be outside the scope of the BSB's remit and could lead to regulatory failure.

Referral fees (paras 59-63)

- The BSB received overwhelming support for the ban on referral fees and has concluded that the prohibition should be maintained in the public interest.

Reporting serious misconduct (paras 64-76)

- Barristers will be required to self-report and report others in relation to "serious misconduct" only. The BSB will publish guidance as to what it considers constitutes "serious misconduct".
- Limiting the requirement to report cases of "serious misconduct" should largely meet any concerns that barristers would be inhibited from discussing possible marginal breaches of the rules with colleagues. If a barrister does reveal "serious misconduct", then the public interest requires that the regulator should be informed so that it can take appropriate action.
- A carve out will however be made for any discussions held on a confidential basis with the Bar Council's ethical help line.
- Where legal professional privilege applies, this will override the requirement to report another barrister's "serious misconduct".
- The requirement to report "serious financial difficulty" has been dropped (but the requirement to report on insolvency or bankruptcy remains).

Dual authorisation (paras 77-84)

- The prohibition on dual authorisation will remain. The main justification for retaining the rule is that it avoids unnecessary confusion for clients. It would also be problematic to accurately define when a joint authorised person was acting as a barrister or acting as solicitor, and consequently what regulatory regime was to be applied.

Insurance (paras 85-97)

- The new Handbook will make it a requirement that all barristers (self-employed or otherwise) and all entities must have insurance in place which covers all of the legal services they supply to the public.
- If you are a BSB authorised person, BSB authorised body or a manager of a BSB authorised body, and the BSB stipulates a minimum level and terms of insurance, then you must ensure that these are complied with.
- Self employed barristers will be obliged to take out the minimum cover with BMIF.
- Entities may obtain insurance from BMIF, but this will not be a compulsory requirement as it is with the self-employed Bar.

International practising rules (paras 98-112)

- The public access rules will apply to foreign work. The BSB does not believe there is any justification for failing to apply the rules consistently across the board.

- The cab-rank rule will apply to instructions relating to work in England and Wales from professional clients in Scotland, Northern Ireland and countries in the European Economic area

Waivers from the cab-rank rule for entities (paras 113-124)

- The cab-rank rule will apply to all entities and authorised persons in entities.
- There will not be a specific rule allowing an entity to apply for a waiver from this requirement.

Management of chambers and entities (paras 125-139)

- Rules around the management of chambers will remain.
- The drafting of these rules has been revised where they seemed more appropriate to entities rather than the traditional chambers model.
- Similar requirements already exist in relation to the equality and diversity rules.
- The requirement to appoint employees under a contract of employment which requires them to comply with the Handbook has been dropped.

Obligation not to mislead the Court (paras 148-156)

- There will be a general rule that all BSB-regulated persons must not mislead the court.
- Guidance will explain that in circumstances where the prosecution is unaware of a previous conviction, a BSB-regulated person must only withdraw if the client does not consent to disclosing the conviction and an unlawful sentence will result. In all other circumstances the BSB-regulated person can continue to act provided they do not say anything in respect of previous convictions that misleads the Court.

Litigation (paras 167-228)

- Barristers will be permitted to conduct litigation provided they satisfy the BSB that they have the necessary skills and case management systems in place. An approval checklist is being finalised together with a post implementation monitoring regime.
- Given litigation has been narrowly defined by case law, the BSB continues to believe that relaxing the prohibition will not introduce significant risks that cannot properly be mitigated.

Third party payment service (paras 229-277)

- The BSB proposes to permit barristers and BSB-regulated entities to take advantage of a third party payment service arrangement approved by the BSB, provided that they fully comply with the conditions of approval.

- The Bar Council is in the process of developing a payment service, named BarCo. The BSB expects to be in a position to consider whether or not to approve this service in the coming months.
- The Handbook will not specify a single provider but will leave open the possibility of more than one payment scheme.

Entity Regulation (paras 278-315)

- The BSB's approach to entity regulation will proceed with only minor changes. The requirement that all persons with any ownership interest (whether material or not) and all managers should be individuals will be moved from a mandatory to a discretionary factor. This will facilitate a situation where a number of individual barristers within chambers, who have formed one person entities, want to come together as an overall chambers entity. Our view is this type of structure does not represent a substantially increased risk.
- Single person barrister entities will be allowed. Ownership of entities by spouses/partners will also be permitted, provided that the spouse/partner is also a manager and provided the BSB exercises its discretion to approve the entity in circumstances where the non-lawyer ownership will in fact be 50%.
- Appeals from BSB decisions not to approve an application, or to impose restrictions on the approval, will initially be heard by the Qualifications Committee and then externally by the First Tier Tribunal (subject to ongoing discussions with the LSB and MoJ).

ANALYSIS OF CONSULTATION RESPONSES

Q1: Do you have any comments on the presentation of the new Handbook?

1. The new Handbook is presented significantly differently to the 8th edition of the Code of Conduct. In general the BSB has sought to make the Handbook more user friendly and to specify more clearly the regulatory outcomes that the BSB is seeking to achieve.

2. The Handbook seeks to incorporate in one document, the Code of Conduct, practising rules, qualification regulations and enforcement rules. The annexes which exist to the 8th edition of the Code have also been incorporated into the main Handbook as appropriate.

3. The Code of Conduct specifically has been broken down into the following sections:

    a) You and the court;
    b) Your behaviour;
    c) You and your client;
    d) You and your regulator; and
    e) You and your practice

    This section also specifies the outcomes the BSB is seeking to achieve.

Responses

4. Responses on presentation of the Handbook were mixed 4 Pump Court, Garden Court Chambers, the Government Legal Service Bar Network and the Bar Council agreed that the presentation of the Handbook is an improvement on the existing Code. Specifically, Garden Court Chambers stated that the Handbook is well laid out, clear and with guidance helpfully inserted and the Bar Council said that in general terms the rules and guidance are much clearer in their formulation than the current Code and the layout is easier to follow. However, other respondents such as three of the Inns of Court commented that the presentation of the Handbook is overly technical. Inner Temple thought that two separate introductions were confusing and unnecessary.

5. Respondents also commented on the introduction of outcomes in this section. Gray's Inn in particular stated that they were 'not persuaded that the introduction of "outcomes" serves any useful purpose. It is important that the public, the bar and the regulator know with certainty what professional and ethical standards are to be adhered to. The problem we perceive with outcomes is that they introduce an unwelcome element of uncertainty. One cannot tell by what yardstick the achievement of an outcome is to be measured. There is also a real danger, we think, of a failure to achieve an outcome being used to justify that there has been some breach of the Code after the event.'

6. The Chancery Bar Association (ChBA) made some detailed comments, including on the hierarchy between core duties, rules and guidance. They thought that this aspect of the Handbook was confusing and unhelpful. They also stated that the status of guidance is not always clear, in particular because there are instances in the Handbook where the guidance is expressed in mandatory terms. The ChBA suggest that where guidance is in

fact mandatory, it should be made clear by elevating it to the status of a rule and if not it should not be expressed in mandatory terms.

BSB Response

7. Since the consultation has closed the BSB has taken respondents comments into account and taken steps to improve the presentation of the Handbook. The numbering and labelling of sections has been revised to make the document flow better and generally be easier to follow. The introductions have also been incorporated to form one main introduction at the beginning of the document.

8. Middle Temple made some useful comments on how the Handbook should be presented online and the BSB will be taking these into account when developing a version for the website. The Handbook will link to other guidance on the website where appropriate so readers should be able to view or access all the relevant documentation from one place. The BSB also aims to be able to show previous versions of the Handbook on any given date.

9. The BSB understands concerns raised about the introduction of outcomes. To clarify the position, in the Handbook the outcomes are intended as justifications for and aids to purposive construction of the rules, but are not the basis for charges of misconduct. The intention is that charges would continue to be for breaches of Core Duties and/or rules. However, the outcomes will have an important role in the BSB's enforcement strategy. The presence, or otherwise, of an adverse impact on an outcome will be at the heart of any decision about whether to take enforcement action against a BSB-regulated person and at what level the penalty should be. The BSB therefore intends to be operationally outcomes-focused, while maintaining an element of prescription in rules that is of value to all parties.

10. We have looked again at the drafting of guidance and sought to clarify its status. Guidance cannot add any additional requirements to the rules but can, for example, explain how the rules apply in specified circumstances or draw attention to other relevant rules. Such guidance is rightly drafted in mandatory terms. It is designed to help users understand the rules while avoiding the need for detailed rules about all the possible ways of breaching the higher level requirements.

Q2: Is the relationship between outcomes, core duties, rules and guidance sufficiently clear?

Q3: Is the balance between rules and guidance about right?

Q4: Are any of the rules unnecessarily prescriptive?

11. Since the previous consultations the BSB 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 core duties will be mandatory with the rules intended to supplement them. Further information or examples of behaviour that would breach rules is contained in guidance.

12. The general approach to the Handbook has been to express all requirements that are genuinely, mandatory as rules, while providing further information or examples of behaviour that would breach rules in guidance. The BSB endeavoured to use prescription in rules only where this is necessary to achieve a desired outcome. In general, the BSB has sought to remove or minimise rules which seek to dictate how barristers or entities organise their business.

Responses

13. Respondents made some useful comments on the relationship between outcomes, core duties, rules and guidance, particularly 4 Pump Court and Combar. Some general comments were also made about material that should be in rules appearing in guidance and vice versa. The Legal Ombudsman stated that while they recognise breaches of rules themselves may be the key driver for a misconduct case, the BSB should always keep in mind whether the outcomes have been achieved or not. They go onto state that the barrister may have technically followed the rules (for example by setting out his advice in writing), but the spirit or intention behind the core duties and outcomes may have been undermined if the consumer is unable to understand the information they have provided. The Legal Services Consumer Panel commented that sometimes the outcomes appear to go wider than the core duties and rules, with the rules in particular potentially not covering all poor behaviours that could lead to the outcomes not being achieved.

14. On the balance between rules and guidance specifically 4 Pump Court broadly agreed that the balance struck was the right one, but made some specific observations about how this could be improved. The ChBA provided detailed comments with examples of where the relationship between rules and guidance is sometimes confused.

15. St Phillips Chambers stated that they thought the core duties, rules and guidance work well in setting out the essential obligations, an expansion of these duties and how they are practically to be applied, they did comment however that the outcomes do not appear to fit well in the regime. They also gave some useful examples of where they considered rules in the Handbook to be unnecessarily prescriptive. Lincoln's Inn also gave some helpful suggestions on rules that were overly prescriptive.

BSB Response

16. The BSB would like to thank respondents for their detailed and helpful comments on the Code of Conduct. The specific examples provided by respondents were particularly useful in assisting the BSB to analyse the relationship and content of core duties, outcomes and rules. We have used these comments to assist in reviewing the drafting of the Handbook. As part of this process, the BSB has again examined the balance between the rules, core duties and guidance. As a result of this review some rules have been moved into guidance and vice versa, with the aim of getting the balance between rules and guidance right.

17. The BSB will also be carrying out a plain English review of the Handbook which should further improve the clarity and usability of the Handbook.

Q5: Do you agree with the addition and purpose of the two new Core Duties?

18. The Handbook contained 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.

Responses

19. Detailed responses on the addition of the two new core duties were received. The Legal Ombudsman agreed with the addition of the two new core duties, in particular the duty to be open and cooperate with regulators, which includes cooperation with any Legal Ombudsman investigation. The Legal Ombudsman was of the view that this is an important mechanism which would allow them to carry out their investigations as quickly and effectively as possible. The Legal Ombudsman was however concerned that this outcome was not addressed in the mandatory rules. The Law Society were also satisfied that the requirements to be open and co-operate with regulators, and to manage business effectively to ensure compliance with legal and regulatory obligations reflects the position for solicitors under the SRA's Code of Conduct.

20. In relation to core duty 9, 4 Pump Court stated that this new duty 'does not have the characteristics of a distinguishing characteristic of practice at the Bar that should be recognised as a core duty. ChBA stated they have no objection in principle to core duty 9, but it should be made clear that this duty is subject to core duty 5 and the duty to maintain client confidentiality and privilege.

21. 4 Pump Court stated that core duty 10 is inappropriate for a number of reasons including "most barristers in self-employed practice would not regard themselves as managing a business, but as pursuing a professional vocation in which their own interests were always (and necessarily) of secondary importance to those of the client and the Court; and there is in any event an obligation to comply with the law and the code." For these reasons 4 Pump Court were of the view that core duty 10 is superfluous except to the extent that it mandates good business management.

22. The Bar Council strongly disagreed with the addition of both core duties. They, like other respondents were of the view that the purpose of these two new core duties could be achieved by adjustments or additions to the rules. The Bar Council stated that a core duty should be something that is fundamental, and marks out a barrister as a barrister, and that it should be so fundamental that a breach of that obligation would naturally be regarded by the profession and the public as professional misconduct. On core duty 9 the Bar Council stated that it is not the hallmark of a barrister that s/he co-operates with the regulator, but it is the hallmark of a barrister that s/he acts with integrity and honesty. They also stated that core duty 10 was expressed too vaguely, as did other respondents. The Commercial Bar Association ("Combar"), for example stated that core duty 10 is

particularly woolly and seemed to be symptomatic of the inappropriate "corporate" treatment of barristers.

BSB Response

23. The BSB is grateful for respondents' comments and concerns about the two new core duties. However, it has decided to retain the two new core duties.

24. The purpose of core duties 9 and 10 is to promote performance of legal and regulatory obligations (including CD1 –CD8) by requiring the regulated community to co-operate with the BSB or other relevant regulators (whose function it is to regulate performance of those obligations), and to conduct business or practice in a way that can reasonably be expected to ensure compliance on the barrister's part. Co-operation with regulators and compliance with applicable obligations are fundamental duties for any professional, and hence, properly regarded as core duties. Other regulators, in particular, the SRA, have similar core duties and as the BSB is moving towards entity regulation it is sensible to have principles that cut across and are consistent. It is acknowledged that these two core duties differ from the others, in that the other core duties directly target conduct which would breach one of the Professional Principles in s1(3) of the LSA 2007, whereas these core duties target conduct which would hamper the BSB's ability to do its job or which creates risks to the public interest which the BSB should be able to pre-empt.

25. For example, where a barrister deliberately obstructs the BSB in its reasonable endeavours to investigate an alleged breach, the BSB's ability to perform, and to be seen to perform, its regulatory function is prejudiced, and in such public confidence is undermined. This is likely to be a breach of core duty 9, in respect of which the BSB may take appropriate action (including disciplinary action), whether or not the original allegation against the barrister is made out.

26. Similarly, if a barrister unreasonably persists in running their business in a way that creates a significant risk of breaches of legal and regulatory obligations, after being put on notice of this, that is likely to be a breach of core duty 10. Such conduct could, if sufficiently serious, result in disciplinary action and/or in steps being taken by the BSB in relation to the barrister's authorisation (including, where the barrister is a manager, that of any BSB authorised body which he or she manages). Effective regulation in the public interest requires that the BSB should in appropriate cases be able to take pre-emptive action based on the risk barristers pose to the public interest even if those risks have not yet, for example, resulted in damage to an identified client or in the Court being misled.

27. The way in which the core duties are presented has been altered slightly. The duty to act in the best interests of the client is now core duty 2 whereas it was previously core duty 6. This has been moved as the order could have potentially created the misleading impression that the duty to act in the best interests of the client was subordinate to the other core duties listed above it. This change does not alter the position that the core duties are not presented in order of precedence. Some guidance has been inserted after the core duties to make this point clear and also to address some concerns around the duty to the court. This guidance tracks the duty in section 188 of the LSA 2007 that states the duty owed to the court overrides any other duty where inconsistent. The

guidance also cross-refers to the specific rules that set out the circumstances in which one core duty overrides another.

Q6: Do you agree that all Core Duties should be applied to unregistered barristers?

28. The BSB had previously decided to apply only two core duties to unregistered barristers. They were:

    - 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; and
    - You must act with integrity and honesty.

    In the context of developing the new entity regulation regime and the changing legal services market, in which there are greater numbers of unregistered barristers, the BSB reviewed the application of the core duties to unregistered barristers.

29. The BSB 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. The BSB therefore proposed to apply all of the core duties to unregistered barristers, including those rules that deal with priorities as between conflicting core duties.

Responses

30. The majority of respondents agreed that all of the core duties should apply to unregistered barristers. The ChBA commented that there should be a difference between unregistered barristers who are providing legal services and those who are not.

31. There was some concern however, about how the BSB would enforce compliance by an unregistered barrister with the core duties where there is no applicable rule requirement in relation to the barristers. The Bar Council was not persuaded that all of the core duties should apply to unregistered barristers for this reason. They stated that they were not sure how compliance would work in practice if unregistered barristers were not made subject to all of the rules in the Code. The Bar Council thought that core duties 2 and 4 (as previously suggested) would be sufficient to encapsulate all areas of concern.

32. The Legal Ombudsman stated that the intention to apply all the core duties to unregistered barristers will provide a greater degree of consumer protection; however they were still concerned that this doesn't go far enough. They were of the view that there would still be a clear gap for consumer redress as consumers are generally not aware of the distinction between regulated and unregulated providers of legal services. The Legal Ombudsman commented that although they have only taken a small number of complaints about unregistered barristers, there may be an increase as the numbers of barristers who do not receive a practising certificate increases.

BSB Response

33. The BSB will be applying all of the core duties to unregistered barristers when they are providing legal services. When not providing legal services, only the core duties relating to not behaving in a way which is likely to diminish the trust and confidence of the public, and to co-operate with regulators will apply to unregistered barristers. These core duties apply to all barristers at all times.

34. The BSB considers that the extension of all core duties to unregistered barristers is desirable. The core duties set fundamental standards which all barristers should reasonably be expected to meet when providing legal services, particularly at a time when legal service providers are becoming more innovative in their working arrangements, which could include novel ways of working and more outsourcing of operational functions. It is likely that as the numbers of unregistered barristers increases, such barristers are likely be involved in such novel arrangements, therefore it is important that consumers are not misled and have some degree of protection.

35. The drafting of the application sections of the Handbook have been reviewed generally and the BSB has sought to clarify the duties and rules that apply to unregistered barristers. The BSB has also reviewed section E5 of Part II with the aim of simplifying and making the rules relating to unregistered barristers more user friendly. In the version of the Handbook consulted on, unregistered barristers were required to give an information notice to anyone who would, (if the unregistered barrister were a BSB authorised person), be entitled to bring a complaint pursuant to the Legal Ombudsman scheme rules. The intention behind this rule was to limit the requirement to provide the information notice only to clients unlikely to understand the difference between registered and unregistered barristers and to rely on guidance for what should be said to more experienced clients such as government departments, local authorities and large clients. The Legal Ombudsman Scheme rules provided one possible way of identifying the clients who need such protection. The BSB has re-considered this conclusion, and recognises, for example, personnel at large clients dealing with unregistered barristers might also not be clear about their status and the consequences of dealing with them. The BSB has therefore decided to change the terminology so that unregistered barristers would be required to give the information notice to all 'inexperienced clients' . Guidance will make it clear that clients who are eligible to complain to the Legal Ombudsman are likely to be regarded as inexperienced for this purpose. Guidance will also suggest what information unregistered barristers should give to other clients to ensure that they are not misled about their status.

Q7: Do you agree with replacing the current prohibitions on sharing premises and associations with a more outcomes-focused rule and guidance?

Q8: Do you think the rules and guidance on sharing premises, associations and outsourcing will provide adequate protections for clients and users of legal services?

