Tom Peplow
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Legal Services Board
One Kemble Street
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21 July 2015

Dear Tom

Application from the Bar Standards Board for a recommendation for designation as a licensing authority

Thank you for your letter of 26 May inviting the Panel to provide advice on the above application. Under the Legal Services Act 2007, the Panel is a mandatory consultee on applications from bodies to become licensing authorities. In deciding what advice to give, the Panel must, in particular, have regard to the likely impact on consumers of the Lord Chancellor making an order for designation as set out in the application.

Making an assessment of the likely consumer impact does not lend itself to a precise formula. The Panel applies well-established consumer principles – such as access, choice and redress – as reference points by which to analyse the issues. In addition, we identify the risks to consumers and the type and degree of possible harm, and then make a judgement as to whether the degree of proposed arrangements are likely to promote access and offer sufficient protection. Finally, the regulatory objectives in the Legal Services Act underpin our assessment.

The Panel has welcomed BSBs continual engagement on the various strands of work that feed into this application, for example on the consumer guide and the risk register. Overall, we have no serious concerns about this application given that it essentially seeks to open up the entity regulation regime to ABS entities – the Panel responded to several consultations on entity regulation, which are enclosed, and will be responding to the further consultations such as the amendment to BSB powers, including statutory intervention, in due course. As such we have only discussed below areas which merit further comment.

Protection and promotion of the consumer interest

We recognise that as the BSB is seeking only to extend its existing entity regulation requirements to ABSs, there is little in the way of increased risk. We also welcome the BSBs efforts to engage consumer representative

organisations as it consults on proposals, and in developing its consumer engagement strategy. Many of the proposals put forward, for example provisions for background checks for HoLPs and HoFAs, complaints handling arrangements, and a piece on consumer guidance, demonstrate a strong commitment to consumer issues, and we welcome this in all future work from the BSB.

Indemnification and compensation arrangements

When the BSB consulted on entity regulation, we responded with some concerns relating to the minimum level of cover required, and the proposal to allow for the aggregation of claims. We are pleased to see that since that consultation, the BSB has already amended guidance sections of its Handbook on holding client money and the taking of fees in advance. Further, the supplementary annex, which sets out the reasoning behind the BSB not creating a compensation fund, provides a detailed and balanced argument for the BSB's decision, and the Panel welcomes the detailed analysis of the risks posed. More so, we commend BSB's decision to seek a statutory power by way of a Section 69 Order so that in the event the policy changes in the future, they have the means by which to establish a compensation fund.

The Panel remains interested to see the results of the research into the likely cost of an insurance premium for compensation arrangements, though it would have been helpful to have this research available to accompany this application in order to provide a fuller picture of what the BSB regime could look like. However, we accept that the BSB has set out clearly that it intends to keep under review its assessment of risks, and to factor in any learning gathered from the experience of licensing entities.

Please contact Stephanie Chapman, Consumer Panel Associate, for enquiries in relation to this submission.

Yours sincerely,

Elisabeth Davies
Chair

Entity regulation consultation
Bar Standards Board
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LEGAL SERVICES CONSUMER PANEL

5 September 2014

Dear Sir/Madam,

Bar Standards Board consultation on entity regulation

The Panel is pleased to respond to this consultation. Our response has been informed by particularly focussing on a number of the consumer principles including: safety – (consumers will feel more confident about using legal services if they are properly indemnified against loss), fairness (regulation should ensure that all consumers have an equal opportunity to obtain redress) and of course redress itself (regulation should ensure that consumers can be adequately compensated for harm or loss they suffer as a result of failures of service).

Our response has also benefited from our meeting with BSB officials in August. This response should be read in conjunction with our previous submissions to BSB consultations on aspects of the proposed entity regulation regime.

Minimum cover amount

The BSB proposes to build on the existing Handbook provisions by including a general duty for all entities to put adequate insurance in place. This is an overarching principle that means the minimum cover amount will be just that; higher risk entities will need to purchase higher cover as required. We support this proposal, and likewise welcome the requirement for entities to undertake an annual risk assessment and the BSB's intention that its Supervision Department will scrutinise an entity's risk analysis to determine the level of cover.