36. The current Code, and the version consulted on in January 2011, contained prohibitions on sharing premises and practising in associations with others along with a detailed list of exemptions. The BSB concluded that these prohibitions impose unnecessary

restrictions on how barristers structure their business and so they are not replicated in the new Handbook. Instead the Handbook adopts a more outcomes-focused approach towards associations with others and a provision was added dealing with outsourcing.

37. In devising the new rules and guidance on associations with others and outsourcing, the BSB 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.

Responses

38. There were few responses to the first question. However the responses received were generally in favour of removing the prohibitions and replacing them with more outcomes-focused rules. The ChBA thought that the outcomes-focused rule was more practical and flexible and based more on common sense. Similarly the Law Society agreed that the current restrictions should be removed subject to the continued ban on BSB-regulated persons holding client money, as well as other restrictions. BACFI agreed but had some concern about the proposed paragraph B 17(b). They said that many legal departments outsource functions, normally to regulated law firms, but there may be other instances of outsourcing.

39. The Bar Council agreed with the objective of preventing confusion or the circumvention of regulatory requirements, but was sceptical that an "outcomes-focused" approach would lead to effective regulation in this area. They commented that their experience of advising on the existing rules is that this is an area which would benefit from more, rather than less, precision as to what is and is not permitted. Only St Philips Chambers disagreed with the proposal to replace the current prohibitions stating that the proposed relaxation is cumbersome and not clearly manageable.

40. They were more responses to the second question. On outsourcing, 4 Pump Court were particularly concerned about the possible unintentional prevention of devilling which could arise as a result of the failure to define outsourcing so that it excludes devilling. This comment was echoed by other respondents including, 11 Stone Buildings and the ChBA.

41. The ChBA made a number of helpful detailed comments about the proposed new rules, including a number of comments on "material commercial interests." Specifically they stated:

    a) It would be preferable if "material commercial interest" were defined (or there were a specific exception for a shareholding in a limited liability company whose shares were listed on a recognised exchange and the shareholding did not exceed a stated percentage of the issued shares) in rules 48, 49 and 51.

    b) Rule 51.1 prohibits barristers from having a material commercial interest in any organisation (a term which is not defined) "which gives the impression of

being or may otherwise be perceived as being subject to the regulation of the BSB or another Approved Regulator in circumstances where it is not so regulated". The ChBA understand the rationale for this insofar as the organisation might itself give a misleading impression. We are not clear as to why the prohibition should extend to organisations which are perceived (without themselves having given the impression) as being regulated. Must the perception be based upon reasonable grounds and/or objectively justified? We are concerned that barristers could be guilty of professional misconduct when they (and organisations in which they have material interests) have done nothing which should attract such censure.

c) Rule 51.2 prohibits barristers from having material commercial interests in any organisation "which may otherwise be seen to bring the Bar into disrepute". Again, we consider that the Rule should be worded so that it is only breached if there is a reasonable basis for saying that the organisation has brought the Bar into disrepute.

BSB Response

42. In light of consultation responses the BSB has reviewed the rules on associations and outsourcing and made some changes. These changes are to make the position clearer that barristers should not be using associations or outsourcing as a means to circumvent the BSB's regulation.

43. In particular the BSB has sought to clarify and define what a material commercial interest would constitute. This will be defined in the body of the rules and in doing so the case law on apparent bias will be used in order to formulate an appropriate definition.

44. The BSB accepts that the proposed rules prohibiting having material commercial interests in organisations which might bring the Bar into disrepute and practising in association with persons whose conduct undermines the professional principles are too prescriptive, and could well give rise to difficulties in practice. Barristers and entities will still need to satisfy themselves that any material commercial interests they have, or any associations they enter into, will not cause them to breach core duty 5, which requires them to avoid behaving in a way which is likely to breach the public's trust and confidence in them or the profession.

45. The BSB appreciates concerns raised in respect of devilling and has added guidance to the outsourcing rule that makes it clear that it will not apply where the barrister instructs a pupil or a devil to undertake work on their behalf. In view of concerns which have been expressed about charging for work done by others, the BSB has inserted additional guidance on devilling in the "You and Your Client" section in relation to misleading clients. The rule makes it clear that a barrister must not mislead clients or potential clients about the terms on which legal services will be supplied, who will carry out the work and the basis of charging, as well as who is legally responsible for the provision of those services. The additional guidance sets out that a self-employed barrister would for example, be in breach of that rule if they charged for work undertaken by a devil or pupil under their own hourly rate, unless this is specifically first agreed with the client.

Q9: Do you think we need to include a separate business rule in the Handbook?

46. The BSB considered whether it was 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.

Responses

47. There was a mixed response on whether a separate business rule is required. 4 Pump Court, the ChBA, Combar and BACFI did not think such a rule is required. The Bar Council, the Law Society and the Legal Services Consumer Panel did think a separate business rule should be included in the new Handbook. The Legal Services Consumer Panel commented that the BSB's decision to be a niche regulator focusing on advocacy would appear to make it more likely for entities to wish to establish separate businesses from which to deliver other types of legal activity to consumers. The Consumer Panel stated that they could find no specific reference in the authorisation regime in relation to establishing separate business structures to carry out non-reserved activities and if the Handbook is not going to include such a rule, considerations of the risks to consumers identified by the BSB should be an explicit part of the authorisation process.

48. The Consumer Panel were also satisfied that the Handbook section on associations with others should provide adequate information to clients about such arrangements, although they noted the limited effectiveness of information requirements and the historic degree of non-compliance with other information provision rules i.e. complaints handling. Overall the Consumer Panel considered the risks to consumers of separate business structures to be high and therefore undesirable in general. The Panel thought it was vital that the BSB take a view about proposed business structure at the authorisation stage and impose licence conditions as appropriate. They suggested that once a licence is granted, active supervision on information and other requirements would also be needed.

BSB Response

49. The BSB has considered respondent's comments and also reviewed the rule that was consulted on in the Handbook. In reviewing the rule and respondent's comments the BSB has decided that there will be no specific rule in the Handbook that would prevent a barrister setting up a separate business providing unreserved legal services. Separate businesses providing any reserved legal activities will still need to be authorised.

50. The BSB will be asking applicants during the application process whether they will be operating any separate businesses and the answer to this will be built into the overall risk profile of the firm.

51. The BSB will monitor the situation in future and revisit whether a specific rule is required. In addition to this the BSB will review whether the current prohibition should be relaxed in

respect of employed barristers providing legal services to clients of their employer where that employer is not an authorised body or ABS.

Q10: 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?

52. In the context of broadening the scope of practice of barristers potentially to include litigation, the BSB considered whether it should also withdraw the current prohibition on managing clients' affairs. The consultation document considered what the risks would be if the prohibition was withdrawn. These risks included:

    a) A barrister's independence might be compromised through becoming too involved with a client's affairs;
    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.

53. Due to the risks outlined above the BSB was not convinced that the prohibition should be relaxed, however we invited views on whether the ban continued to be appropriate.

Responses

54. The majority of respondents thought that the current prohibition on managing client affairs should be retained. The Legal Services Consumer Panel however thought there would be clear benefits to consumers in lifting this restriction in terms of a one-stop shop and greater competition with solicitor practices. The Consumer Panel were not convinced that the risks outlined in the consultation document were as great as the BSB suggested. The Panel considered that the arguments were similar to those in relation to the litigation developments and that the BSB could manage the risks in the same way, for example through appropriate training, management systems and insurance.

55. The Legal Ombudsman thought that although removing the prohibition could create further consumer choice, they were concerned that this could lead to an increase in complaints in areas such as costs and managing expectations.

BSB Response

56. The BSB has considered respondents comments and revisited the risks that would present themselves if the ban on managing client affairs were to be removed. In light of the strong responses in favour of keeping the ban and on reconsideration of the risks, the BSB has decided that it remains appropriate to retain the ban.

57. Managing client's affairs could include things such as having a power of attorney or could more generally include managing or advising on the lay client's financial affairs, such as assisting individuals in structuring their corporate assets or real estate. The BSB considers that if barristers were able to undertake these sorts of tasks, this could lead to

situations where the barrister's independence is compromised but also there is a more serious concern that barristers would be undertaking tasks that they are not competent to perform.

58. Furthermore the BSB is seeking to become a niche specialist regulator focussing on advocacy and ancillary services. To regulate beyond this more widely would be outside the current scope of the BSB's remit and could lead to additional costs and potentially regulatory failure.

Q11: Are there any situations in which you think it would be in the clients' best interests to allow referral fees?

59. The BSB reviewed the prohibition on referral fees in the current Code of Conduct and concluded that a prohibition continued to be in the public interest. The consultation document set out some of the risks the BSB believes would occur if the prohibition were to be relaxed.

Responses

60. There was strong support to maintain the ban on referral fees. Garden Court Chambers stated that, in their view referral fees undermine what should be a prime principle that the introduction given to a potential client of his/her legal adviser should be in the client's best interests and not as a result of payment by the lawyer. Lincoln's Inn commented that referral fees are contrary to the public interest and inhibit fair access to justice, and cannot be justified.

61. Gray's Inn stated that referral fees can never be justified and are to be deprecated because they are plainly contrary to the public interest and inhibit fair access to justice. They go onto state that the lay client should be able to have confidence that he is engaging the services of someone who is wholly independent and not someone who depends on the goodwill of a referring solicitor or other intermediary who will only engage him or her if the barrister is willing to agree to pay a "commission", an "administration fee", or to enter into a fee-sharing agreement, or provide a quota of other services to that intermediary for free in exchange for a quota of paid work. Gray's Inn stated that the lay client is entitled to assume that he is paying a fee for the professional services that he is receiving, not for a recommendation; he is also entitled to assume that the professional intermediary will recommend/select the best person for the job and not someone who is willing to pay for the privilege of being instructed.

62. The Bar Council stated that they have been concerned by reports of widespread abuses of the prohibition by unscrupulous lay and professional clients who will not instruct counsel unless they receive a referral fee in one guise or another, and who are making significant amounts of money at the expense of either the bar or the public purse. The Bar Council and Gray's Inn were particularly concerned at the impact such arrangements are having on the junior bar, especially those doing crime, family and personal injury work.

BSB Response

63. The BSB continues to believe that the prohibition on making or receiving referral fees is in the public interest and this prohibition will not be relaxed. The reasoning in the Jackson Report which led the Government to legislate to ban referral fees in the personal injury sector applies, in the BSB's view, with equal force to other privately funded areas of work; the counter-argument to the effect that referral fees further access to justice for the lay client has no application to the referral Bar, since the professionals who instruct them need no such assistance in accessing justice and should make their selection solely in the best interests of their client; the arguments against referral fees are even stronger in areas where the wider public interest is directly engaged, such as criminal defence work, where such payments may also breach the Bribery Act 2010.

Q12: Do you think that a barrister should be obliged to report his own failure to comply with the applicable rules?

Q13: Do you agree that failure to comply with the 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)?

64. The BSB previously decided that the new Code will include a positive duty on barristers to report serious misconduct. This duty was retained in the new Handbook and it was 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. It was proposed that the duty to report would arise in the following circumstances:

    a) Where the barrister himself has failed to comply with the 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 or her entity or chambers.

Responses

65. Respondents provided detailed and helpful comments in relation to reporting misconduct. The Legal Services Consumer Panel and the Law Society agreed with the proposals; however the Consumer Panel thought they did not go far enough. Their concern with the proposed rule was that serious misconduct by another barrister must only be reported where it is in the public interest to do so and they queried the circumstances in which it would *not* be in the public interest to report serious misconduct. In their view this offered a convenient get-out clause for barristers to hide behind and potentially places the barrister in an invidious position of weighing up public interest considerations and would no doubt produce inconsistent approaches. They suggested that the simplest approach, that would be most likely to foster public confidence, would be to require all cases of serious misconduct to be reported. It should then be for the BSB to decide whether it would be in the public interest to proceed.

66. While the ChBA could see the value of a rule requiring disclosure of the type of misconduct set out in the guidance, they did think that it would be useful to have a full definition of serious misconduct, as it would be useful for barristers to know when they are and are not obliged to report each other without having to make subjective judgments. The ChBA also stated that the rules give rise to serious questions of client confidentiality and legal privilege. They were unclear how a barrister's obligation of confidence and privilege could be overridden by the Code of Conduct. This in turn, they stated, would lead to a problem with the proposed rule 40, as in effect barristers could not discuss problems which did or might involve breach of some provision in the Code in confidence, as they are able to now.

67. The Professional Conduct Committee ("PCD") had considerable misgivings about the self reporting proposal. Their comments were echoed by other respondents. They stated that the worst wrongdoers are unlikely to report themselves and deliberate wrongdoers are likely deliberately not to report their deliberate wrongdoing. Similarly those who lack insight are likely to lack the insight to report misconduct committed through their own lack of insight. The PCD were of the view that such a rule was only likely to result in defensive self-reporting by conscientious or even over-conscientious individuals of minor or even non-existent infractions of the rules.

68. Inner Temple questioned whether the rule was necessary and if it is to be considered necessary, then it should only apply to serious breaches. BACFI commented that a barrister risks being punished twice – for the original failure and for the failure to report. They were of the view that if the rule is retained there should be mitigation for those who do self report. BACFI were also concerned that the requirement to self report may lead to a significant increase in the number of investigations which the BSB has to manage, leading to an increase in costs and delays in resolving cases.

69. The Bar Council were previously strongly against the introduction of the rule that barristers had to report the misconduct of others and in response to this consultation stated that there is no good reason for extending this rule to compelling barristers to report their own misconduct. The Bar Council stated that they provide a valuable service through the ethical enquiries helpline to barristers who find themselves in difficult ethical situations. They are concerned that members of the Bar are unlikely to contact the ethical enquiries line if they consider that there is a risk that in the course of such a conversation they will be told that they have broken the rules and have to report themselves to the Head of Chambers. The Bar Council were of the view that an exception should introduced to enable PPC and others (including Heads of Chambers) to provide ethical advice to barristers. Gray's Inn also made similar comments.

70. Both Combar and Middle Temple commented that the obligation to report that you are "in serious financial difficulty" should be removed as this is too vague and unclear as to what it encompasses, particularly at a time when the costs of qualification are so large that many barristers in practice face "serious financial difficulty."

71. As to whether failure to comply should be reported to the HOLP or Head of Chambers in the first instance with an obligation on them to report material breaches to the BSB, again the majority of respondents disagreed with this proposal. This was mainly because

respondents were of the view that barristers should be able to raise issues of concern with fellow members of chambers without the fear that the confidence of that discussion will be breached by unnecessary record keeping of that concern or passing it onto the BSB.

BSB Response

72. The BSB appreciates that the rules in relation to reporting misconduct are controversial and is grateful for the detailed comments made by respondents. The BSB has considered consultation responses in detail and has decided to retain the provision requiring barristers to self-report and report others, but only in relation to serious misconduct by themselves and others.

73. The BSB understands the concerns respondents have expressed in relation to barristers feeling they would be unable to seek advice from colleagues or the ethical enquiries line for fear that the confidence of that discussion would be breached.

    a) The ability to have such discussions is clearly in the public interest as it assists barristers to deal with difficult situations without breaching the rules. However, that needs to be balanced against the concern that, without the reporting obligations, serious misconduct might not come to the notice of the BSB. Limiting the requirement to report to cases of serious misconduct should largely meet these concerns as barristers need not be inhibited about discussing possible marginal breaches of the rules with their colleagues.
    b) If a barrister does reveal serious misconduct, then the public interest requires that the regulator should be informed so that it can take appropriate action. For example, if a barrister consults their Head of Chambers, that individual will be able to provide guidance on whether the matter in question does constitute serious professional misconduct and if it does, will advise the individual to report him or herself. If the barrister does so, the Head of Chambers will not be obliged to report them. If, however, the individual refuses to follow that advice then the BSB's view is that the Head of Chambers (or other barrister with whom the matter has been discussed) should be under a duty to report. To those outside the profession, it would, rightly, be unacceptable that others who become aware of serious misconduct should, in general, be allowed to remain silent.
    c) That said, the BSB agrees that it would be helpful for barristers to have an avenue available to them for seeking confidential advice without the fear of being reported. Therefore a limited carve out will be inserted in the rules for discussions held with the Bar Council ethical helpline and those to whom they refer enquiries. This mirrors similar arrangements in other regulatory regimes. The BSB will engage with the Bar Council as to how this can best be implemented.
    d) The BSB has also re-visited the rules and guidance on serious misconduct with the aim of providing greater clarity to barristers on when the need to report certain matters to the BSB may arise. The guidance has been expanded in some instances, for example there is additional guidance that sets out that if a barrister who has committed serious misconduct reports

himself the barrister who was aware of the misconduct taking place would no longer be under a duty to report that barrister as they would have already reported themselves.

e) Any barrister who does report him or herself and who also takes such steps as they reasonably can to remedy the effects of their breach can expect that to be taken into account by the BSB and by any Disciplinary Tribunal, as compared with the position of someone who has done neither of those things. The BSB will reflect this in its enforcement policy.
f) Conversely, anyone who reports another barrister without a genuine belief that they have a duty to do so (for example, as a litigation tactic) will themselves be in breach of the Code and exposed to disciplinary action.

74. In terms of providing a more explicit definition of serious misconduct, the BSB is of the view that it would be impossible to provide an exhaustive list of what would constitute serious misconduct. There is existing case law on what constitutes serious misconduct and the BSB believes this read in conjunction with the guidance already in the Handbook, should be sufficient in assisting barristers to decide whether serious misconduct has taken place.

75. It follows from the BSB's decision that there will no longer be a requirement for HOLPs and heads of Chambers to keep a record of all instances of misconduct (other than serious misconduct) reported to them. HOLPs will nevertheless need to have arrangements in place to enable them to meet their obligations to ensure that the entity and those working in it comply with all relevant rules. Chambers will similarly need to have appropriate arrangements in place. The BSB will still require Chambers to nominate someone, normally the Head of Chambers, to be their principal point of contact with the Chambers on regulatory matters.

76. The BSB has also taken respondents comments into account in relation to the requirement to report "serious financial difficulty." The BSB agreed with respondents that this would be a difficult concept to define and also it raised the question of what the BSB would do with the information when it was received. Therefore this requirement has been dropped from the new Handbook.

Q14: Do you agree that the prohibition on dual authorisation should be removed?

Q15: Do you think that the removal of the prohibition is likely to pose any risk to clients?

77. The BSB has 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. This rule is distinct from the rule that allows barristers to practise in self-employed and employed capacity at the same time (i.e. dual capacity), which the BSB is not proposing to amend.

78. In the most recent consultation, the BSB reconsidered the necessity of the prohibition on dual authorisation and whether it continues to be justified given the wider changes taking

place in the legal services market. The BSB concluded that the prohibition could no longer be justified but that in reality it would be unlikely that a self-employed barrister, for example, would want to incur the additional costs and administrative burdens of dual authorisation.

79. The BSB considered the risks to clients in removing the prohibition and was of the view that clients would be protected by the various rules and enforcement regimes of the different regulators and the removal of the prohibition would not affect the client's right to complain to the Legal Ombudsman.

Responses

80. Almost all of the respondents were against the removal of the current prohibition. Many commented that removing the prohibition would cause real confusion for clients. The Bar Council stated that dual regulation may be positively harmful for clients and could be used as a device for getting round the BSB's own rules.

81. While the Legal Ombudsman stated that they had no evidence that would support or argue against keeping the current prohibition, they did have concerns about the proposed change. The queried how a dual authorised person would separate out the conflicting duties of a solicitor and of a barrister and how they would communicate which regulatory hat they are working under when they first meet clients. They state this would be a potentially confusing situation for consumers who are less likely to understand the distinction. They went onto say that when they investigate a complaint they take into account the regulator's code of conduct, but also whether the barrister or solicitor has provided a reasonable standard of service. However the Legal Ombudsman state that they would need to know under which regulatory regime the service was provided, for example in situations where a complainant needs to seek redress through insurance or other compensation arrangements, or when they need to make a potential misconduct referral.

82. The ChBA commented that there are further risks in that solicitor-barristers could advise their clients that they should act as advocates in a case where it is not appropriate or not in their client's interest to do so.

BSB Response

83. Due to the strong views expressed by respondents about removing the prohibition, the BSB has decided to maintain the current position and not allow dual authorisation. Therefore barristers will not be allowed to hold a practising certificate issued by another Approved Regulator at the same time as holding a practising certificate issued by the Bar Council. The BSB agrees with respondents that removal of the prohibition is likely to cause real confusion for clients and could, as the Bar Council suggest, be used as a means of circumventing the BSB's own regulatory regime.

84. There is not likely to be an adverse impact on clients from retaining the prohibition as any practising barristers who are also qualified as solicitors will anyway be able to extend

their authorisation as barristers to enable them to conduct litigation and so provide a one stop shop for clients.

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?

85. All practising barristers providing legal services to the public must have insurance cover against claims of professional negligence. In case of employed barristers there needs to be insurance cover to the level required by the relevant Approved Regulator, or if there is no Approved Regulator then on the terms required by the Bar Council. This insurance requirement does not apply to employed barristers if they are only providing legal services to their employer.

86. The consultation paper proposed that all practising barristers (employed or self-employed) and BSB-regulated bodies must have adequate insurance in place covering all the legal services they provide to the public. Guidance explains that employed barristers who provide legal services to people other than their employer should consider whether they need additional insurance, having regard to the arrangements already put in place by their employer. BMIF does not cover employed barristers but they should consider whether they need extra cover from the open market.

Responses

87. There were a variety of responses to this question, many going much broader than the insurance position for employed barristers. The PCD felt that the rule and guidance was satisfactory (although the consultation paper itself slightly confused the position).

88. The ChBA felt it would be inappropriate for the BSB to leave it to employed barristers, who are providing services to a third party, to decide whether they have professional indemnity insurance or not. Either they or their employers must have insurance.

89. More broadly they felt rule 44 was not adequately drafted in respect of all barristers. Given that the primary purpose of professional indemnity insurance is to protect clients, minimum levels and minimum terms of insurance should be specified.

    a) Self-employed barristers should be required to obtain insurance from BMIF (there are very significant advantages in a mutual insurer); and
    b) Entities should be required to have a level of professional indemnity insurance on terms which provide equal cover to that required by the SRA for equivalent entities (i.e. with a higher level of cover for limited liability companies and limited liability partnerships), including, crucially, the terms on which such insurance is to be obtained. It is not just a question of the amount of cover, but issues such as restrictions on insurers' rights to avoid for non-disclosure and misrepresentation, attribution of fraud or dishonesty to a body corporate and aggregation of claims for the purposes of the limit of cover.

90. The Legal Services Consumer Panel noted that the rules on insurance for employed barristers will be replaced by guidance. They felt that the wording of the guidance should be more explicit and should state unambiguously that where a barrister is not covered by their employer's insurance they must have in place proper insurance cover themselves.

91. ComBar could see no reason not to require employed barristers to have insurance. Similarly the Bar Council's position was that clients should be entitled to expect the person providing the services to have adequate insurance in place whether or not they are self-employed or employed.

BSB Response

92. Some of the confusion in the section seems to have arisen out of a misunderstanding of the proposed approach combined with mistaken drafting of the Handbook.

93. The new Handbook will make it a requirement that all barristers (self-employed or otherwise) and entities must have insurance in place which covers all of the legal services they supply to the public. Further, if you are a BSB authorised person, BSB authorised body or a manager of a BSB authorised body, and the BSB stipulates a minimum level and terms of insurance, then you must ensure that these are complied with.

94. We accept that confusion may arise around the term "adequate" and this has been removed. The BSB further accepts the criticisms made about the rules relating to entities and, as above, will introduce minimum levels and minimum terms, akin to those operated by the SRA and other regulators, which will be a condition of authorisation.

95. All self-employed barristers will be required to take minimum insurance cover out with the BMIF and will be required to pay promptly any insurance premium required. The BSB acknowledges that the draft rules in the Handbook did not make this clear and this has been amended. Guidance makes it clear that a barrister's practice maybe such that the minimum BMIF cover is not sufficient to ensure the insurance covers all the legal services you supply (because you deal in very high value claims). In these circumstances you should consider taking out top up cover from the open market.

96. For employed barristers working in a non BSB-regulated entity the level of cover will depend on the nature of the work being done. For those providing legal services to the public, consideration will need to be given as to what arrangements are already in place with the employer (additional top up cover may be required if the employer's cover is not sufficient to ensure activities are covered). For example, employed barristers working for an SRA regulated firm will probably be covered by the firm's insurance, but barristers should check whether additional insurance is required for the type of work being done, especially if such barristers also work at a legal advice centre or otherwise do pro bono work.

97. Barristers working for an organisation that does not supply legal services to the public (like the GLS and CPS), will not need insurance cover because they only provide legal services to their employer.

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?

98. The main proposals around the International Practising Rules (IPRs) were that the Public Access Rules (PARs) should apply to foreign work and that the cab rank rule (CRR) should only be extended to apply to instructions relating to working in England and Wales from professional clients in Scotland, Northern Ireland and countries in the EEA, but not for other foreign lawyers.

99. The BSB considered that the PARs should be applied because not to do so would cause inconsistencies and would imply that protections thought necessary for domestic clients where unnecessary for foreign clients or domestic clients in relation to foreign work.

100. The BSB originally considered applying the CRR to all foreign instructions for work to be conducted in England and Wales. On reflection this was thought to be a step too far. It will still, of course, be open to barristers to take the work if they wish, but they will not be compelled to do so by the CRR. To apply the CRR more generally was unfair given many barristers will know very little about their foreign clients.

Responses

101. The majority of responses did not like the idea that the PARs should be applied to foreign work. 4 Pump Court said that in their experience foreign clients tend to be from a legal professional or corporate background. Common sense and good regulatory practice dictates that they do not need to be treated in the same way as consumers instructing barristers in the UK.

102. Similarly the ChBA did not agree. They were aware of no evidence which would justify the proposed extension. The IPRs have been in force for some time and, if there were a problem, one would expect it to have arisen by now.

103. The Bar Council was strongly opposed. The original changes to the IPRs were proposed to increase the clarity of these rules, as there were a number of anomalies and some rules appeared to be difficult for barristers to understand. They do not believe that there is a case for an increase in the regulatory burden on barristers in relation to international work.

104. They went on to say this is not a matter of simply completing a course. It introduces a number of new restrictions on the way in which a barrister is able to practise. For example, the PARs prohibit barristers under 3 years' call carrying out Public Access

work. There is no such restriction under the IPRs. A further example is the need for the barrister to retain, or take reasonable steps to ensure that the lay client retains, for at least 7 years copies of all instructions, all advice given and documents drafted or approved, originals, copies or a list of all documents enclosed with instructions and notes of all conferences and of all advice given on the telephone. These steps are not required under the IPRs. The imposition of PARs on all foreign work would result in a restriction in relation to those less than 3 years call and would increase the regulatory burden for barristers (and for their administrative staff). Neither would be minimal.

105. ComBar and the Legal Practices Management Association both opposed the proposals. In pursuing an outcomes-focused regulatory model, the BSB should not be adding unnecessarily to the existing rules. There is no justification for this step.

106. With respect to the CRR rule, the majority of responses agreed with the proposal. 4 Pump Court and ComBar gave a qualified approval subject to a requirement that the instructions are subject to enforceable contracts governed by English law and subject to the jurisdiction of England and Wales. They emphasised that it is important that barristers are not left in a position where (a) they are obliged to accept instructions under CRR terms but (b) face a serious prospect of difficulties in enforcing payment of their fees.

107. The Professional Conduct Committee agreed but had reservations about compulsion to accept instructions from professional clients in some states in the EEA. They understood, however, that EU law requires this.

108. The Law Society generally queried whether the CRR is in fact a proportionate way of achieving its aim in any event. Although the ethos behind this rule is supported, the numerous exceptions to the rule mean that barristers may easily refuse cases which they consider undesirable. Solicitors have no such obligation, and yet 'undesirable' clients are still able to find solicitors to represent them.

BSB Response

109. Despite the strong opposition to the extension of the PARs to foreign work, the BSB proposes to implement this rule change. Fundamentally the BSB does not believe there is any justification for failing to apply the rules consistently across the board.

110. The BSB does not accept some of the criticisms made by respondents about additional regulatory burdens. We are currently in discussions with the LSB about removing the 3-year prohibition and hope to have rule change implemented in the coming months. In the BSB's opinion the requirement to retain proper records is an important regulatory safeguard that should apply.

111. Completion of the one-day training course is not unduly onerous and provides useful assistance to barristers doing this work. The course itself is currently under review and it is likely that a more targeted, modular approach will be adopted in future. This will allow the course to be targeted at specific practice areas so that barristers doing foreign work will not necessarily complete the same course as, for example, criminal practitioners.

112. With respect to the CRR, the BSB proposes to apply it to international instructions from the limited group of countries identified in the consultation. We feel this is the right balance but emphasise that barristers will be free to accept instructions from other countries if they wish.

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?

113. The proposal is that the CRR would continue to apply to self-employed barristers in the normal way including in relation to litigation, but only on a referral basis. For entities and authorised persons working in them (including solicitors), it is proposed that the CRR would mirror the rule applicable to self-employed barristers. Therefore, it would only apply to referral instructions to named individuals.

114. The BSB acknowledged that even with the existing restrictions, there was a chance that people might try and take advantage of the CRR in an attempt to conflict an entity out of work by instructing it to act on some minor aspect of a major case.

Responses

115. The majority of respondents agreed that the CRR should be applied in the way proposed. 4 Pump Court felt that the CRR is a fundamental and distinguishing characteristic of the Bar.

116. The ChBA agreed with Lord Hobhouse in Hall v. Arthur JS Hall & Co [2002] 1 A.C. 615 at 739-740 that the CRR is "a fundamental and essential part of a liberal legal system" and that it "is also vital to the independence of the advocate".

117. They had little sympathy for the view that it should only apply to instructions to work on a referral basis where the instructions name the individual in the entity. The application of the CRR should not depend upon whether the professional client has named an individual or not in the instructions: that might depend upon whether the professional client has discussed the choice of barrister with the entity's equivalent to the clerks in a set of chambers before sending written instructions or not. If he has, the instructions might well name an individual. But the professional client might send down instructions stating that he wants to discuss which individual will carry them out. Then the instructions, as such, will not name the individual. The application of the CRR should not depend upon chance.

118. Inner Temple did not see the benefit in retaining the CRR. They thought there was no longer a justification for the CRR. There are many barristers and even unpopular causes will, they had little doubt, find able advocates. There are so many exceptions to the rule that it would be odd if the independent bar were the only or one of the few sets of people who would be subject to it. In any event, they suspected that it is already more honoured in the breach than in the observance. Discrimination will, in any event, be outlawed.

119. The Legal Practice Management Association did not like the proposal. Applying the CRR to entities or to individual members/employees in entities has the potential to place burdens upon the entity that, collectively, could impinge upon the entity's business plans and disadvantage it in comparison to its competitors. They strongly proposed that the CRR should therefore not be imposed on entities.

120. In relation to waivers of the CRR, the majority of respondents did not consider that this would be a good idea. 4 Pump Court, 11 Stone Buildings and ComBar all had concerns that the use of any waiver process might undermine the fundamental characteristics of the CRR. They were not aware of any evidence that a waiver process is required. The CRR has stood for centuries without any such provision, the inference being that there is no evidence that this is required. They found it difficult to understand when or how a waiver might be sought and what evidence might be deployed. No details are provided of the procedure that the BSB envisages deploying.

121. The ChBA had doubts as to whether the proposed waiver process would work in practice. First, to show abuse, the entity applying for a waiver would have to show more than that it had received instructions in relation to a relatively minor aspect of a large matter. It would probably have to show a pattern of instructing other entities by the same client in the same way. Given the obligations of client confidentiality, this will usually be very hard to show because the entity receiving instructions should not know that other entities had received similar instructions. Second, how long would the process of granting a waiver take? And could the entity accept instructions from another client in relation to the matter which formed the subject of its application for a waiver while the application was pending? The Courts have taken a robust approach to allegations that major firms of solicitors cannot act because one or more solicitor at the firm previously acted on a related matter. We suggest that this is a more appropriate solution to any perceived abuse of the cab rank rule.

122. Inner Temple and the Bar Council favoured having a waiver. They felt that it would provide a very important safeguard against abuse.

BSB Response

123. The BSB proposes to continue with its stated policy that the CRR shall apply to all entities and authorised persons in entities to the same degree that it applies to individual barristers at the moment. The CRR forms a fundamental part of the BSB's regulatory regime and will be maintained.

124. The proposals to introduce a waiver from the CRR will not however be taken forward. The BSB agrees that a waiver would be very difficult to operate in practice and there would be difficulties in applicants providing evidence in support.

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

125. The proposal was that all members of chambers and entities would have some responsibility for management. The specifics of those responsibilities will depend on the individual's position and whether they have any specific duties, for example in relation to pupillage.

126. A Head of Chambers and members of the management committee will normally be expected to ensure all management responsibilities are met, while junior members may only be obliged to highlight concerns. The entity, its managers and all authorised persons working in the entity will be responsible for ensuring that proper arrangements are in place and the entity is complying with its Handbook obligations.

127. The new rules are more outcomes-focused and list the systems and arrangements that need to be in place without prescribing how these should work.

128. The consultation also included the proposal that entities, as with chambers, would have to appoint all staff under a contract of employment which requires them to comply with the Handbook insofar as it applies to them and do nothing which substantially contributes to a breach of the handbook.

Responses

129. One Crown Office Row mentioned that no definition of "junior members" is provided and that an attempt to draw a line between senior and junior members is unnecessary and unhelpful.

130. 4 Pump Court felt that the proposals fundamentally failed to understand the self-employed nature of the referral bar. Making barristers in chambers responsible for the affairs of one another will inevitably lead to increased challenges – and provide those challenges with a firmer footing. This could have a dangerous effect on access to and the administration of justice.

131. They also repeated the earlier observation about the impossibility of requiring the contracts of existing employees of chambers to be amended to include a requirement to comply with the Code of Conduct – and the absence of any evidence of need for that in connection with self-employed barristers in chambers. Imposing such a general and unfocussed requirement in contracts of employment is in any event unnecessary in relation to the (predominantly) clerical and administrative staff in chambers.

132. The ChBA echoed these concerns and felt that the proposals were an attempt to impose broadly similar rules on sets of chambers, which are associations of self-employed barristers, and entities (entities being subject to rules 58-61). Members of a set of chambers can act for parties with different interests because they are independent of each other. Attempts to introduce collective responsibility in a set of chambers threaten that independence.

133. If every member of chambers had to be reasonably satisfied that all persons working in that set were "competent to carry out their duties" and carried "out their duties in a

correct and efficient manner" (rule 56.6(a) and (b)), the result could be multiple supervision and endless debate as to staff performance.

134. The Bar Council welcomed the non-prescriptive approach which rightly recognises that what may be appropriate for one set of Chambers could be unduly burdensome for another, depending on factors such as the size, the nature of work undertaken and the existing administrative structure.

135. BACFI felt the rules surrounding the regulation and management of entities should reflect the size, activities and the market the entity is serving. For example a small organisation providing services to businesses should not need the same level of regulation as an organisation providing services to consumers who are individuals.

136. They would like to see the guidance which the BSB is proposing to issue on the management of entities before commenting further but would make the point that companies must in any event comply with the provisions of the Companies Act 2006 and the guidance should not conflict with these obligations.

BSB Response

137. The BSB understands the concerns expressed by respondents in relation to the proposed arrangements for the management of chambers, but would like to clarify that the proposals are more about individual responsibility and the limits of that individual responsibility rather than collective responsibility. The purpose of the proposal is to ensure that each member of chambers bears some individual responsibility for the affairs of chambers, the extent of which will depend on their position and role in chambers. This accurately reflects the nature of the self-employed Bar, in which each individual is responsible for their own conduct and affairs. It is therefore logical that each individual who practises from the traditional chambers model should have some responsibility for the way in which that chambers is run.

138. The BSB has already introduced similar requirements in relation to the equality and diversity rules. The new rules impose a responsibility on self-employed barristers to take reasonable steps to ensure that in relation to their chambers there is in force a written statement of policy on equality and diversity and that there is an accompanying written plan on implementing that policy. The approach to shared responsibility has in effect already been adopted and the proposed rules in the Handbook are an extension of practice which is already in place.

139. The proposed rules will leave chambers free to decide how to administer themselves, subject to ensuring compliance with the underlying requirements for effective administration. The BSB has taken on board respondents' comments about imposing rules on chambers that are similar to those being imposed on entities. The BSB is sensitive to these concerns, so has revisited this. Rules that did appear to be more appropriate to entities have been amended, more accurately to reflect the fact they apply to chambers. As a result of such concerns, the BSB has also removed the rule which proposed that chambers would have to appoint staff under a contract of employment. Further detail of this is provided in response to question 14 in Part II.

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?

140. The Licensed Access and Public Access Rules are more detailed and prescriptive than much of the new Handbook. The BSB considers that these rules could benefit from rationalisation and that a number of the specific obligations are adequately covered by other sections of the Handbook.

141. A more radical step would be to abolish the concept of Licensed Access and treat all clients who have not instructed a solicitor as public access clients.

Responses

142. In principle most respondents agreed that the rules could be made less complex but without detailed proposals it was difficult to comment further.

143. In principle the ChBA were in favour, although it all depended on what changes were proposed in practice. They considered that Licensed Access works extremely well, and is well understood by practitioners. Licensed Access is extremely important to the Bar, particularly in a world of increased competition with solicitors' firms, and nothing should be done which undermines it. Detailed guidance in this area is helpful to practitioners, because barristers are more used to working on the instruction of solicitors.

144. 4 Pump Court felt that without details of the proposed changes it would be difficult to answer. However, it seems that (a) there is a good reason for the BSB to continue to exercise vigilance over individual barristers (particularly those practising outside a chambers structure) accepting instructions directly from members of the public; and (b) the degree of vigilance which is needed where professional organisations approach well-established commercial chambers is far less.

145. The Law Society considered that it is essential that the public should be aware of the limitations on what barristers can, and cannot, do, and that barristers should not be permitted to undertake work which is beyond their expertise, or which they do not have the capacity to perform. The existing rules are a very clear way of ensuring this.

146. The Bar Council thought simplification was always a desirable objective, and there is undoubtedly room for simplification of the rules. The Licensed Access system currently operates very well indeed, to the mutual benefit of the Bar, of professional clients, and of the public generally (particularly in the fields of planning, tax, surveying and rent review). There is, therefore, also a very considerable concern that any attempt to review/amend the Licensed Access Rules, or to bring the two systems together under a single umbrella would potentially disrupt the smooth working of that system

BSB Response

147. For the time being the Licensed Access and Public Access Rules will be transferred in their entirety to the new Handbook. The BSB will however be conducting a review of the Rules with the intention of simplifying the various provisions. A further consultation will be released in due course but presently the intention is to keep the two sets of rules separate.