The BSB propose a minimum level of cover of £500,000 for entities, which is the current level for the self-employed Bar. Its starting point is that the insurance required for entities should be broadly similar to that currently provided to the self-employed Bar unless there is a regulatory reason to treat them differently. The BSB also wishes to avoid regulatory arbitrage should the approved regulators adopt significantly different terms.

In the Panel's view, the BSB has overstated the regulatory arbitrage point. The risk profile of lawyers differs between approved regulators and so

different cover amounts would be consistent with risk-based regulation. This reasoning explains our objection to the SRA's proposal to reduce its minimum PII cover to £500,000, yet why we felt able to support ICAEW's proposal for the same cover amount. Each situation should be treated on a case by case basis, with a firm emphasis on evidence.

It is difficult for us to take an informed view on whether £500,000 is the right amount for BSB-regulated entities. On the positive side, the BSB regulates a relatively small number of providers when compared to solicitors, and historically it seems the Bar Mutual Indemnity Fund (BMIF) has provided an adequate level of consumer protection. The need to avoid entry barriers for small entities also carries force of argument and this affects consumers in terms of the breadth of choice in the market.

Against this, the BSB anticipates entities having a higher risk profile than self-employed barristers. It expects entities to offer a wider range of legal work and run on a larger scale – with greater volumes of work, turnover and complexity of structure as a result. We understand that BMIF premiums are calculated by reference to fee income and areas of practise. Therefore, should the minimum cover amount not have a significant influence on premiums, the issues around barriers to entry and cost of legal services become less relevant. A lack of evidence that promised cost savings would follow a reduction in the minimum cover amount featured in the LSB's recent warning notice on the SRA's PII proposals.

Furthermore, in the absence of BMIF claims data and in light of other recent BSB changes which change the risk profile of the profession, for example public access and litigation work, it is hard for us to assess if £500,000 is right for self-employed barristers, let alone entities. Our 2013 publication on *Financial Protection Arrangements*[1] called for greater transparency and open channels for information sharing between regulators and those who hold data. However, we understand the BSB still do not have access to data collected by BMIF. Of course such information may be commercially sensitive and insurers would not want it to be widely disseminated. Yet surely, some arrangement must be possible to allow the regulator to have access to data which would allow it to make informed decisions on the right levels of cover.

We note the possible future requirement for both the self-employed bar and entities to carry whichever is the higher of a minimum level of insurance or a multiple of turnover. This is one way of ensuring that small firms carrying out low risk activities obtain an appropriate level of cover, whilst at the same time making sure that large firms or those carrying out high risk work (with potentially high levels of financial risk) hold an amount of cover which adequately protects consumers. We urge the BSB to conduct further research into the costs and benefits of this proposal, as it may provide a better way of identifying the optimum levels of cover.

[1] Legal Services Consumer Panel, *Financial Protection Arrangements*, June 2013. http://www.legalservicesconsumerpanel.org.uk/ourwork/Financial%20Protection/FPAs%202013%2006%2010%20final.pdf.

Aggregation of claims

We have concerns over the proposal to allow aggregation of claims. The risk to consumers is that where large losses arise there is a possibility that individual claims may not be met and this would happen on an arbitrary basis. Further, the definition of what is to count as one claim is broadly drawn, in particular the clause allowing insurers to aggregate 'similar' acts or omissions could be abused by insurers. The ongoing case of Godiva Mortgage Ltd v Travelers Insurance Company case turns on the interpretation of the definition of 'any one claim' in the SRA's rules.

The Godiva case illustrates the possible risk that consumers could be left out of pocket due to the use of caps on claim aggregation. The case concerns a partner at a law firm who was involved in a number of allegedly fraudulent property transactions. When the losses came to light numerous claims were brought against the firm, including by the claimant, Godiva, a lender. The law firm has gone into liquidation and cannot meet the claims. The insurer asserts that all the activities from the partner's involvement in alleged fraudulent activity can be aggregated as one claim and capped at £2 million (the Solicitors Regulation Authority's current cap). However, the total losses in the case could exceed £50 million in reality. The Law Society and the SRA have been given permission to intervene in the case by the High Court. The case was due to be heard in the first half of 2014 but is now listed for November 2014.