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

148. 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 fact without the client's consent. In these circumstances there is a real risk that the court will be misled so the proposal is that the barrister should advise the client that if he does not consent, the barrister will need to withdraw.

149. This is a change from the current position, which allows the barrister to continue to act if the convictions are not disclosed, provided that the barrister does not say anything to the court implying that the client has no other convictions.

150. The BSB's view was that in these circumstances the public interest in ensuring that an appropriate sentence is passed outweighs the interests of the client.

Responses

151. The majority of responses were against this proposal. The Law Society said that such an amendment would place the BSB Code at odds with that of solicitors in a key area where the conduct rules applying to all advocates before the court need to be consistent. It cannot be appropriate for the BSB simply to change the rules governing barristers in this area without consulting the SRA and other regulators and ensuring that there is consensus on the proposals.

152. There are circumstances in which an advocate must withdraw if the client does not agree to permit disclosure of previous convictions; namely in respect of mandatory minimum sentences for burglary and for dealing in class A drugs, which otherwise could lead to an illegal sentence or procedure being carried out by the court. However, this is an exception which already has precedent, and the SRA believe that the proposed change is wrong in principle. The advocate cannot allow the court to act illegally, and so, if he is aware, he has a duty to inform the court.

153. St Philips Chambers considered that the revised guidance is not appropriate. It has always been a cornerstone of representation in criminal proceedings that the prosecution has to prove all relevant matters. Making this amendment is an unnecessary encroachment on that principle.

154. Lincoln's Inn thought the proposals was fundamentally repugnant and would undermine the relationship between the client and his Counsel. Inner Temple similarly

considered that imposing such a duty on a barrister would be an unwarranted breach of the duty of confidentiality and client privilege.

155. Garden Court Chambers considered that the existing professional rule for those defending in criminal cases requires a barrister to protect his client from conviction other than on the basis of admissible evidence and in accordance with law, whatever his lay client's instructions. This is of fundamental importance and is a consequence of the burden of proof. Because it is for the prosecution to prove guilt, a rule which requires the barrister to volunteer evidence which adversely affects his client, but of which the prosecution are ignorant, risks undermining the very basis on which those who defend in criminal cases are required to act. The interests of justice are amply protected by the existing rule that a barrister must not positively mislead the court.

BSB Response

156. The BSB accepts these criticisms of the proposals, and will amend the rule and guidance, in line with the suggestion of the Law Society. There will therefore be a general rule that a barrister must not mislead the court. Guidance will explain that in circumstances where the prosecution is unaware of a previous conviction, a barrister must only withdraw if his client does not consent to disclosing the conviction, and an unlawful sentence will result. In all other circumstances a barrister can continue to act provided he does not say anything in respect of previous convictions which misleads the Court.

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?

157. The new Handbook proposes that when new instructions are accepted they must be confirmed in writing setting out the terms on which the person will be acting (email will suffice). The BSB felt it would be disproportionate to expect written confirmation in cases of subsequent or supplementary instructions, therefore you will be deemed to have accepted these instructions once the work has been commenced. Guidance will however require the barrister to consider whether additional correspondence with the client is necessary to avoid any confusion or misunderstanding.

158. The BSB will not specify what needs to go into the written communication, but barristers must ensure that clients are adequately informed as to the terms on which the work is to be done.

Responses

159. The Law Society agreed and highlighted the importance of communicating any information that is available about costs, and complaints procedures at the point of instruction and at timely intervals beyond that.

160. Henderson Chambers were concerned that a careful distinction be made between lay clients, and the duties owed to them, and professional clients, and the duties owed to

them. They considered that any duty should be owed to the lay client but that that duty might in appropriate circumstances be discharged through the professional client (e.g. as with giving notice of terms of acceptance of instructions).

161. 11 Stone Buildings generally agreed but felt the current requirement to ensure that the lay client is personally aware of Chambers' complaints procedure is impracticable and unrealistic and demonstrates an absence of understanding of how the Bar, as largely a referral profession, operates.

162. In general the ChBA thought the proposals were appropriate and proportionate. However, the proposed rule assumes that the barrister will specify the terms on which he will be acting. In practice most barristers do not specify terms and do not enter contracts with their clients. And, where terms are specified by the barrister, they may not be the terms that are contractually binding. We consider that the rule should be amended to require written acceptance and "the terms, if any, on which you propose you will be acting".

BSB Response

163. The BSB will adopt this proposal but will modify the guidance to make the obligations clearer.

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

164. The BSB welcomed any further comments on any aspects of the Handbook.

Responses

165. A number of respondents proposed specific drafting amendments. In particular 4 Pump Court, the ChBA, Middle Temple and BACFI asked the BSB to consider a number of amendments.

BSB Response

166. For a full list of the specific suggestions we refer readers to the list of complete consultation responses. It is not practical to repeat all these suggestions in this document, but all of the proposed changes have been considered and where appropriate have been included in the revised Handbook.

QUESTION 28: Do you have any comments on the proposed self-certification procedure [for authorisation to undertake litigation]?

167. The consultation paper proposed that in order to be authorised to conduct litigation 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

168. Further details of these proposed requirements were laid out at paragraphs C20 onwards of the consultation paper.

Responses

169. The Bar Council questioned whether it was necessary or desirable to permit self-employed barristers to conduct litigation although it agreed that entities should be allowed to do so. Other respondents also had concerns about the proposals. Comments included the following:

Lack of current capability to conduct litigation

170. Many respondents raised concerns about the current capabilities of barristers to conduct litigation. For example, one respondent argued that no barrister currently has the capability, and the existing systems run in chambers do not contain the capability, to handle litigation.

Criteria

171. Opinion varied on whether or not the proposed contents of the checklist were too specific or too general, though most responds agreed with the proposed headings. The ChBA argued that the criteria are very general and suggested that certification ought to be assessed against a series of specific, detailed, technical criteria.

Assessment by the BSB

172. It was argued that the proposed procedure is essentially subjective and that it requires confirmation of only a bare minimum standard of qualification or experience. There is a risk that those applying for authorisation will simply confirm they are suitable. For these reasons, the BSB should assess self-certification.

173. The Bar Council suggested that, in order to ensure parity with solicitors, the self-certification procedure should not be more onerous in its requirements than the equivalent requirements for solicitors.

174. There should be a general duty to inform the BSB of changes in circumstances.

Public access training

175. Some respondents argued that public access training, or its equivalent, does not need to be undertaken by employed barristers.

176. However, other respondents commented that, at the very least, there should be a mandatory obligation on the barrister seeking authorisation to have undertaken the Public Access training or an equivalent.

177. Public access training would not always be necessary as part of the self-certification checklist in relation to knowledge of litigation procedure – it would not be relevant to a significant number of practitioners and therefore should not be compulsory.

178. It was also suggested that the public access training, or its equivalent, should include a component on dealing with vulnerable clients.

BSB Response

179. The BSB is concerned to ensure that it achieves a sufficiently rigorous process of authorisation to meet the risks associated with what is, for self-employed barristers at least, a new type of service. Applicants for a litigation extension to their practising certificate will need to demonstrate how they meet the criteria specified by the BSB.

180. The BSB needs to balance the need to ensure that the criteria are sufficiently detailed and specific against the need to limit how onerous the application procedure is for applicants. It needs to take care that it is not imposing a disproportionate burden on applicants to provide information as well as ensuring that the information provided is useful and not extraneous.

181. The BSB will further review the criteria discussed in the consultation paper in developing a draft self-assessment checklist. The Bar Council is currently developing a new quality mark, the Bar Business Standard, and the BSB intends to integrate with this and other quality marks, in relation to the criteria around practice administration. It will also consider how the process for barristers submitting applications from the same practice (multiple applications) might be made more efficient, especially around certifying appropriate administrative systems are in place.

182. The BSB believes that the proposed procedure is objective in that it requires an objective set of criteria to be met. The criteria will be laid out in the self-assessment questionnaire in the form of key outcomes which achieve the criteria. The BSB expects to produce guidance on how to meet those outcomes, though applicants will have scope to derogate from the guidance so long as they provide sufficient explanation about how they do so. In this way there is flexibility in the evidence that is provided in order to meet the criteria, but that does not mean that the process is wholly subjective.

183. In terms of current capability of barristers and practices, the BSB agrees that it is a central concern that any practice that conducts litigation will need to ensure it has appropriate systems in place to deal with communications and instructions appropriately. Barristers will need to adapt their practices and it will be up to them to find workable commercial solutions. For example, small chambers or sole practitioners might take a similar approach to small solicitors firms or sole practitioner solicitors. Such practitioners have a long history of managing similar concerns and the Law Society and Sole Practitioners Group produce guidance.

184. Practices may not have systems and resources to conduct litigation in place at present, but they are not yet conducting litigation - they will need to ensure they have put

these in place before they are authorised. It will be incumbent on a practice to adapt its systems and resources when it begins to offer additional services.

185. The BSB needs to carefully consider the risk highlighted by respondents that those applying for authorisation will confirm they are suitable to conduct litigation when objectively they might not be. This risk will be mitigated by: a) checking a sample of self-certification returns; and b) monitoring and risk assessment.

186. In relation to sampling, applicants will be informed that a sample of the completed and returned litigation checklists will be subject to further checks, which should help to promote compliance and to encourage accurate self-assessment. Checks will be carried out by BSB staff and are likely to include asking applicants for further details and evidence as to how they have complied with the requirements in the checklist, including supplying copies of relevant policies and procedures referred to in the completed checklist. The BSB is currently considering the sampling method and the details of the checking process. This may take account of different risk levels.

187. In relation to risk assessment and monitoring, the BSB may develop its sampling and checking according to specific risks once these are identified. These could be, for example, whether a practice is newly formed or whether the applicant is under three years' standing, or whether he or she is in an entity which the BSB has designated high risk. As part of its wider supervision framework, the BSB will be consulting shortly on how best to monitor practices and its proposals are likely to include consideration of practice administration and management. They may also include specific monitoring of the conduct of litigation where appropriate (though this will be at practice or entity-level, rather than at the level of individuals.

188. The BSB, as regulator, should have a limited role in assessing the quality of the business plan and the administrative arrangements of an individual practice. However, it can require applicants for a litigation extension to take responsibility for ensuring that there are appropriate systems in place. As above, it will develop guidance on best practice for meeting key outcomes. Though the emphasis should be on prevention, it will of course also be able to hold individual barristers and practices to account where those systems turn out to be inadequate and result in a breach of the Handbook (e.g. new rules on the administration of chambers).

189. In terms of parity with solicitors, the SRA does not have an equivalent requirement for litigation - all practising solicitors are authorised to conduct litigation - and it does not assess the quality of the business plan or administrative arrangements when authorising a new recognised body.

190. The BSB agrees with respondents that there should be a duty to inform it of changes in circumstances.

191. In terms of public access training, where employed barristers are providing services only to their employers they would have a reason not to undertake the public access

training. The BSB is currently reviewing the public access training including the extent to which it deals with vulnerable clients.

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

192. The BSB proposed in the consultation paper that barristers of less than three years' standing should only be allowed to conduct litigation if they work in the same place as a qualified person of over eight years' standing, who has practised for a period of at least six years in the previous eight years and has made such practice his primary occupation, and who is themselves authorised to do litigation.

Responses

193. There was a mixed response to this proposal. Some respondents agreed or thought the requirement was unduly onerous; others questioned whether barristers, even experienced barristers, were in a position to act as a qualified person in relation to litigation. Comments were as follows:

The role of the supervisor

194. A qualified person should be responsible for allocating work to a barrister of less than three years standing, to monitor the quality of the work and to take responsibility for it when it is completed.

195. The suggestion that 'experienced barristers… will anyway have considerable experience of litigation related matters' (paragraph C23) and hence not require to be supervised is misconceived - even experienced barristers will have no experience of conducting litigation and of implementing and managing the systems that are required to do so.

196. At present, no self-employed barrister has been sufficiently trained and tested in the actual conduct of litigation.

197. One respondent questioned how the BSB can form the view that every barrister who has practised for at least 6 of the last 8 years would have a sufficiently high level of understanding of how litigation is conducted to be able to provide guidance.

Length of supervision

198. The GLS argued that three years supervision appears to be an excessive and an administratively burdensome requirement - for those barristers who spend the majority of their time dealing with litigation, a shorter period, e.g. 6 months, would be adequate.

Nature of supervision

199. A distinction must be made between guidance and supervision - the BSB should explain the basis upon which it considers that the availability of guidance is sufficient to justify allowing new practitioners to conduct litigation without supervision.

200. The closeness of the relationship between the supervisor and supervisee needs to be clarified - how would that translate in practice, including the impact on the supervisor's professional insurance? One respondent commented that the proposal is unnecessary and informal supervision would be more effective in practice.

Consistency with public access

201. Barristers under three years' standing are not permitted to undertake public access work - there should be consistency between the public access rules and the conduct of litigation in this regard.

202. The requirement for junior practitioners to be supervised when conducting litigation should mirror the supervision requirement for when they are doing public access.

Comparison with solicitors

203. St Philips Chambers noted that there is no equivalent requirement for solicitors. A solicitor who is newly qualified is equally inexperienced, but has to abide by the appropriate professional standards set by his profession. There is no reason for this distinction.

BSB Response

204. The BSB has carefully considered the comments made and has decided to maintain its original proposal. It considers that barristers in their early years of practice should be able to demonstrate the necessary knowledge to conduct litigation but should work with someone more experienced who can give help and guidance in dealing with difficult issues, handling vulnerable or difficult clients and establishing effective procedures. While it accepts that more senior barristers will not initially have experience of conducting litigation, they will have been part of litigation teams, often working very closely with solicitors, and being closely involved with litigation correspondence, advice and managing deadlines. They will also need themselves to have established appropriate procedures for conducting litigation in order to obtain their own authorisation, as well as having had several years' experience of working with clients and dealing with the sort of issues which arise in preparing for court proceedings. They will therefore be well placed to advise less experienced barristers.

205. The BSB will provide guidance on the nature of the role of the qualified person, including the relationship between the qualified person and the barrister.

206. The BSB agrees that there should be consistency between the public access and litigation requirements. The BSB will shortly be seeking LSB agreement to amending its rules to allow barristers of less than three years standing to undertake public access work provided that they work with a qualified person.

207. The BSB needs to consider further a number of implications about the consistency of the proposals in relation to employed barristers. A category of employed barristers are unable to exercise rights of audience because they have not satisfied the requirements to work under the supervision of a qualified person (advocacy). This means they would be defined as under three years' standing under the definition in the new Handbook and would require supervision under the proposals. However, they may be already be authorised to conduct litigation if they have already satisfied the qualified person requirements.

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

208. The majority of respondents were in agreement with this proposal. The Bar Council commented that it was appropriate having regard to the code requirements for barristers to act within their competence.

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?

Responses

209. The majority of respondents opposed this proposal, save by way of exceptional grant to those pupils who can demonstrate that their prior experience and qualifications renders them suitable. The Bar Council noted that it would be anomalous to permit pupils to conduct litigation but not do public access work. Other respondents made the following points:

210. Authorisation of pupils might create a potential problem as the application and authorisation would be the pupil's but the risk would be the pupil supervisor's as pupils do not have separate insurance.

211. There is a significant risk of exploitation of pupils.

212. If junior practitioners are to be supervised while doing public access work, then the requirement for supervision would be engaged when they were conducting litigation on a public access basis in any event. Supervision must be sufficiently structured and thorough and second six pupils must not be entrusted with work that they cannot complete with the correct level of competency (Law Society).

213. Pupillage is only for twelve months and is unlikely to involve much if any experience of conducting litigation.

214. What would happen if a pupil were not taken on at the end of pupillage and he had agreed to conduct litigation - the pupil might not have a chambers from which he could continue to conduct the litigation?

BSB Response

215. The BSB has carefully considered the responses and is persuaded by the concerns raised about pupils conducting litigation and the risks that this might give rise to. It has revised its view and proposes to prevent pupils from conducting litigation.

216. The BSB believes that this proposal would not prevent pupils from gaining valuable experience of litigation during training. 'Second six' pupils assisting in the conduct of litigation would have to ensure they were undertaking tasks within their competence (and their pupil supervisor would have responsibility for this also). Assuming this condition is met pupils should be able to undertake the less complex tasks involved in support of the conduct of litigation by a pupil supervisor.

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?

Responses

217. Opinion as to the desirability of this proposal was fairly polarised, ranging from the view that 'this is essential, as it is for changes with regard to direct access and sharing of premises' (Doughty Street/LPMA); to 'No. The piecemeal introduction of regulations and changes is not helpful to the profession. If there are to be changes they should be introduced in one reform'.

218. Some of the respondents who were in favour of introducing litigation early asked for further clarification of the BSB's regulatory arrangements.

BSB Response

219. The BSB now proposes to introduce the new Handbook alongside provisions for the authorisation of BOEs and LDPs, prior to the introduction of a licensing regime for ABSs. The authorisation of self-employed barristers to conduct litigation will be introduced in the first round of reforms, as part of the new Handbook.

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

Responses

220. The majority of respondents felt that there should be an additional fee. Some respondents argued that the costs should be borne by those who choose to accept the additional risks of conducting litigation and that regulation should be self-funding. It was also commented that the BSB has seriously underestimated the regulatory risk, and that the costs may escalate significantly beyond what the BSB might charge by way of upfront additional extension to the PCF.

221. Doughty Street and LPMA thought that it would be preferable to have one fee regardless of the scope or limitation of an individual's practice - but it is hard to know whether there would be a noticeable increase for barristers from current charges.

222. BACFI pointed out that employed barristers have been able to conduct litigation for several years and do not pay an additional PCF for the right to conduct litigation - it is therefore inappropriate to charge an additional fee.

223. Estimates of the regulatory costs varied from the view that: 'administrative costs are limited to the BSB receiving self-certificates and monitoring the three year periods and so should not be too burdensome. In any event, regulating litigation is probably more straightforward than regulating advocacy. There is no additional fee for advocacy and so there should be no additional cost for conducting litigation' (GLS)';

224. 'If barristers are allowed to conduct litigation, the very much more expensive function of the BSB in monitoring that sort of practice should be borne solely by those who seek to practise in that manner'.

BSB Response

225. The BSB will take into account the views of respondents in assessing whether or not it would be appropriate to charge an additional fee. The Board has decided to review this issue further once it is clearer as to the extent to which it might face an increase in administrative/regulatory costs in order to authorise the conduct of litigation.

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

226. The majority of those respondents who clearly expressed a view felt there should be an ongoing annual fee for those authorised to undertake litigation (9 respondents answered 'yes' and 2 respondents answered 'no').

227. However, many of the respondents qualified their answers in respect of how expensive the regulation of litigation would be and the extent of the additional fee.

BSB Response

228. As above, the BSB will defer taking any decision on this issue until it has further details of potential regulatory costs.

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?

229. The BSB proposes to continue to prohibit barristers from holding client money. Client money is one of the areas of greatest regulatory risk in the provision of legal services. If the BSB were to permit self-employed barristers, or BSB authorised entities, to hold

client money, the public would be exposed to greater risks and the nature of the BSB's regulation would be significantly changed, leading to higher costs.

Responses

230. Almost all respondents agreed that barristers should continue to be prevented from holding client money.

231. The ChBA commented that the prohibition should encompass preventing barristers having control over money, rather than handling it. Doughty Street Chambers suggested that the justification for the prohibition should be kept under review and examined further separately.