In addition, we note that the aggregation limit, as currently drafted, would be the limit of cover held by the firm. The BSB supervision team will take into account whether the entity is carrying out types of work which could result in claims being aggregated when they are assessing whether the level of cover the firm holds is appropriate. Nonetheless this means that in some circumstances the aggregation limit could be as low as £500,000. Further, the breadth of the current clause means it is unclear whether multiple consumers, who have used different entities, yet encounter the same or similar issues could have their claims aggregated. An example could be widely used defective software which results in poor quality work. Because, unlike some other regulators, the BSB does not have a compensation fund which such claims might be able to fall back on, the impact on consumers would be even greater.

Nature of clients

We disagree with the BSB's intention that the proposed minimum terms should apply to all clients. Corporates and other large buyers are better able to assess risks and suffer less from the information asymmetries present for smaller consumers, such as individuals, small businesses and small charities. Although there may be some practical difficulties, these should not be insurmountable. Experienced or wealthy clients should be capable of negotiating the terms of cover they require. Furthermore, we believe scarce regulatory resources should be directed towards those who are less able to protect themselves.

Individuals, small businesses and small charities should be treated in the same way. However, Bar Mutual currently allows a defendant to demand security costs from a company claimant to be held against the barrister's

costs in the event the claimant should lose. This may have a chilling effect on those small businesses who wish to bring a justified claim.

Other issues

The Panel agrees with the BSB's analysis around intervention, and that it would be in the client's interest for the BSB to have the power to intervene if and when required. We note the BSB will consult on the policy issues at a later date. For the moment we are content with the proposed interim Handbook rules before the BSB gains statutory powers.

We recognise that the current terms of cover do not need to deal with successor practices, although there is still provision for run-off cover. The new provisions will require a successor entity to have insurance in place which covers claims relating to the previous practice. Otherwise the entity will need to enter run-off. The Panel is content with these proposals, and agrees that the duration of run-off should cover at least the statutory limitation period of six years.

We note with interest the proposal to find different ways of managing exit, for example by holding run-off deposits in escrow accounts. The Panel made a similar proposal in our publication on *Financial Protection Arrangements*[2] and we would certainly be supportive of innovative ideas like this being scoped out in more detail.

We are content with the proposals around misrepresentation and non-disclosure, as these will ensure a good level of consumer protection.

I hope these brief comments are helpful. Please contact Harriet Gamper, Consumer Panel Associate, with any enquiries.

Yours faithfully

Elisabeth Davies
Chair

[2] Legal Services Consumer Panel, *Financial Protection Arrangements*, June 2013, p. 38. http://www.legalservicesconsumerpanel.org.uk/ourwork/Financial%20Protection/FPAs%202013%2006%2010%20final.pdf .

Consultation response

BSB: Regulating Entities

Overview

1. **Overall, the Panel supports the BSB's proposal to be a specialist advocacy regulator. However, this decision may have wider implications for the BSB's approach to regulation which should be considered.**

2. **The Panel supports permitting barristers to conduct litigation. However, accreditation and practical experience must be required before authorisation is granted due to the significant consumer detriment that can result from poorly conducted litigation.**

3. **The BSB must ensure that barristers have the skills to deal directly with lay clients, as this will be a new experience for some advocates. Client care should infuse its regulatory arrangements – in the training of advocates, code of practice and in monitoring compliance.**

4. **The extension of the cab-rank rule to entities is important for ensuring access to justice for unpopular clients. However, increasing direct access to advocates may mean the BSB should consider whether the rule could also apply to lay client instructions.**

The proposals

5. The BSB is proposing that it become a specialist regulator of entities which focus on advocacy and related services, including ancillary litigation services.

- BSB regulated entities would be subject to ownership and management restrictions:
  - No external ownership (i.e. all owners would need to be managers)
  - Non-lawyers comprising no more that 10-25% of ownership and management; and
  - The majority of managers would need to practice as advocates in higher courts.
- The BSB would not regulate multi-disciplinary practices
- Barrister managers and employees would be permitted to conduct litigation
- Restrictions on self-employed barristers conducting litigation would be lifted
- Entities would not be permitted to hold client money but could manage funds through a third-party 'custodian' (e.g. a single client account managed externally from the entity).
- Entities would have to develop appropriate systems to identify and manage conflicts of interest

- The statutory non-discrimination rule for acceptance of instructions would apply to all advocates in any entity
- The cab-rank rule would apply to entities in the same way as for self-employed barristers (that is, for instructions from professional clients for named advocates only)
- BSB would introduce an interventions scheme (still to be developed)
- Entity-wide professional indemnity insurance would be required, subject to minimum terms and conditions.

The Panel's response

6. Given the breadth of issues being considered, the Panel has limited its comments to those areas likely to have a direct impact on consumers.

Implications for the regulatory framework

7. The consultation paper considers in detail the practical implications of regulating entities. Before commenting on these proposals, the Panel briefly discusses the possible implications of this move for the BSB's overall regulatory framework.

8. The BSB has previously agreed to permit barristers to work in entities regulated by other approved regulators and to work in Barrister Only Entities (BOEs). The Panel was not constituted when these decisions were consulted on, but we welcome them as positive steps towards opening up the market to extend choice for consumers. The starting point should be to give barristers freedom to choose the business models that make them most attractive to potential clients subject to suitable safeguards to protect consumers.

9. In this context, the Panel supports the BSB's proposal to become a specialist advocacy regulator. Ideally, we would prefer the BSB to be the only regulator of advocacy services as we are sceptical that regulatory competition benefits consumers. Whilst it is designed to facilitate an efficient regulatory regime and so minimise costs that are passed on to clients, practitioners are likely to be attracted to the lowest cost option, which may provide insufficient consumer protection. This might lead to a race to the bottom.

10. However, regulatory competition is a fact of legal services regulation. With this in mind, the BSB faces a balancing act in terms of its regulatory jurisdiction. Certainly it should only regulate those business structures for which it has the expertise and resources. Nonetheless, if the BSB is too restrictive in the business structures that it is prepared to regulate, advocates may be tempted towards other regulatory regimes. Through its continued reluctance to regulate MDPs the BSB is arguably being unduly cautious.

11. Regulating entities has implications for the BSB's style of regulation. The existing regime is based on a detailed set of rules and requirements. Whilst this may work satisfactorily for regulating individual practitioners, an outcomes-based approach is better suited for regulating entities as management systems need more freedom to cater for a diverse set of business arrangements. In a changing market, and one in which advocates will have greater contact with lay clients, entities require the flexibility to innovate and develop more

consumer focused services and deliver these through a range of different business models. A prescriptive, rules-based approach is reactive and could restrict innovation that benefits consumers, whereas an outcomes-based approach would enable the BSB to future-proof its regulatory requirements and still afford consumers sufficient protection. The Panel has set out the wider advantages of outcomes-based regulation in its responses to SRA consultations on the issue[1].

12. Finally, regulating entities throws up a series of different challenges to those to which the BSB is accustomed when regulating individuals. The BSB must understand organisations as well as the practice of advocacy. It is important that the BSB builds up the knowledge and skills required for this task, so that there can be confidence about the organisation's ability to protect consumers. This expertise should be found at executive and board levels.

Litigation services

Risks to consumers from poorly conducted litigation

13. The Panel supports barristers being permitted to conduct litigation. The option of a one-stop-shop advocacy and litigation service should have benefits for consumers by delivering greater choice and driving competition.

14. However, if barristers are to conduct litigation, the BSB must introduce robust quality assurance measures, as poorly conducted litigation can have a major impact on case outcomes. Furthermore, litigation involves strict processes and procedures which, if conducted incorrectly, can have major repercussions for consumers, including cases dismissed due to missed time limits, and unnecessary expenses for clients due to inefficient systems. Most barristers will have to learn from scratch the processes and procedures, whilst the BSB will need ways of verifying their competence.

Direct contact with lay clients

15. A key outcome of the proposed changes is that barristers will need to become '*accustomed to receiving instructions from – and dealing directly with – lay clients'*. In conducting litigation, barristers will be taking on new roles and responsibilities with clients. These include providing advice about the merits of litigation, negotiating settlements (instead of simply acting as the advocate and advisor when the case reaches court), and developing ongoing relationships with clients.