BSB Response

232. The BSB will retain a rule prohibiting self-employed barristers and BSB authorised entities from holding client money. It will keep this position under review. Barristers and BSB authorised entities will be permitted to make use of an alternative payment service, as discussed below. They will also be permitted to be employed by, and manage, entities regulated by other regulators which are permitted to hold client money (for example a solicitor's firm regulated by the SRA).

QUESTION 36: Would you find a payment service useful?

233. The BSB proposes to permit barristers and entities to make use of a third party payment service, which would take the form of a custodian or escrow arrangement, in order to deal with payments to and from clients, such as fees, disbursements and settlements. The point of such a service would be to prevent barristers and entities from having direct control over payments, transferring risk and protecting the public. Any such payment service will need to comply with strict criteria, set by the BSB, as well as financial regulatory requirements, e.g. those imposed by the FSA.

Responses

234. The majority of respondents supported the use of a payment service, agreeing that it would help to avoid the burden and cost of further regulation and would help to protect the public. They felt that such a service would be especially useful for those authorised to conduct litigation and public access work. Some argued that a payment service would be essential for effective litigation services.

235. The Legal Services Consumer Panel supported the proposal and noted that a comparable service is operated in France.

236. Respondents were more divided on the extent of the prospective market for a payment service. Generally, it was noted that it would be more useful for criminal practitioners, and other publicly-funded barristers.

BSB Response

237. The BSB proposes to permit barristers and BSB regulated entities to take advantage of third party payment service arrangements approved by the BSB, provided that they fully comply with the conditions of approval.

238. If and when the BSB approves any such payment service, it will publish details as to the scheme that has been approved and the conditions attached to that approval. (It will also publish full details of the approval process in advance of applications made.)

239. The Bar Council is in the process of developing a payment service, named BarCo.

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

240. The consultation paper was concerned with the risks associated with the proposal to permit the use of a payment service. It identified as key the need to remove from barristers and entities direct control over client money. The previous consultation paper, Regulating Entities, included a more detailed discussion of the general risks associated with client money holding, in Chapter 2.

Responses

241. Respondents including 4 Pump Court and COMBAR identified the primary risks associated with the service to be a) misappropriation and b) disputes arising in the event of insolvency of the service provider. 4 Pump Court suggested further details needed to be provided as to how these risks would be avoided. It may be necessary to take into account the contractual terms upon which the barrister or entity is engaged. The BSB might also have to impose requirements for contractual terms relating to the holding of money. COMBAR said that there is a danger of contradiction between the rules of the payment service and contractual terms agreed between barristers and solicitors/clients.

242. Lincoln's Inn said that risks were associated with introducing a payment service for civil litigation. It felt that this solution would add to costs, slow down cash flow, and reduce competitiveness with solicitors and that the suggested mechanism is too elaborate and bureaucratic.

243. The ChBA/TECBAR felt that the risks need to be better identified and detailed. The ChBA notes that: "If the consent of the client is needed for money to be released, we do not see why the client should not just pay directly from his own account. If the consent of the client is not needed, we see potential for abuse…"

244. The ChBA further noted that the BSB has 'a clear duty to satisfy itself of any payment service, because it will be relying upon that detail to protect consumers and not upon annual audits and clear account rules which are prominent features of the SRA Accounts Rules'.

245. The Bar Council argued that, whilst it supported the proposals, there is a risk that if the payment service attracts high costs, these may be directly or indirectly passed onto clients and may reduce the ability of the bar to compete.

246. The Bar Council also noted that there could be a risk of providers making unilateral changes to the terms and conditions of the scheme but that such risks could be addressed by providers being required to notify the BSB of any proposed changes to the terms and by a requirement to periodically re-apply or approval.

247. Monckton Chambers emphasised that any service provider must operate on a not-for-profit basis. If the BSB authorises only one payment service, the costs should not be artificially raised as a result of monopoly.

248. The Legal Services Consumer Panel supported the principle of the payment service on the grounds that it could minimise risks such as misappropriation. It asked for further evidence of how such a scheme would work and be monitored in practice. For example, it would like to see evidence that the BSB has considered and will put in place specialised monitoring arrangements, such as setting aside time and funds for training staff to understand and work with the payment service system, in order to ensure effective monitoring takes place.

249. A significant number of the remaining responses felt that there were no further risks other than those already identified in the consultation paper.

BSB Response

250. The BSB will continue to review the possible risks associated with a payment service, taking into account the risks identified by respondents. It is working closely with the Bar Council in assessing the current development of its proposed BarCo service.

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

251. The BSB proposes to leave open the possibility of more than one payment service and the draft Handbook does not limit this. However, we noted at C45 of the consultation paper that there are a number of potential advantages in having a single (not-for-profit) payment service run by an organisation such as the Bar Council. Numerous small schemes may not be cost effective and may prove difficult and costly to monitor.

Responses

252. Some respondents voiced concerns about the risks in having one provider, on the grounds that it would create a monopoly and provide no incentive to reduce costs. On the other hand, having one provider could help to drive down regulatory costs.

253. The Legal Services Consumer Panel considered that it is important that any scheme is run by a single not-for-profit organisation which is independent and subject to full

scrutiny by the BSB. It suggested that numerous small providers could create further difficulties in effective monitoring and therefore place consumers at risk.

254. The ChBA supported in principle the approval of any scheme so long as it satisfies strict criteria. It suggested that it would be appropriate to require any organisation which sought BSB approval to pay the cost of approval and, if as would appear to be appropriate to have ongoing supervision, of that supervision.

255. Inner Temple suggested that it would be sensible to have a small number of payment services to provide competition but not so many as to make supervision difficult and/or expensive.

256. Monckton Chambers considered that the BSB should fully explore both options, suggesting that if it would be possible to achieve the requisite economies of scale with more than one provider, we consider that the preferred option should be for a number of providers.

257. The Professional Conduct Committee suggested that a single provider could be analogous to the BMIF for professional indemnity insurance.

BSB Response

258. The BSB will proceed on the basis that the Handbook will not specify a single provider but will leave open the possibility of more than one payment scheme.

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

259. The proposed criteria for approval of the payment service provider are laid out at paragraph C46 of the consultation paper.

Responses

260. Respondents generally felt that the proposed criteria for approval were reasonable.

261. A number of respondents felt that this area of regulation would be better left to the Financial Services Authority (FSA). The Legal Services Consumer Panel noted that any payment provider would have to be monitored by the BSB but would also have to comply with FSA regulations under the Payment Services Regulations 2009 (PSRs). It was concerned that this adds a further layer of complexity and could create 'enforcement gaps'. It suggested that the BSB should liaise with the FSA over shared information.

262. Some respondents said that the proposed measures will involve substantial costs and that this issue should be addressed in the criteria. The Bar Council suggested that it is important that providers should be subject to a requirement that costs should not be excessive in a similar manner to pension fund providers.

263. The Bar Council also suggested that two issues need to be addressed: funds which are credited and then returned unpaid; and urgent cases where money needs to be paid out quickly. It further suggested that the proposed criteria should address: client bankruptcy and the event of funds being lost in the collapse of a financial institution.

BSB Response

264. The BSB will give further consideration to the issues raised by respondents in developing further the regulatory criteria for the authorisation of payment services. It will look to prepare a revised set of criteria and guidance and may consult further as necessary.

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

265. Few respondents answered this question and the majority of those who did suggested no further criteria for approval, subject to those issues discussed above. Lincoln's Inn suggested that criteria should be left to a single regulator in the form of the FSA. However, the BSB considers it important that it develops its own criteria for approval, albeit they might complement the requirements of other regulators.

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

266. The consultation paper suggested three options for handling interest payments:

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).

Responses

267. Responses were divided on this issue, though the majority of respondents did not express a view.

268. 4 Pump Court responded that, assuming the model involves the monies being held for the client, the interest must accrue to the client. Clients are unlikely to leave funds on deposit with a scheme which paid no interest (particularly as and when deposit account interest rates increase). COMBAR, ChBA/TECBAR and Lincoln's Inn agreed with this response.

269. Inner Temple argued that '(a) is the only practical option although we recognise that this scheme could involve holding quite substantial sums of money and therefore the accrual of large sums in interest'.

270. The Bar Council said that it has no strong views as to which of the three options is preferable and does not consider that the BSB need specify a single requirement on interest payments as part of the approval process rather than judging each application on its merits. The LPMA similarly suggested that providers should be left to judge this as part of the process of meeting tendering requirements.

271. The Legal Services Consumer Panel reported that there is some anecdotal evidence that under the scheme used by the French bars, client money may in some cases be held for excessive amounts of time. There may be added incentives for this where interest payments are retained by either the provider or the scheme. In order to mitigate against this risk the BSB could consider introducing limits on the amount of time client money can be held for after the conclusion of a case. Interest earned while the money is held should be returned to the client. If this is impractical, the interest might be pooled and given to a cause that would benefit all consumers, for example to public legal education initiatives.

BSB Response

272. The BSB proposes to judge each application for approval on its merits.

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

Responses

273. 4 Pump Court emphasised the risk of dishonesty. For example, where a provider might be authorised to pay out in the event that a pre-agreed condition is achieved, a dishonest barrister might specify the manner in which the condition is prescribed so as to ensure payment of monies due to a third party into his own funds. Alternatively, company funds left on account at the direction of the finance director of the company and the barrister might be fraudulently diverted to the benefit of the finance director and the barrister.

274. The ChBA/TECBAR identified the risk that a dishonest barrister will procure a payment out of client money in circumstances in which (i) his own professional indemnity insurance will not respond (you cannot insure against your own dishonesty) and (ii) the provider is not liable to the client in either negligence or fraud so that it will have no liability to the client and its insurance (as envisaged by paragraph C46(e) of the Consultation Paper, unless the proposed insurance will cover payment out of money at the direction of a dishonest barrister where the provider has no liability itself) will not respond. The ChBA suggested there is also the risk of collusion between an employee or agent of the client and a barrister to procure the payment away of the client's money. Again, the barrister would not be insured and the provider might well have no liability.

275. COMBAR felt that the BSB has insufficiently recognised the risk of misappropriation and the lack of compensation available to the client.

276. The Legal Services Consumer Panel noted that the FSA PSRs are intended to protect consumers in the event of insolvency of the payment service provider. The BSB intends to ensure that further insurance requirements are in place to mitigate risk due to fraud or negligence of the service provider, and that as barristers or entities would not hold client money themselves consumers should be protected in the event of insolvency of the barrister. For these reasons no compensation fund would be put in place. The Consumer Panel supports this but underlines that the BSB must have effective monitoring and enforcement procedures in place to ensure the insurance requirements are met.

BSB Response

277. The BSB will take account of the risks identified by respondents in further developing the criteria and guidance for a payment service.

Q43: Is this definition of legal activities sufficiently broad to encompass all the main activities that a BSB-regulated entity is likely to undertake?

278. The BSB proposed that the various entities we will be regulating should only, in substance, be able to 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, legal activities. 'Legal activity' was defined as any reserved legal activity and any other activity which consists 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.

Responses

279. Most respondents agreed that the definition of legal activities was sufficiently broad. Combar, 4 Pump Court and the ChBA however thought the definition should include drafting or settling documents. The Bar Council considered it might be useful to refer expressly to the fact that the provision of legal services through attendance at police stations, whether advisory, representation or by way of attendance and observation, are included in the definition.

BSB Response

280. The BSB's view is that the drafting or settling documents is covered by 'legal advice or assistance' and 'representation' which are both already included in the definition of legal activities. So the BSB will be keeping the version of this definition which was consulted on.

Q44: Do you agree that the proposed authorisation criteria are appropriate?

281. The BSB detailed in the consultation paper the criteria it would use when authorising entities. The general approach outlined was that as a relatively small specialist regulator, it would concentrate on managing efficiently risks that are similar to those with which the BSB is already familiar and is suited to managing. For this reason a set of mandatory criteria was proposed which the BSB will impose. It will also have a discretion whether to approve entities. The exercise of this discretion will enable the BSB to exclude entities unsuited to regulation by the BSB, while dealing with possible regulatory arbitrage and preserving its specialist remit.

282. The consultation paper also set out that proposed limits on structure would not be operated as rigid limits but rather as indicative factors, as part of an overall assessment of risk and suitability for BSB regulation. The paper then detailed circumstances in which the BSB may refuse authorisation.

Responses

283. There was general support for the BSB's proposed approach but with comments on particular aspects of its detailed proposals. The Bar Council thought that the proposed authorisation criteria are an appropriate mechanism for narrowing the BSB's regulatory scope and agreed that the BSB should not regulate all entities. They also recognised that, due to the many different possible types of entity, it will be necessary, at least in the initial stages, for there to be a significant element of discretion within the authorisation criteria. They were concerned, however, that this would reduce predictability of outcome for applicants and might increase the costs of the exercise.

284. An individual practising barrister commented that the proposed authorisation criteria are too restrictive, particularly in relation to the percentage of non-barrister ownership. He stated that the limit of 25% of may force him to apply to the SRA for regulation, although he rather be regulated by the BSB. His view was that the proposed entity-regulation regime anticipates that the Bar will still predominately offer advocacy services, whereas, in reality, he considers that the balance of work will be advisory within 5 years, as clients realise that the cost of litigation is prohibitive.

285. The LPMA did not understand why the BSB would not regulate entities in which any owner or manager is a corporate body, as this would limit the establishment of an uncontroversial form of entity i.e. single practitioner entities some of which may wish to form a further entity with one or more single practitioner entities.

286. 4 Pump Court, the ChBA, and Combar stated that the additional regulatory cost arising from the regulation of entities should be borne by entities alone and not the entire profession.

287. Lincoln's Inn commented that the proposed authorisation criteria should not preclude participation in ownership of a spouse or civil partner of an authorised person.

BSB Response

288. The BSB has examined the authorisation criteria in the light of the responses, and whether the criteria proposed would be too restrictive. In response to the LPMA's comments, the BSB has decided to change one of the mandatory authorisation criteria into a discretionary criterion. So the requirement that all persons with any ownership interest (whether material or not) and all managers should be individuals will be a discretionary factor in deciding whether the entity is suitable for BSB regulation. This would potentially allow the types of ownership arrangements the LPMA describes. The BSB considers that the risk posed by such arrangements is likely to be minimal as both entities would be subject to full regulation by the BSB.

289. The remaining authorisation criteria will remain the same.

290. Single person barrister entities will be allowed, with the barrister fulfilling both the HoLP and HoFA role. Ownership of entities by spouses/partners will also be permitted, provided that the spouse/partner is also a manager and provided the BSB exercises its discretion to approve the entity in circumstances where the non-lawyer ownership will in fact be 50%.

Q45: Do you agree with these principles and section E of Part 3 of the Handbook?

291. The BSB proposed that once authorisation is granted to an entity, it will continue unless, or until, revoked, suspended or subjected to conditions. The BSB also proposed to move towards a risk-based supervision system. In addition to requiring entities to submit information annually and through ad-hoc BSB requests, we also proposed 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. The analysis will determine the level of supervision the entity will require.

Responses

292. Most respondents agreed with the proposed arrangements. The Bar Council considered that it should be made clear to applicants that they risk no longer being suitable for BSB regulation because of a change in its structure or business or the death of a HoLP, in particular the timeframes involved in finding another regulator. They were of the view that it should be made clear that all entities should ensure that their business planning takes into account the possibility of time being needed to change regulator and that appropriate contingency plans are put in place in respect of any "key person risk" where the death or retirement of 1 or 2 individuals might threaten the entity's regulatory status.

BSB Response

293. The BSB will develop a risk assessment framework which will assist the BSB in analysing the risks posed by applicants. Guidance around the authorisation process will be developed and will be available with all the relevant application forms.

Q46: Do you have any concerns about the proposed route of appeal?

294. The consultation paper proposed that an appeals process will be established for all decisions made in relation to the authorisation and ongoing licensing or authorisation of entities. Decisions would initially be subject to an internal review (possibly by the BSB's Qualification Committee) after which there would be a further right of appeal to the General Regulatory Chamber of the First Tier Tribunal.

Responses

295. Most respondents had no concerns about the proposed route of appeal. Lincoln's Inn and the Bar Council commented on the language used in the rules. The Bar Council considered that the phrase "review" suggests that the Qualifications Committee's role would be limited in a judicial review sense to the identification of errors of law or irrationality in the underlying decision. They and Lincoln's Inn thought this could be reworded to state that either each stage of appeal should be a re-hearing or a reconsideration of the original decision.

BSB Response

296. The BSB has considered the position in relation to appeals and is currently proposing that regulatory appeals from entities (i.e. appeals in respect of authorisation decisions) will be heard internally by the Qualifications Committee in the first instance and then go on to appeal to the first-tier tribunal.

297. The appeal route for disciplinary matters in relation to entities should follow the same route as disciplinary appeals for individual barristers. All defendants (individuals or entities) will be able to appeal conviction and/or sentence to the Visitors. The BSB will also have the right to appeal sentence and dismissal of charges, but only on the limited grounds that the decision of the Disciplinary Tribunal had:

a) taken into account irrelevant considerations;
b) failed to take into account relevant considerations;
c) reached a decision that is wrong in law; and/or
d) reached a decision which no reasonable Tribunal could properly have reached.

298. The BSB remains committed to transferring the existing Visitors' jurisdiction over to the High Court, and will continue to work towards this goal with the LSB, MoJ and Lord Chief Justice.

Q47: 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?

299. Section 106 of the 2007 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.

300. The BSB reviewed the draft rules for approving and supervising entities and did not think there was a need to amend the rules for special bodies and in any event it would be disproportionate to operate a special regime for these types of organisation alone.

Responses

301. Almost all respondents stated that they did not think the BSB should be regulating special bodies if they did not meet the requirements for authorisation set out elsewhere in the rules.

302. The Legal Services Consumer Panel stated that they will be responding to the LSB's consultation on special bodies and that it would be premature for the BSB to conclude that amending its rules for special bodies is unnecessary before being able to consider responses by special bodies and others. They went on to state that the 2007 Act enables special bodies to request 'special treatment' from licensing authorities so such changes were envisaged when the regulatory architecture was being designed.

BSB Response

303. In light of the LSB's ongoing work on special bodies and their recent consultation on this subject the BSB agrees with the Legal Services Consumer Panel, that at the present time it would be premature to determine whether any changes to rules would be required. The work in this area will be developed on an ongoing basis.

Q48: Do you agree with the general principles outlined above?

Q49: Do you agree that there should be a standard application fee for entities subject to the right to charge more if in depth investigations are needed? If you disagree, please specify what different basis should be used.

304. The BSB consulted on general principles that would apply to the fee structure for BSB-regulated entities and also to individuals and entities who are authorised to conduct litigation. Some of these principles were that the fee structure should be fair to fee payers, ensure a predictable income to meet the costs of regulation, 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 and that it should be based on data that can be verified.

305. The BSB had previously proposed that the set up costs (estimated to be in the region of £400k) should be borne by the Bar as a whole, as the impact on individual practising certificate fees is likely to be small and any barrister now in practice may at some point take advantage of the changes.

306. In terms of application fees it was proposed that entities will pay a one off fee for authorisation and will remain authorised/licensed unless and until the BSB removes their

authorisation/licence, but will need to supply specified information and pay a fee annually. Fees for parts of the application process that are not of general application should be borne by those making the application on a cost recovery basis. The intention set out was that the fees for the initial authorisation process will be fully borne by the entities and will not be recovered from the rest of the regulated community.

Responses

307. Respondents again commented on self-employed barristers having to pay the costs associated with the regulation of entities and the conduct of litigation. For example while the ChBA agreed with the general principles outlined they stated that it would be entirely wrong to place any additional costs on barristers who choose not to become employees of an entity, conduct litigation or get involved with clients' money, even through a payment service.

308. Monckton Chambers considered that the BSB's entire rationale for allowing entities is to allow barristers to compete more effectively with solicitors. They thought it would be inconsistent with that rationale if fees were to be set in such a way as essentially to set up a barrier to entry, as it would stifle the competition the BSB is hoping to create.

309. The Bar Council expressed concern that a variable fee could create uncertainty and make it difficult for those who wish to set up entities properly to predict the costs of an application, which would make it more difficult to properly evaluate whether it is sensible to set up an entity at all. They suggested that there should be a standard application fee for all applications.

BSB Response

310. The BSB appreciates concerns around the set up costs of the entity regulation and the views that these costs should be borne by those who wish to set up entities and/or conduct litigation. However both the Bar Council and the BSB have previously agreed that the set up costs should be borne by the profession as a whole as it would be open to any member of the profession to take advantage of these changes now or at some point in the future.

311. It is argued that set-up costs will be too high. It is important to note that such costs also cover the cost of the introduction of the new Handbook. The new Handbook is intended to be a more user-friendly document with all the relevant information for individual barristers and entities in one place.

Q50: 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.

312. The costs of regulating entities will vary depending on the nature of their activities, their regulatory history and their size. Although the BSB considered that there was an argument for basing the annual fee 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. For these reasons the BSB proposed that the annual fee should be calculated on a banded turnover model.

313. The consultation paper also proposed that the BSB would be charging fees for applications for approvals of new managers, or the appointment of a HOLP or HOFA. We also set out that we may charge for additional monitoring visits if these are necessary.

Responses

314. Monckton Chambers' view was that an annual fee for entities should be based on a risk assessment. Those entities which present a higher regulatory risk, and therefore need more supervision and intervention, should bear those costs. They did suggest, however, that if a risk-based system is not feasible, then basing the fee on turnover would be a reasonable alternative, as one would expect turnover broadly to reflect the size of an entity and the number of cases it handles (and therefore, at a very high level of generality, to equate to risk).

315. The Bar Council's view was that turnover is not an accurate indicator of the risk posed by an entity, nor of the nature of its activities, or its regulatory history. They did state however, that as there is insufficient data to allow a more tailored approach, turnover is an objective and predictable criterion upon which to base annual fees.

BSB Response

316. At present the BSB does not have sufficient information to base annual fees on a detailed risk assessment. When the BSB begins regulating entities annual fees will need to be based on turnover. However, as the BSB develops more experience in regulating entities it will review the position on calculating annual fees to determine whether it remains appropriate to calculate annual fees on turnover.

Q51: Do you agree that these factors are appropriate for assessing potential impact on the regulatory objectives?

Q52: Do you agree that these factors are appropriate for assessing the probability of an adverse regulatory impact occurring?

317. This part of the consultation discussed the BSB's approach to risk assessment, in particular the role that risk assessment might play in our monitoring of entities. The BSB proposed that the potential impact on the regulatory objectives would be measured through an assessment of the following factors:

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

318. Once potential impact has been measured the BSB will consider how likely it is that an entity will not comply with the regulatory requirements set out in the Handbook. An assessment of probability will determine the intensity of the supervision that is adopted.

319. The BSB proposed that in assessing the risk of non-compliance the following general factors would be considered:

- Systems that assist in the delivery of services;
- Governance and business model;
- First tier complaints;
- People and training;
- Regulatory history;
- Novelty of the work undertaken or of the business model;
- The availability of outside assistance;
- Client satisfaction; and
- Quality accreditation.

Responses

320. 4 Pump Court was not clear whether the discussion was limited to risk assessment in respect of chambers. They stated that in circumstances where there is a surfeit of evidence available to the BSB concerning the performance of chambers they would expect the approach to risk assessment in respect of chambers to be based on that evidence rather than on the hypothetical matters set out in the consultation paper. In relation to the factors for assessing the probability of an adverse regulatory impact occurring 4 Pump court thought that some factors seemed to carry greater weight than others. The example they gave was that it may be that little (or no) weight should be placed on "softer more client focussed skills" gauged by "properly vetted satisfaction surveys." These views were also echoed by Combar.

321. Lincoln's Inn thought it was difficult to comment on what appears to be purely a subjective interpretation of risk without any research base. They commented that if the quality of the BSB's data is inadequate the first step is to improve that information and to make a proper risk assessment model.

322. The Legal Services Consumer Panel wanted to see a strong emphasis on vulnerable clients in the mandatory elements of the Handbook. They thought this should go beyond the discrimination provisions in section D2 of the Handbook to require barristers to cater for the particular needs of vulnerable client groups.

323. The Bar Council stated that it is not true that "a model based heavily on mathematical algorithms, with defined scores and weightings would likely produce more consistent risk assessment results." They thought such a model would only be likely to produce results which were of no practical use, since it would be attempting to perform the impossible, not only by assigning numerical values to matters which inevitably depend upon qualitative assessments, but also by adding together or comparing numbers which reflect different, and incommensurable factors.

BSB Response

324. The BSB is aware that until it begins to regulate entities the information it has available to it in order to make a fully informed risk assessment is limited. When the BSB does start regulating entities it will be in a better position to build up information on the risks posed to the regulatory objectives, through effective monitoring. So the approach to risk assessment will evolve.

325. In relation to the risk assessment of chambers, the BSB will be launching a separate consultation on the development of the BSB's wider risk-based monitoring strategy as it relates to chambers monitoring at the beginning of 2013.

Q53: Do you have any comments on the issues raised above?

Q54: Do you have any views on the applicability of the principles outlined above to individual barristers and the chambers model?

326. The BSB went onto consider other aspects of the risk assessment framework in the consultation paper. This consideration included:

- Method of assessment;
- Review;
- Confidentiality;
- Self-assessment; and
- Data collection and use.

327. The BSB said that data would be received via five main routes – authorisation applications, annual returns, ad-hoc information, intelligence (complaints and other sources) and monitoring visits.

Responses

328. 4 Pump Court thought that the details of the risk assessment model proposed by the BSB were not clear. They stated that in respect of self-employed barristers in chambers the BSB should place considerable weight on the fact that they are predominantly (and in some cases exclusively) a referral profession. They go on to say that such barristers' chambers have informed consumers (i.e. solicitors) who are capable of assessing the quality of the service provided and to respond accordingly. Their view was that chambers which are the subject of few (or no) substantiated professional complaints should generally not be regarded as presenting any significant risk. The Bar Council also echoed this view.

329. The Bar Council questioned the purpose of the risk assessment framework. They thought that a focused exercise that aims to think ahead and tries to anticipate and monitor the effects of any changes would be more effective and efficient exercise than a bureaucratic assessment framework.

330. Monckton Chambers agreed that as long as the BSB is monitoring medium/high-risk entities to ensure compliance, there would be no need to make public their status as medium/high-risk.

331. The ChBA commented that the BSB needs to justify, with evidence, any increase in the regulatory burden on individual barristers. The LPMA thought the proposals were sensible business procedures.

BSB Response

332. The BSB appreciates that the information provided in the consultation does not provide a full picture of the approach that will be taken to risk. However the BSB has taken respondent's views on board and will be launching a further consultation with more detail at the beginning of 2013.

Q55: Do you have any comments on the issues raised in the interim equality analysis?

Q56: Are there any potential impacts on equality and diversity from the new Code as a whole which you wish to draw to our attention at this stage?

333. The BSB produced an interim equality analysis which formed part of the consultation. The focus was on entity regulation and the key changes that were proposed to the Code of Conduct and views were sought from consultees on the likely impact on groups with protected characteristics.

Responses

334. 4 Pump Court made some detailed comments on the interim analysis, including comments in relation to reporting misconduct, shared responsibility for the management of chambers and the impact of the development and expansion of the use of entities on women. Monckton Chambers agreed with 4 Pump Court's comments and added that the level of the various fees and charges proposed by the BSB must be set in such a way that it does not impact adversely on junior and/or low income members of the profession.

335. The Bar Council stated that given the potential for conscious and subconscious discrimination in recruitment it should be necessary for at least one member of a selection panel in any entity to have attended a course in fair recruitment. The Bar Council believed this would make an entity's recruitment process more transparent, and ensure public confidence in the fairness of access to the legal profession. They went on to consider whether such a requirement would be disproportionate in the case of small entities and whether an exception should be made for them, but concluded that as the principle is so important, and because it is not onerous, there should be no exceptions.

BSB Response

336. The BSB is grateful for responses to these questions. The BSB will be conducting full equality impact assessments which will be considered by the Board, before being submitted alongside the Handbook and licensing authority applications to the LSB. The BSB will feed respondents' comments into the final version.

PART 2: SUMMARY OF MAJOR POLICY DECISIONS

Supervision and risk (paras 1-21)

- The BSB's proposed approach to risk and supervision is being developed further and a detailed consultation paper will be released by the Quality Unit before the end of the year. The consultation will build on the earlier work and will propose that all entities and chambers should be assessed against stated risk criteria.
- The criteria assessed will be "exposure" (i.e. the business model, any historic misconduct findings) minus any "mitigation" that is in place (i.e. proper governance structure, award of the Bar Business Standard). This figure will then be multiplied against the "potential impact" (i.e. the size of the organization, the vulnerability of the client base) to reach an overall risk score.
- A risk scoring matrix is being developed that will group chambers and entities as low, medium or high risk. The level and intensity of BSB supervision will be directly linked to the overall risk score.

Use of administrative sanctions (paras 32-57)

- The BSB will apply administrative sanctions to any breach of the Handbook. Administrative sanctions will be imposed by the PCC (or senior staff in line with existing delegated authority) applying the balance of probabilities.
- The maximum level of fine that will be imposed is £1,500 for entities and £1,000 for individuals.
- Alleged breaches of the Handbook will only be elevated to the more serious professional misconduct if one or more of the relevant criteria have been satisfied.
- Administrative sanctions will be recorded but will not be published.

Determination by Consent (DBC) (paras 58-62)

- The DBC procedure will be expanded to include entities, but a DBC panel will not have the power to disqualify any individual.

Disciplinary Tribunals (DT) (paras 63-74)

- Only the most serious cases will be referred to a DT and only where a) the conduct may constitute a breach of the Handbook, b) an administrative sanction is not appropriate c) the PCC considers that there is a realistic prospect of a finding being made and d) the PCC considers that the regulatory objectives would be best served by pursuing disciplinary proceedings.
- 5 person panels will be retained for the time being but this will be kept under review.

Interim Suspension and Disqualification Panels (paras 75-92)

- The triggers for referral will be expanded and will include a broad public interest ground.

- The powers available to an Interim Panel at the conclusion of a hearing will be expanded and will include the power to suspend or disqualify where referral was caused by an allegation or charge (as opposed to conviction).
- Interim orders will remain in force until such time as the DT has been convened to hear the substantive charges.
- Immediate Interim Orders may be imposed by the PCC if they deem fit, but these orders will automatically lapse after four weeks.

Regulation of non-authorised employees and disqualification (paras 93-102)

- The BSB will retain a power to disqualified non-authorised employees from working in other BSB-regulated entities or chambers, but will not insist on new employment contracts.

Interventions (paras 103-129)

- The BSB will obtain the "off the shelf" intervention powers in relation to ABSs but will not have intervention powers in respect of LDPs, BoEs, chambers or individual barristers.
- Any intervention costs that cannot be recovered from the intervened party will be met by all entities (not by chambers or individual barristers).

Level of fines (paras 130-144)

- The maximum level of fine for ABSs will be the statutory maxima, namely £250 million for the entity and £50 million for an individual within the entity.
- The maximum level of fines otherwise will be £250,000 for LDPs and BoEs and £50,000 for individual barristers and individuals within LDPs and BoEs.

Disciplinary Tribunal Rules (paras 145-155)

- The BSB will move to a system of automatic directions, with a right to challenge these within 21 days. Defendants will subsequently be able to challenge directions after the 21 day period, but there will be adverse cost implications for frivolous applications.
- A copy of the certificate of conviction relating to any offence will be conclusive proof that the defendant committed the offence.
- Any court record of the findings of fact upon which the conviction was based (which may include any document prepared by the sentencing judge or a transcript of the relevant proceedings) will be proof of those facts, unless proved to be inaccurate.
- The BSB will have the right to appeal sentence and dismissal of charges, but only on the limited grounds that the decision of the Disciplinary Tribunal had:
    a) taken into account irrelevant considerations;
    b) failed to take into account relevant considerations;
    c) reached a decision that is wrong in law; and/or
    d) reached a decision which no reasonable Tribunal could properly have reached.

Appeals (paras 156-158)

- The BSB will continue to press for the abolition of the Visitors and the transfer of the jurisdiction to the High Court.
- Regulatory decisions (i.e. a decision to decline a licensing application) will be appealed to the Qualifications Committee in the first instance and then to the First Tier Tribunal.
- Decisions of DTs will continue to be appealed to the Visitors/High Court.

PART 2: ANALYSIS OF CONSULTATION RESPONSES

QUESTION 1: Do you agree that this level of supervision is appropriate for low and medium risk entities?

1. The first part of section two dealt with the BSB's proposed approach to supervision and how it was linked to risk. The consultation proposed moving towards a more proactive, risk-based supervision and monitoring regime. A newly established Monitoring Unit will be responsible for identifying and resolving any regulatory issues that arise post authorisation. The emphasis of the Monitoring Unit will be to try and resolve issues through non-disciplinary means (offering advice, agreeing action plans, recommending extra training etc), and will only refer the most serious cases to the Professional Conduct Department ("PCD") and Professional Conduct Committee ("PCC") for possible disciplinary action.

2. Specific complaints would still be managed by the PCD in the ordinary way but information will be freely transferred between the PCD and Monitoring Unit so that an accurate picture of risk is maintained. Unlike some other regulators, all complaints will not be processed through a mathematical risk framework.

3. As part of the authorisation process all entities will be subject to a risk assessment, which will lead to a low, medium or high risk score. The eventual risk score will depend on a number of factors under the broad headings of impact and probability.

4. The consultation proposal was that within the first 12 months of being authorised all BSB-regulated entities that produce a medium or high risk score would receive an initial monitoring visit. Thereafter ongoing supervision would be built around the existing chambers monitoring regime. The basic proposition was that entities who produced a high risk score would be subject to closer and more intensive supervision than medium and low risk scorers. For low and medium risk scorers the BSB proposed that the appropriate level of supervision was to require no more than completion of an annual return.

Responses

5. The majority of respondents welcomed the BSB's new proactive, risk-based approach. However, some respondents were not clear as to the exact level of supervision that was being proposed and felt there was little detail about the nature of the annual returns. A few respondents warned against adopting an overly bureaucratic approach.

6. BACFI had specific concerns about the costs of this approach and indicated that the structure of the Practising Certificate Fee ("PCF") may need to be looked at again because employed barristers present a low level of risk as compared to their self-employed colleagues.

7. The TechBar and ChBA thought that an initial monitoring visit within the first few months of authorisation would be essential for all entities, irrespective of the risk score.

BSB Response

8. The proposed approach to risk and supervision will be adopted but the BSB accepts some of the criticisms around lack of detail. A more detailed proposal will be presented in a consultation run by the Quality Unit of the BSB at the beginning of 2013

9. The BSB acknowledges BACFI's concern with respect to the structure of the PCF. The Bar Council is responsible for setting the PCF and for the immediate future the PCF will continue to be charged with reference to years of call. However, in the future, and following a full consultation, the Bar Council may move to risk-based charging, or charging on the basis of turnover.

10. The BSB continues to believe that initial monitoring visits will only be necessary for higher risk scorers and that it would not be a good use of our limited resources to visit entities that produce a low risk score. General compliance will be achieved through the expanded chambers and entity monitoring scheme and use of short notice spot checks.

QUESTION 2: Do you agree that this level of supervision is appropriate for high risk entities? Should the BSB do anything more by way of supervision of these entities?

11. Entities that produce a high risk score will be subject to more intensive supervision. This may include:

    a) Monitoring visits/telephone conversation on areas of concern;
    b) Recommending additional training;
    c) More frequent monitoring returns;
    d) Working towards an agreed action plan to reduce the risk profile.

Responses

12. The majority of respondents agreed that high risk entities would need more intensive supervision, although the TechBar and ChBA questioned why the BSB would want to regulate high risk entities at all.

13. Some respondents felt that the proposals lacked clarity as to what would constitute a high-risk entity. The Law Society stated that any supervisory approach to entities should be tailored to take account of the risk it poses, its management of risk and its approach to, and history of, compliance.

BSB Response

14. The BSB believes that there is benefit in regulating entities that produce a high risk score but which otherwise comply with the various mandatory and discretionary approval factors. It must be remembered that "high risk" in the BSB sense still represents a considerably smaller risk than that represented by other similarly classified entities operating under different Approved Regulators (primarily because the BSB will continue to prohibit the handling of client money and will not regulate organisations with owners who are not involved in the business, or with complex structures). The BSB will work

proactively with high-risk entities in an attempt to implement measures that will lower their overall risk.

QUESTION 3: Do you agree that the BSB should adopt short-notice inspections of randomly selected entities and thematic inspections?

15. The consultation proposed that the BSB would carry out short notice spot inspections of randomly selected entities, irrespective of the risk score. This was designed to incentivise compliance.

Responses

16. There was a mixed response to this proposal. 11 Stone Buildings felt that such inspections were not warranted unless supported by evidence already in the BSB's possession. The Bar Council, TechBar, Enterprise Chambers and ComBar could see no justification for such a power and felt it would be disruptive and overly intrusive.

17. The Bar Council felt that performing such inspections at short notice would also be liable to result in the relevant people not being available for the inspection due to clashing professional commitments which could not be changed at short notice.

18. Middle and Inner Temple and the LPMA felt there was benefit in conducting spot visits in appropriate circumstances.

BSB Response

19. The BSB continues to believe that a small number of randomly selected, short-notice inspections will be beneficial and will serve to promote compliance with the Handbook.

20. However, the BSB accepts some of the criticisms on this proposal and in particular the Bar Council's comments that very short notice inspections might be unproductive because people and resources might not be available. This proposal will therefore be modified to build in sufficient time between notification and inspection to ensure that the visit is useful. It will be important that the BSB remains in control of the inspection timetable, and it will be up to the inspected party to demonstrate that any proposed timetable is unworkable.

21. Further proposals about the percentage of entities to be randomly selected and the exact timeframes will follow in the forthcoming risk and supervision consultation paper.

QUESTION 4: Do you agree that the above should be included in the BSB's enforcement policy; are there any other factors that should be included?

22. Proper enforcement of the Handbook is essential to protect the public interest, and to promote the other regulatory objectives. It also ensures that the BSB can offer credible deterrence and generally encourage compliance with the Handbook.

23. The hallmarks of the BSB's enforcement policy will include, among other things, proportionality, individual responsibility, flexibility, and an assessment of whether the stated outcomes have been adversely affected.

24. In deciding whether or not to take disciplinary action, the BSB will take into account a number of criteria including the seriousness of the act or omission, whether one or more of the outcomes has been affected, the period over which the act or omissions took place, any previous offending etc.

Responses

25. The majority of respondents agreed with the various criteria of the proposed enforcement policy. The Bar Council felt that the financial impact on clients (of the breach) and on the entity (of compliance) should be an extra criterion.