16. The Panel's work on quality assurance[2] found that consumers want their lawyers to be empathetic, to explain the legal process, to be efficient and professional, and to tailor their knowledge proactively to the specific situation. The BSB must ensure that individuals and entities meet consumer expectations around client care, in addition to providing technically sound advice and advocacy. This requires the BSB to incorporate greater emphasis on client care in its regulatory regime, with client care becoming central to the code of conduct and to BSB compliance monitoring. The inclusion of lay client care skills in training or accreditation is welcome[3].

17. The Panel raised these issues in relation to the Quality Assurance for Advocates (QAA) scheme for criminal advocates[4] but it applies across all advocacy areas.

18. QAA will be mandatory for criminal advocates and may be extended to other practice areas. Whilst a mandatory scheme ensures that advocates can only offer services to clients for the level of complexity they are authorised to provide, this is not true outside of this regime where clients can exercise a wider degree of choice. Solicitors, as professional clients of advocates, should have the required knowledge and experience to identify an appropriate advocate, and therefore filter the market for their lay clients. However, if direct access for barristers increases, the BSB will need to explore mechanisms, such as consumer education and quality assurance, which can help to match clients with suitably qualified advocates.

Authorisation and accreditation

19. The Panel is pleased that the BSB has recognised the quality issues involved in allowing barristers to conduct litigation. In particular, paragraph 1.40 notes that '*many barristers will not have any training in the skills required to conduct litigation*'.

20. On this basis, the Panel strongly supports the BSB requiring both accreditation and practical experience before litigation authorisation is granted to any barrister. In practice, this means that entities are licensed by activity (i.e. they must be pre-approved to conduct litigation). Furthermore, an individual barrister would need to be authorised by the BSB before being able to conduct litigation, or be working within an entity under the supervision of an authorised and experienced litigation barrister. The Panel suggests that any entity seeking to conduct litigation must have at least one manager who is authorised to conduct litigation, has a strong record of experience, and who can take responsibility for delivering services that meet the required standards.

21. In the case of self-employed barristers, this may require an alternative accreditation path with supervised practice hours, that must be fulfilled before authorisation to litigate is given. Litigation services are not just about skills but also case management. Should self-employed barristers choose to become single-person entities offering litigation, there is a risk of insufficient administrative support for the complex procedures. The Panel strongly agrees that the BSB would need to satisfy itself that suitable arrangements were in place before any authorisation[5], and encourages it to ensure that risks associated with small entities are fully considered.

22. Notwithstanding the above, barristers should have the option of not providing litigation services, particularly in the context of the public access scheme. The option of clients being able to act as the litigant themselves, with barristers then providing solely advocacy, could reduce costs. If clients no longer wanted to act as litigants, then it is likely self-employed barristers will just choose not to offer this option. However, if there is demand, there is no reason why such a service should not be available.

Costs of litigation services

23. The Panel welcomes the competition with solicitors from barristers offering litigation. This could reduce costs and make services more efficient for consumers through packaged delivery. The Panel notes the BSB's concern around increased overheads but is not convinced that allowing barristers to conduct litigation would increase the overall costs to consumers, thus reducing access to justice.

24. Whilst barristers providing litigation may have increased overheads, the packaged costs of combining litigation and advocacy services should be no more than if the client had to pay solicitors for litigation services (with the associated overheads) plus advocacy from a self-employed barrister. The change will enable barristers to compete with solicitor advocates, who already offer packaged services.

Client money

25. The Panel notes that satisfactory systems operate for the payment of fees and disbursements through the Public Access Scheme. Experience suggests that lay clients are more reliable in making payments than professional clients and barristers are able to pursue clients who do not pay. Staged payments on completion of milestones already help barristers to manage risk where there are large fees. Therefore, the Panel sees no need to provide additional arrangements for payments to barristers in relation to litigation, by enabling them to hold client money. Both payment in arrears and staged payments should be permitted to enable client choice.

26. The Panel accepts that the risk of non payment by clients is greater in relation to handling settlements and court awards. Furthermore, there are risks to the client of the barrister misappropriating funds in a successful claim. The proposed approach of using a third party is supported as it removes the fraud issues that have faced solicitors in relation to client funds.