26. 4 Pump Court, the Tech Bar, the ChBA, and others, felt that there was a considerable overlap between the elements listed and queried certain of the elements listed ((h) and (k) caused particular concern for some respondents).

27. The PCC were generally supportive, and proposed that a further factor should be added to account for situations where the breach, if proved, would amount to a criminal offence. They also felt the list might be too complicated and that it should be made clear that not all of the factors had to apply to every case.

BSB Response

28. Despite the various concerns above, the BSB continues to consider that the majority of these factors are relevant to the enforcement policy. Factor (a) is required because the BSB does not intend to make the outcomes themselves enforceable. Instead an assessment of whether an outcome has been negatively affected will influence the decision to take enforcement action.

29. In the BSB's assessment the second part of factor (f) is a valid and will remain (whether the defendant has taken and steps to correct the breach and provide appropriate redress). However, the BSB accepts that whether a breach as been admitted or not is not a relevant factor for enforcement but should be considered when determining the appropriate sentence.

30. The BSB may, from time to time, change aspects of its regulatory focus (for example, it may choose to focus resources on CPD compliance or E & D compliance). Therefore factor (k) is relevant if the alleged breach is related to a particular area of regulatory focus.

31. The BSB accepts that there is benefit in rationalising the list and therefore proposes to exclude factor (g), as it is arguably covered by other factors, and factor (j) as this is already included in the general justifications for taking enforcement action.

32. A final enforcement policy will accompany our application to the LSB.

QUESTION 5: Do you agree that the BSB should adopt this new approach to enforcement with greater use of administrative sanctions?

QUESTION 6: Do you agree with the new maximum level of fines proposed?

QUESTION 7: Do you agree with the application of the civil standard to administrative sanctions?

33. The consultation proposed that administrative sanctions should be applied, where appropriate, to the entire Handbook. The proposal changes the current position where only a limited number of provisions can be dealt with by way of administrative sanction.

34. Once disciplinary action is deemed necessary the BSB will consider, in the first instance, whether the matter can be appropriately dealt with by way of administrative sanction. The factors which are likely to indicate that a charge of professional misconduct is appropriate include, all of those listed in the enforcement policy, the person's disciplinary record, whether the likely sentence should be higher than the administrative maxima, whether the breach includes non-compliance with previous orders or directions from the BSB.

35. The decision to impose an administrative sanction would rest with the PCC who, in accordance with existing arrangements, could delegate that power to senior PCD staff. Unlike the standard of proof which is applied by Disciplinary Tribunals, the civil standard of proof will be adopted.

36. The proposal is that the maximum fine that could be imposed would be £3,000 for an individual and £5,000 for an entity.

Responses

37. The majority of responses did not agree with the proposal that administrative sanctions should apply to the entire Handbook. 4 Pump Court felt that it was not appropriate for an individual in the PCC to decide to levy a fine in connection with a disputed allegation of misconduct, let alone on the balance of probabilities.

38. The Bar Council felt that the balance is correctly struck at present, whereby only minor infractions of the Code can be dealt with administratively at a low level. For any infraction potentially to be the subject of administrative enforcement moves too far away from regulation of barristers by barristers.

39. ComBar indicated that administrative sanctions are currently, rightly, reserved for the most mundane, uncontentious matters. It is wholly inappropriate, and possibly in breach of the ECHR, for officers of the BSB to levy fines in connection with a disputed allegation of misconduct. It is also entirely inappropriate to permit this on the balance of probabilities.

40. The Tech and ChBA opposed the proposal. They felt breaches of rules should be professional misconduct. They did not understand how or why a breach of a rule could be a breach such as to attract a sanction but as a matter of discretion not be misconduct.

41. BACFI, LPMA and Inner Temple favoured adopting a wider use of administrative fines.

42. With respect to the level of fines there was a mixed response from consultees. The Bar Council thought the proposed fines were too high for sanctions imposed administratively by staff, and even more so if a lower standard of proof were to be adopted. However, they agreed some increase from the current £300 was appropriate. They suggested a maximum of £1000 for barristers and £1500 for entities. They felt that if a greater fine might be justified in a particular case, then this is a very strong indication that administrative enforcement was inappropriate. Middle Temple agreed with the Bar Council's proposed levels and the Tech Bar and ChBA suggested £5,000 for an entity and £1,500 for an individual. 11 Stone buildings thought the existing levels were sufficient.

43. Henderson Chambers and Fayyaz Afzal suggested that the fines should be limited to those handed down in the Magistrates Court.

44. Garden Court, Inner Temple and the LPMA agreed with the proposed increase.

45. In terms of the standard of proof to be applied, not surprisingly the majority of respondents favoured keeping the criminal standard. Inner Temple thought even an administrative sanction is a finding of professional impropriety and potentially serious for a barrister, whatever the sentence. Therefore the criminal standard of proof is necessary.

46. The Bar Council did not agree that there was any proper justification for applying a different standard of proof to infringements resulting in administrative sanction than to other infringements. Either a civil standard is appropriate for all misconduct charges, or it is not. Its appropriateness should not vary according to level of disposal. The less serious nature of administrative breaches should be reflected only in the penalty and not in the burden of proof.

47. Middle Temple felt that the standard of proof required for an administrative sanction should be the criminal standard. Although "less serious" the imposition of an administrative sanction is still a serious step in the regulatory framework. There was no suggestion that application of the criminal standard would be unworkable or would give rise to any difficulty in practice.

48. The Legal Services Consumer Panel supported the civil standard and went further to suggest it should be applied to all Disciplinary Tribunals. The underlying purpose of disciplinary proceedings is public protection, which could be frustrated if the BSB is unable to take action, or is unsuccessful in so doing, because the evidentiary burden is disproportionate. Cases prosecuted using the criminal standard of proof are likely to take longer and be costlier. In other professional services sectors, such as medicine and accountancy, the civil standard of proof is regularly used in serious cases that have a major impact on individuals and businesses.

BSB Response

49. Despite barrister-led opposition to the proposal that administrative sanctions should apply to the entire Handbook, the BSB continues to believe that this is the right policy. Maintaining the current position is undesirable and is not consistent with the principles of better regulation. It is possible for minor breaches of most rules to be committed, and those should be dealt with quickly, and in a proportionate way.

50. The BSB further believes that it is not proportionate to expect the PCC to deal with every case for which administrative disposal is proposed, and that senior PCD staff have the adequate experience and skills to properly apply the relevant criteria in an open and transparent way, in straightforward cases. Difficult cases will be dealt with by the PCC on a case-by-case basis, and defendants will be able to appeal any decision to an independent panel administered by COIC.

51. The BSB continues to believe that the civil standard of proof is appropriate for these low level disposals, and that it would not be in line with current regulatory practice to apply the higher criminal standard. The BSB accepts that this will lead to a split system (Disciplinary Tribunals will still apply the criminal standard), but sees no reason why this should cause practical problems and notes that other Approved Regulator's, including the SRA, have adopted a similar approach.

52. The BSB accepts that the proposed level of fines available for administrative disposal was too high and will instead adopt £1,500 for entities and £1,000 for barristers.

53. The BSB further accepts the factor e) – whether there is any substantial dispute of fact - is not relevant to a decision about whether a breach should be treated as professional misconduct.

QUESTION 8: Do you agree that administrative warnings and fines should be recorded but not be published?

54. The BSB proposed that, because administrative sanctions were for lower level breaches, the findings would be recorded but should not be made public. The BSB felt that dealing with lower level breaches without publicity would be more likely to encourage co-operation and that public disclosure would lead to disproportionately serious consequences for the barrister.

Responses

55. The majority of respondents agreed with this approach, although the Bar Council thought that it would only be appropriate if the status quo is preserved, namely that administrative sanctions are limited to the present low levels of infringement. They felt it would not be appropriate to introduce a regime whereby breaches of any provisions of the Handbook could be dealt with administratively, and yet infringements of higher level obligations should remain unpublished.

56. If the administrative sanctions regime was introduced, the Tech Bar and ChBA supported the proposal not to disclose, but commented that such a policy does not mean that an application for a judicial post or for silk would not have to disclose the existence of the finding and the sanction.

57. The Legal Services Consumer Panel considered that administrative sanctions and fines should be published. They felt that the effect of publication on a barrister's reputation among peers could serve as an effective deterrent against the behaviours leading to such sanctions, and that publication of these sanctions reinforces the importance of professional ethics and would further cement public confidence in the BSB. The proposed widened scope for administrative sanctions makes the case for publication stronger than in the past.

BSB Response

58. Despite opposition from the Legal Services Consumer Panel the BSB continues to believe that publicising administrative sanctions would be disproportionate to the level of the breach. The main aim in imposing such sanctions is to encourage recognition of behaviour which breaches the Handbook and to deter future breaches. This requires the co-operation of the person responsible and is more likely to be achieved if the sanctions are not publicised. Affected parties will still have to disclose these findings if required to by other bodies, but the BSB will not publish the findings without the consent of the defendant.

QUESTION 9: Do you agree that the Determination by Consent procedure should be extended to include entities and to allow the PCC to impose conditions on a practising certificate, licence or authorisation and to disqualify individuals?

59. The BSB proposed that the current DBC procedure should be expanded to include entities and all individuals working in the entity. The BSB has no power to disbar a barrister under this procedure, but the proposal was that additional powers to impose conditions on a practising certificate, license or authorisations should be added together with a power to disqualify a person from working in a BSB-regulated entity.

Responses

60. There was widespread support for extending the DBC procedure to include entities. However, the overwhelming majority of respondents rejected the proposal that the PCC should have the power to disqualify individuals. The Tech Bar and ChBA felt that the effect of such disqualification could be as severe for a non-authorised person as disbarment or suspension is for an authorised person, and so only a Disciplinary Tribunal should be able to impose such a sentence.

61. The Bar Council disagreed that the powers of the PCC should extend to imposition of conditions and to disqualification. The comparatively summary nature of the DBC procedure operated by the PCC renders sanctions of this severity inappropriate.

BSB Response

62. On reflection, the BSB agrees that it would be inappropriate for disqualification to be a power available to the PCC through the DBC procedure. Instead this power should be left exclusively to Disciplinary Tribunals following a full hearing.

63. However, the PCC will be given a power to impose conditions on a licence, authorisation or practising certificate if they see fit. The BSB believes that this is a proportionate power. Anyone unhappy with the outcome of the DBC can refer the matter to a full Disciplinary Tribunal.

QUESTION 10: Do you agree with the proposed approach to Disciplinary Tribunals? Do you think there is still benefit in retaining five person Panels or should the BSB move to three person Panels?

64. The proposal was that only the most serious cases would be referred to a Disciplinary Tribunal and only where a) an administrative sanction was not appropriate, b) the PCC considers that there is a realistic prospect of a finding being made, and c) the PCC considers that the regulatory objectives would be best served by pursuing the disciplinary proceedings.

65. The BSB considered but rejected the idea of giving the Disciplinary Tribunal a power to impose administrative sanctions.

66. There was also a proposal that the BSB should do away with 5-person panels as they are unduly burdensome, expensive and do not offer any additional expertise that cannot properly be achieved by a 3-person panel.

Responses

67. There was general support for the proposal about disciplinary tribunals but a mixed response about whether the BSB should retain 5-person panels and whether the panel should have the power to impose administrative sanctions.

68. Middle Temple thought there was no need for a 5-person panel, which is out of step with other regulators. For example, the SDT uses a 3-person panel (two solicitors, one lay member); the RICS has a 3-person panel, assisted by a legal adviser.

69. However, Inner Temple, Henderson Chambers, the Tech Bar, the Bar Council and others favoured keeping 5-person panels for the most serious cases.

70. The PCC felt that Disciplinary Tribunals should be able to impose administrative sanction if they think that is the most suitable sentence in all the circumstances.

BSB Response

71. For the time being the BSB has decided to retain 5-person disciplinary panels. However, there are obvious scheduling and costs implications associated with this decision and the BSB will keep this under review.

72. Having considered the responses the BSB continues to believe that Disciplinary Tribunals should not have the power to impose administrative sanctions. Disciplinary Tribunals will exclusively be concerned with matters of professional misconduct. If the charge(s) are not proved to the required standard then the defendant should not be liable to administrative sanction. If a Disciplinary Tribunal dismisses a charge(s) it may still offer advice on future conduct.

QUESTION 11: Do you agree that conditions on authorisations or licences should be published by the BSB?

73. The PCC and a Disciplinary Tribunal will have the power to impose conditions on an authorisation or licence. The proposal was that these conditions should be made public.

Responses

74. There was strong support for this proposal. The TechBar and ChBA thought that if there is to be a public register of authorised persons and entities, with the terms of their licences, authorisations or practising certificates available, then it is inevitable that any condition imposed on a licence, authorisation or certificate must be published since a condition might preclude a person from doing certain work or acting in specified circumstances.

BSB Response

75. The BSB's proposal will not be changed.

QUESTION 12. Do you agree with the amendments being proposed by the BSB to the powers and procedure relating to the Interim Panel?

QUESTION 13. Do you have any views on whether time limits should be imposed on interim suspension or immediate interim suspension?

76. The consultation proposed a significant extension of the BSB's powers in relation to the interim suspension and disqualification rules. The triggers for referral to an Interim Panel would be widened to include circumstances where:

    a) The defendant had been charged or convicted of a criminal offence, other than a minor criminal offence;
    b) The defendant had been convicted by another Approved Regulator and received a sentence of suspension or loss of practising rights;
    c) The defendant was a licensed body that had been intervened into;
    d) The defendant was a BoE or LDP and the grounds for intervention had been met;
    e) The referral is necessary to protect the interests of the client (or former or potential clients).

77. Assuming one or more of the above criteria is satisfied, the PCC must then satisfy itself that an interim order is appropriate in all the circumstances, having regard to the regulatory objectives.

78. Where an individual or entity is referred to an Interim Panel the PCC shall also consider whether an Immediate Interim Suspension is justified. The PCC may only impose an Immediate Interim Suspension or disqualification if they are satisfied that such a course of action is justified having considered the risks to the public if such interim suspension or disqualification is not implemented. Such an order would take effect immediately and would remain in force until such time as the Interim Panel has disposed of the matter.

79. Irrespective of what has triggered the referral, an Interim Panel will have the following powers at the conclusion of the hearing:

    a) Decide not to impose any period of interim suspension, disqualification or condition;
    b) Decide to impose an interim suspension, disqualification or condition pending disposal of the case by a Disciplinary Tribunal, provided that no interim suspension or disqualification shall be imposed unless:
        i. The Interim Panel considers that it is likely a Disciplinary Tribunal would impose a sentence of disbarment or suspension (with respect to barristers), or a sentence of disqualification (with respect to non-BSB authorised persons or non authorised managers and employees), or a sentence of suspension or revocation of an entity's licence/authorisation; and
        ii. It considers it to be necessary in the public interest to do so.

    c) In lieu of imposing a period of suspension, disqualification or condition, accept an undertaking from the individual or entity on any terms the Interim Panel thinks fit.
    d) Require the individual or entity to inform lay and professional clients about any conviction, charges or other matters the Interim Panel thinks fit.

80. The BSB also proposed that the Interim Panels be reduced to three people (a QC Chair with at two other members, of whom one must be a lay person).

81. The final proposal was the BSB should move to a position where any interim order would remain in force until such time as a Disciplinary Tribunal had heard the case or the order has been overturned or varied. Affected parties would have the right to appeal the order, or to seek a review of it where there had been a change in circumstances, but it would not otherwise be time limited.

Responses

82. There was a mixed response to the proposals with the majority generally supporting the changes. The Bar Council was in support but recognised the difficulty of striking a balance between protection of the public and the rights of the individual practitioner.

83. 4 Pump Court and others were broadly in support but emphasised that Interim Panels would do well to bear in mind the observation of Lawrence Collins LJ (as he then was) in *Watson v Durham University* [2008] EWCA Civ 1266 that "*For any person to be suspended from his or her employment pending the investigation of misconduct is a serious matter. It casts a shadow over the employee, and suspension is particularly serious if the ... suspension drags on for an extended period while investigations are being made or a disciplinary process is being pursued*"

84. The Tech Bar, ChBA and ComBar opposed the widening of the powers. They felt there was no evidence of any real regulatory risk caused by the existing powers, nor any evidence of any past problem caused by the powers being too narrow.

85. The LPMA were similarly opposed. They thought suspension/revocation of an entity's licence/authorisation could put a small or medium-sized entity out of business. An Interim Panel (either of three or five members) should not have such authority.

86. The majority of respondents favoured not imposing a time limit on interim suspension orders. The Bar Council stated that the purpose of the provision is to protect the public. A time limit, particularly one as short as the current period of 6 months, does not ensure effective protection. An example is a case where a barrister has been charged with a serious criminal offence, but the trial is more than 6 months away.

87. 4 Pump Court, Inner Temple, and others, felt that provided there was scope to review the order, a time limit was not required. Henderson Chambers thought that an interim order should automatically be reviewed every three months.

88. The Tech Bar and ChBA thought that immediate interim suspension orders should certainly be time limited because the matter should be fully considered by an Interim Panel at the earliest possible opportunity. An Interim Panel should always be capable of being convened for a hearing within 4 weeks in the case of a serious matter, which this would inevitably be. With normal Interim Panels where there has been a hearing, the imposition of a time limit before the full disciplinary hearing is unrealistic. The suspended defendant should be entitled to apply back to the panel if there is a substantial change of circumstances or other good reason for doing so.

BSB Response

89. This is a difficult section of the Handbook where the BSB is seeking to strike a balance between public protection and the rights of individuals and entities. The BSB maintains that reform is required because the existing rules have caused difficulty in the past, especially where referral to an Interim Panel has been caused by a criminal charge or other serious allegation (as opposed to a conviction or finding).

90. The BSB believes that the current rules do not go far enough and intends to press ahead with the proposed changes. The recent case involving a senior criminal barrister continuing to act for clients even though he had been charged with a very serious fraud is a good example where the BSB's current powers leave the public and the profession's reputation at risk.

91. In terms of time limits for ordinary interim suspension or disqualification orders (those arising following a full hearing of the Interim Panel), the BSB considers that it would not be appropriate to impose any time limits. An affected party is always entitled to appeal the decision to an independent panel and can also ask to have the decision reviewed if there is a material change in circumstances.

92. In terms of Immediate Interim Suspension orders (those imposed by the PCC before an Interim Panel has heard the matter), the BSB considers that time limits are appropriate. These orders will be made in advance of a full hearing and a time limit is necessary in order to protect the interests of the individual or of the entity. The BSB considers that a 4-week time limit is appropriate, so that any Immediate Interim Suspension order will lapse after 28 days, or earlier, if considered by an Interim Panel in the meantime.

93. The BSB considers that a 3-person panel is sufficient (a QC Chair with two other members, of whom one must be a lay person).

QUESTION 14: Do you agree with the BSB proposed approach to the regulation of non-authorised employees and to disqualification?

94. The proposal was to have consistent powers over non-authorised persons, regardless of the type of business structure in which the person works. The BSB was aware that relying solely on the LSA 2007 might leave anomalous gaps, since non-authorised persons working in LDPs, BOEs, or chambers would not be subject to the same disqualification powers as those working in ABSs. It was therefore proposed that all managers and employees of BSB-authorised persons should be subject to disqualification if they breached, or caused an authorised person to breach, rules which applied to them, and that it was necessary in the public interest to prevent them continuing to work for a BSB-authorised person. This duty was to be imposed by way of employment contract.

Responses

95. There was near universal objection to the proposal to introduce new employment contracts, but most respondents agreed that the BSB should have the power to disqualify non-authorised persons.

96. The Bar Council agreed that the extent of the BSB's regulation of non-authorised individuals ought to be limited to disqualification. However they disagreed with the BSB's proposal that all employees should be engaged on contractual terms which impose equivalent duties to those prescribed in sections 90 and 176 LSA 2007. The contract of employment governs the relationship between employer and employee. Supervision and control of non-authorised employees is not a matter of statutory regulation and, on the BSB's preferred approach, is not to be a matter for the BSB. It is therefore a matter for the employer and the BSB ought not to purport to dictate contractual terms.

97. 4 Pump Court and others felt there was no evidence to suggest that the BSB's existing approach of not directly regulating the employees of barristers has given rise to any

difficulty. The appropriate sanctions for gross misconduct on the part of an employee will arise under that person's contract of employment. That sanction is sufficient.

98. 11 Stone Buildings understood that the BSB sees it as anomalous for it to have no equivalent powers over non-authorised persons working in chambers. However, they felt the proposed approach represents a dramatic extension of the BSB's disciplinary functions to those who may perform only administrative or clerical functions in chambers. It is for individual barristers to ensure compliance with the Code and the proper administration of their practice. It is for the employers of non-authorised persons to ensure those persons perform their duties appropriately. Those employers can use powers under the applicable contracts of employment and in accordance with employment law to enforce that performance. There is no need for the BSB to assume a power to disqualify non authorised employees or require amendments to their contract of employment. It may also be inconsistent with existing employment law.

99. Inner Temple and the LPMA agreed that non-authorised persons should be subject to a disqualification power.

BSB Response

100. The BSB recognises that this proposal represents a significant extension of its disciplinary powers. But it is concerned that the interests of the public and clients may suffer if an employee who has been dismissed for causing a serious breach of the rules can go on to work for another BSB authorised person, who may be unaware of their history.

101. The BSB will withdraw the requirement for a suitably worded employment contract. The Handbook will, however, place general obligations on authorised persons, managers, and the entity to ensure that their businesses and chambers are competently run and that non-authorised employees have the necessary skills and experience to do their jobs properly.

102. Non-authorised persons working in chambers, LDPs and BoEs will still be under an obligation, pursuant to s176 of the LSA 2007, to comply with the general requirement not to do anything, or cause an authorised person, to breach rules which applied to them. The proposed introduction of employment contracts was a belt and braces exercise that the BSB now recognises is unworkable.

103. Any serious failure to comply with the Handbook may therefore lead to disqualification proceedings being brought against the non-authorised employee. A successful disqualification order will make it professional misconduct for any BSB-regulated person to employ the disqualified person without prior BSB approval.

QUESTION 15: Do you agree with the BSB assessment of the regulatory risks and the provisional view not to have statutory intervention powers over LDPs and BoEs? Are there any other safeguards that could sensibly be adopted?

104. The BSB provisionally proposed that it would acquire the “off the shelf” intervention power in relation to ABSs but that similar powers were not required for LDPs, BoEs and Chambers.

105. Additional rules which may be introduced in lieu of an intervention power include a requirement on BSB-regulated individuals in entities to take all reasonable steps to inform clients and distribute files if the organisation is itself unable to do so, and in extreme circumstances applying for a court supervised receivership in the public interest.

Responses

106. The majority of respondents agreed that there was no need for powers of intervention other than the statutory powers over ABSs. However, the Tech Bar and ChBA found it difficult to see why there should be no need for intervention powers in the case of BSB-regulated LDPs conducting litigation and otherwise behaving in a similar way to a law firm. The SRA has intervention powers in equivalent cases, and the BSB and other regulators will have equivalent powers in the case of licensed bodies, which may differ from an LDP only in having one lay owner (and manager in the case of BSB-licensed bodies).

107. Rather than acquiring full powers of intervention it was suggested that the same controls could generally be obtained, in the case of entities which do not hold clients’ money, by imposing a personal requirement on all BSB-regulated persons in relation to documents, files and computer records.

BSB Response

108. The BSB’s proposals not to have powers to intervene in LDPs, BoEs and Chambers will remain. We will however place a general duty on all BSB-regulated individuals to take reasonable steps to inform clients and distribute files in the event that their organisation is unable to do so.

QUESTION 16: Are there any other considerations that should be included in the policy paper on interventions in ABSs?

109. The BSB proposed to produce a policy paper setting out how any “off-the-shelf” statutory powers to intervene in ABSs would be used. The policy would emphasise that the primary aim of an intervention is to take control of documents, mail and other forms of communication. The BSB would seek to recover its costs from money held by the entity and would not normally seek to exercise our powers over clients’ money (because entities should not be holding clients’ money). However, in the event that an entity was holding clients’ money, the BSB would seek to establish to whom it belonged, and to distribute the statutory trust accordingly.

110. Any decision to intervene would be authorised by the Office Holders of the PCC on recommendation from BSB staff, or in urgent cases by the Chair of the PCC.

Responses

111. Responses either agreed with this proposal or offered no view.

BSB Response

112. The BSB's will not change this proposal.

QUESTION 17: Do you agree that the BSB should retain the full powers of office and client monies?

113. Even though BSB-regulated entities will be prohibited from holding clients' money, the proposal was that the BSB should retain full powers over office and clients' money.

Responses

114. This proposal received universal support from respondents.

BSB Response

115. The BSB's proposal will continue unchanged.

QUESTION 18: Do you agree that the best option would be for the BSB to appoint intervention agents on an ad hoc basis?

116. Since interventions are likely to be relatively rare and will concentrate on reallocating client files (rather than securing and distributing client funds), the BSB proposed that it would not need an elaborate set of arrangements in relation to intervention agents. Instead the BSB will appoint intervention agents on an ad hoc basis.

Responses

117. There was broad support for this proposal but the TechBar and ChBA thought it would be wise to have some contractual arrangement in place, rather than attempt to deal with matters on a purely ad hoc basis. All such costs should be borne by licensed bodies regulated by the BSB.

BSB Response

118. The BSB's proposal will not changed and the BSB acknowledges that it will be sensible to have contracts in place in advance.

QUESTION 19: Do you agree with the BSB's funding proposals? If not, what alternative funding method do you favour?

119. The proposal was that, although interventions would only apply to ABSs, they should be funded from a percentage of the annual fees charged to all entities. Wherever possible, the cost of the intervention would be recovered from the offending ABS.

Responses

120. The Bar Council did not agree with the proposal. They felt that the cost of an item of regulation ought, if anything, to be met by the entity being regulated. The BSB should not spread the cost of regulation onto BoEs and LDPs who will not be subject to it.

121. Inner Temple felt that the ABS being intervened into should pay the whole of the cost of the intervention, if it has been guilty of malpractice. Otherwise, it ought to be paid as a contribution by all ABSs.

122. The Tech Bar and ChBA felt the costs of setting up an intervention regime should be shared by all entities whose authorisation or licence terms make them liable to the exercise of intervention powers, not by BoEs if no such powers are acquired in relation to BoEs, and certainly not by the entire profession. It is simply part of the price of practising in the shape of a particular kind of entity.

BSB Response

123. Wherever possible the full cost of any intervention will be recovered from the offending ABS. However, where there is a shortfall the BSB will recover that money from a percentage of the fee charged to all entities. The BSB understands that some non-ABS entities may find this policy unfair. However, there is a general threat to the reputation of the Bar associated with interventions and the BSB considers it appropriate that all entities should be responsible for covering any shortfall. By way of comparison, the SRA insists that all firms pay into the compensation fund irrespective of whether or not they hold clients' money.

124. Further, the BSB may need a large pool of money to meet the very occasional but possibly high costs of an intervention. It would be disproportionate to expect ABSs to meet this cost alone.

QUESTION 20: Do you agree that intervention should be a ground for referral to an Interim Panel?

125. The BSB proposed to make intervention a ground for referral to an Interim Suspension and Disqualification Panel.

Responses

126. There was general support for this proposal although Inner Temple did not think that intervention ought, of itself, to be a ground for referral to an Interim Panel. However, the reasons for the intervention may well also justify referral to an Interim Panel.

BSB Response

127. The BSB's proposal will not change.

QUESTION 21: Do you agree that intervention powers are not necessary for individual barristers?

128. The proposal was that there should be no intervention powers over individual barristers. The BSB is aware of no evidence to suggest an intervention scheme is necessary for individual barristers and the BSB does not consider that the regulatory objectives will be adversely affected if the current position continues.

Responses

129. All respondents agreed that intervention powers over individual barristers were not necessary.

BSB response

130. The BSB's proposal will not change.

QUESTION 22: Do you agree with the above proposals with respect to the maximum level of fines?

131. The prescribed maximum levels of fines for ABSs are £250 million for the entity and up to £50 million for a manger or employee in the ABS. The proposal was that the BSB would adopt these statutory maxima with respect to ABSs but adopt the lower maxima of £1 million for LDPs, BoEs and individual barristers.

132. The BSB acknowledged that the proposed maxima were somewhat arbitrary and stressed that the BSB and Disciplinary Tribunals would still be bound by the fines policy and earlier precedents.

Responses

133. There was universal objection to the proposed maximum level of fines. 11 Stone Buildings felt that the proposed £1m maximum fine on individuals was a wholly disproportionate increase from the current maximum of £15,000.

134. Of the two options, the Bar Council agreed that the lower £1 million maximum was appropriate for BoEs and LDPs. However, they felt it was extremely high for an individual barrister, and they found it difficult to imagine in what circumstances a fine at that level would be the appropriate penalty. A fine of £1 million would inevitably lead to bankruptcy for all but a very privileged handful of barristers. The same would be true of any fine over £100,000 and, for the vast majority of barristers, a fine much in excess of the current level (even given time to pay).

135. The Bar Council could see some justification for raising the level to, perhaps, £25,000, but they found it difficult to conceive how an offence truly justifying fines at higher levels would not justify disbarment, or how disbarment would not be the most appropriate sanction.

136. 4 Pump Court and others thought it was obviously sensible that different limits should apply to individual barristers than to regulated entities, but it is very striking that the BSB has been unable to advance any evidence to support an increase in the fines applicable to barristers to £1 million. They offered two attentive approaches:

a) set a sensible maximum (possibly updating the current level of fines for inflation) and then making provision for indexation of that maximum by reference, for example, to RPI; or
b) set a maximum by reference to the turnover of the practice. They could not envisage any circumstances in which a fine should exceed 10% of a practice's turnover. That is a figure that is reflected in the sentencing for anti-competitive behaviour.

137. 3 Hare Court felt the proposals for fines of up to £1 million for individuals and £250 million for entities were wholly disproportionate. An important (if not the overriding) aim of regulation is to promote high standards win the profession. The BSB's proposals suggest a far greater focus on punishment than on encouraging barristers to live up to the standards associated with the Bar. It would create a whole new satellite area of litigation and add nothing to regulatory objectives.

BSB Response

138. Having considered the consultation responses the BSB agrees that the proposed maxima are too high. There is no discretion with respect to ABSs, but the BSB has concluded on reflection that the maxima for LDPs and BoEs should be set at £250,000 and the maxima for individual barristers and individuals in LDPs or BoEs should be set at £50,000.

139. The new limits represent 10% of the maximum fine available in ABSs and in the BSB's opinion this adequately reflects the level of risk that BSB-regulated entities and individuals carry. The BSB were particular persuaded by the argument that one of the main functions of a regulator is to protect the public and promote high standards, not to punish the profession by imposing large fines. The more appropriate sanction for very serious offending is suspension or disbarment.

QUESTION 23: Do you agree with the factors to be included in the fines policy paper? Are there any additional factors that should be included?

140. The BSB proposed to include the following in its fines policy. Any financial penalty should:

a) be proportionate to:
   (i) the misconduct;
   (ii) the harm done;
   (iii) the means of the person directed to pay;

b) be of an amount that:
   (i) is likely to deter repetition of the misconduct;

(ii) will remove any financial gain or other benefit obtained as a direct or indirect consequence of the misconduct;

c) take into account:
(i) the intent, recklessness or neglect that led to the misconduct;
(ii) any mitigating or aggravating circumstances;
(iii) any indicative guidance published by the BSB from time to time.

Responses

141. ComBar felt that element (b) was too prescriptive and b(ii) wrongly treated the payment of fines as having a confiscatory element. Any element of confiscation should be in favour of the client, not the BSB.

142. 4 Pump Court also felt that element (b) was overly prescriptive. In some cases there will be no point in deterring repetition of the misconduct (for example, where the circumstances giving rise to the misconduct are unique). It also expressed doubt as to whether the BSB can be the rightful recipient of a fine which is intended to "*remove any financial gain or other benefit obtained as a direct or indirect consequence of the misconduct*".

143. BACFI thought that there should be discounts for self reporting and admissions of failures.

144. The Tech Bar and ChBA agreed with all of the factors except (b)(ii). Fines are not imposed by criminal courts to remove the amount of gain resulting from a crime, but as a measure of the culpability of the offender and the seriousness of the offence. The proposed (b)(ii) confuses fines with confiscation proceedings.

BSB Response

145. The BSB accepts the comment that removal of any financial gain or other benefit obtained as a direct or indirect consequence of the misconduct should not be a factor in determining the size of a fine.

QUESTION 24: Do you agree that disciplinary cases involving entities should follow the same procedure as individual barristers? Is there anything unique to an entity that means other options would be more appropriate?

QUESTION 25: Do you agree that the proposed changes would be beneficial? Are there any additional changes you would suggest?

146. The BSB's proposal was that, as far as possible, the procedures for disciplinary cases brought against entities should mirror those applicable to individual barristers. The sentencing powers will be slightly different, allowing Disciplinary Tribunals to revoke or suspend an entity's license/authorisation or place conditions on the licence/authorisation.

147. The most substantive proposals put forward were around changes to the Direction Hearings process. The proposal was that the current system of agreed direction should be replaced by one of automatic directions that will take effect 21 days after the charges have been served. Variations to the automatic directions can only be made on application where the Judge considers it necessary.

148. Other proposals included:

a) a power to give evidence over the phone or by Skype;
b) in cases involving disciplinary proceedings brought for criminal convictions, the fact that the defendant has been convicted of a criminal offence may be proved by producing a copy of the certificate of conviction relating to the offence and the findings of fact upon which that conviction was based shall be admissible as conclusive proof of those facts;
c) Setting out in the rules the extent of the BSB's duty in respect of disclosure of relevant documents as this can be the subject of protracted argument leading to lengthy delays;
d) Amending the appeal provisions so the BSB may appeal to the Visitors (with the consent of the PCC) where the Disciplinary Tribunal has dismissed all charges or applications (the current rules only allow the BSB to appeal against dismissed charges in cases where at least one charge has been proved).

Responses

149. The majority of respondents agreed that the disciplinary process should be the same for individuals and entities. However, there was a mixed response to the other proposals with a number of people suggesting specific drafting amendments.

150. The TechBar and ChBA agreed with the majority of changes except:

a) The proposal that the findings of fact on which a conviction was based are admissible as conclusive proof of the facts: this is an area fraught with difficulty. The certificate of conviction does not contain this information. Since it is the fact of conviction itself which triggers the disciplinary proceedings, the tribunal is likely to have a sufficient indication of the seriousness with which the offence was regarded by referring to the sentence imposed; in other cases in which a particular fact is of significance it should have to be proved in the usual way at the tribunal;
b) Amending the rules so that the BSB can appeal a decision of a tribunal dismissing all charges: they could not see why there should be a change in this rule (Inner Temple similarly disagreed with this proposed amendment).

151. The LPMA felt that in cases where the defendant was either an entity or non-authorised person (either a manager or an employee), the Disciplinary Tribunal should contain at least one senior non-authorised person (for example, Chambers Chief Executive, Senior Clerk, HoFA) in order to bring to the Tribunal appropriate expertise in the management of entities and staff.

152. 4 Pump Court and others had serious reservations about standard directions. Their experience of practice in civil litigation shows that effective case management is essential. Boilerplate directions will not generally be appropriate for the business of Disciplinary Tribunals. The starting point should be to engage a directions judge in the management of the case to ensure that issues of disclosure, statements, time estimates etc are progressed effectively. Generally the standard directions appear to be wholly one-sided, placing obligations on the defendant with no correlative obligations on the BSB – for example in relation to the disclosure of documents.

BSB Response

153. Despite the objections to the introduction of standard directions the BSB proposes to push ahead with their implementation. We do not believe that the directions are one sided and are of the view that there are a variety of rules which make the Disciplinary Tribunal process fair, transparent and otherwise ECHR compliant. Other regulators have standard directions and CPRs also make provision for them.

154. Although not appropriate in every case provision has been made to allow them to be varied so a balance has been struck between progressing swiftly and ensuring fairness to defendants. A defendant who wishes to can put any issues before a directions judge. It is not a good use of resources to insist that a directions judge be involved in all cases, no matter how straightforward.

155. A copy of the certificate of conviction relating to any offence shall be conclusive proof that the defendant committed the offence. Any court record of the findings of fact upon which the conviction was based (which may include any document prepared by the sentencing judge or a transcript of the relevant proceedings) shall be proof of those facts, unless proved to be inaccurate.

156. The BSB will adopt changes to the appeals rules that will make it possible, with the consent of the PCC, to bring appeals against sentence and dismissal of charges. It is envisaged that this power will be used sparingly and the BSB will obviously be liable to pay costs if any appeal is dismissed. The BSB will only be permitted to bring appeals on the limited grounds that the decision of the Disciplinary Tribunal had:

a) taken into account irrelevant considerations;
b) failed to take into account relevant considerations;
c) reached a decision that is wrong in law; and/or
d) reached a decision which no reasonable Tribunal could properly have reached.

QUESTION 26: Do you agree that entity appeals should be heard before the Visitors?

157. Subject to reaching agreement with the Lord Chief Justice, the proposal was that disciplinary appeals for individual and entities should be heard by the Visitors.

Responses

158. The majority of respondents agreed with this approach and some thought it was a matter for the Visitors to decide. The Bar Council felt that for as long as the Visitors' jurisdiction continues, the Visitors appeared to be the appropriate tribunal. They agreed that the entire jurisdiction (barristers and entities) should transfer to the High Court in due course.

BSB Response

159. The BSB is continuing to work with the Lord Chief Justice, MoJ and LSB to reach a satisfactory conclusion on this point.

ANNEX 1: LIST OF REPSONDENTS

Individual barristers

Dr Fayez Afza
Jeremy Barnett
Phillip Booth
Richard Copnall
Anthony Coyle
Ali Malek

Chambers

11 Stone Buildings
11 King's Bench Walk
3 Hare Court
4 New Square Chambers
4 Pump Court
Atkins Chambers
Crown Office Row
Doughty Street Chambers
Enterprise Chambers
Essex Court
Garden Court Chambers
Henderson Chambers
Landmark Chambers
Monckton Chambers
St Philips Chambers

Bar Council/ BSB Committees

Bar Council
Professional Conduct Committee

Bar Associations

Bar Association for Commerce Finance and Industry
Chancery Bar Association and Techbar
Cost Lawyer Standards Board
Commercial Bar Association
Gray's Inn
Inner Temple
Legal Practice Management Association
Lincoln's Inn Bar Representation Committee
Middle Temple

Other

Bar Mutual Indemnity Fund
Government Legal Service Bar Network
Law Society
Legal Ombudsman
Legal Services Consumer Panel
The Office of the Lord Chief Justice