27. The Panel supports the BSB investigating this option further. The main concern is that the 'custodian' must be independent and able to be fully scrutinised by the BSB. Furthermore, clients should expect service standards around payment, particularly around timeliness, as delay could lead to financial detriment, such as loss of interest. As the client's contractual relationship would be with the barrister entity, clients should be able to seek redress from the Legal Ombudsman.

Managing conflicts of interest

28. The Panel supports the BSB's analysis that regulating entities should not reduce access to justice due to the commercial incentives. This debate was resolved in a previous consultation and the Panel does not wish to expand on this point.

29. The Panel welcomes the emphasis on requiring firms to have appropriate systems to manage conflicts and to consider whether any conflicts arise before accepting instructions. However, it is unclear from the brief discussion of the issue how the BSB intends this regime to operate in practice and, in particular, how it intends to monitor compliance. The Panel would welcome further development of the BSB's thinking in this area.

30. There is an opportunity to learn from the SRA. An outcomes-based approach, supported by guidance, is more likely to protect consumers than detailed prescriptive rules which cannot foresee every potential conflict. However, increased freedom for entities to interpret which course of action would be in the best interests of clients should be accompanied by tough sanctions for those who abuse this position of trust.

Cab-rank rule

31. The Panel welcomes the proposal to extend the cab-rank rule to entities. The rule is vital to ensuring access to justice for unpopular clients and to upholding the rule of law. The survey evidence shows that 63% of barristers stated that maintenance of the rule was important or very important. Rather than seeing this as significant support for the rule, the Panel is alarmed that more than one-third of barristers gave an alternative response.

32. The consultation proposes that the cab-rank rule apply to entities in the same way as to self-employed barristers, that is, for instructions from professional clients for named advocates only. This approach made sense in the context of minimal direct access to barristers. However, with increasing direct access via entities, this would mean that an advocate would be obliged to take a case for a specific client who approaches them through a solicitor but would not be so obliged if the same client approached them directly. The Panel is concerned this could inhibit consumer choice; the BSB may need to give further consideration to this matter.

Insurance

33. The development of appropriate consumer protection through professional indemnity insurance is increasingly difficult in the legal services market. In looking to develop new PII arrangements for entities, the BSB should consider the challenges facing the SRA, including which clients are covered by mandatory insurance.

December 2010

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[1] Legal Services Consumer Panel, *Consultation response – Solicitors Regulation Authority: Achieving the right outcomes*, February 2010.

[2] Legal Services Consumer Panel (2010) *Quality in Legal Services*, http://www.legalservicesconsumerpanel.org.uk/ourwork/QualityAssurance.html

[3] Para 1.56

[4] http://www.legalservicesconsumerpanel.org.uk/publications/consultation_responses/documents/2010-11-12_JAG_QAAScheme.pdf

[5] Para 1.69

LEGAL SERVICES CONSUMER PANEL

Consultation response

BSB: New BSB Handbook

Overview

1. **The BSB should take enforcement action where achievement of the outcomes has been frustrated due to the actions or omissions of a barrister.**

2. **There should be a stronger emphasis on vulnerable clients within the mandatory elements of the Handbook.**

3. **The BSB should take steps, such as producing a short summary of the key Handbook requirements, to help clients understand what they are entitled to expect from a barrister.**

4. **The Panel considers separate business structures to be undesirable in general. The BSB should take a view about such structures at the authorisation stage, as we are sceptical that information rules will mitigate consumer confusion risks.**

5. **The prohibition of barristers managing client affairs should be removed.**

6. **It should be mandatory for barristers to have their own insurance cover in place should they not be covered by their employer's insurance. We support the proposed third party payment service, although we raise issues around monitoring and enforcement gaps between the BSB and FSA regimes. The service should be run by a single and independent not for profit organisation.**

7. **Interest earned while client money is held by the payment service should be returned to clients. If this is impractical, the interest could be pooled and given to a cause benefiting all consumers, such as public legal education initiatives.**

8. **Serious misconduct should always be reported to the BSB, leaving it to the BSB to decide whether it would be in the public interest to pursue matters further.**

9. **The civil standard of proof should apply to all disciplinary proceedings. Public protection is undermined if the BSB is unable to act due to the evidentiary burden being disproportionate. This would leave consumers at risk of harm and undermine confidence in the BSB. Other professions are moving to the civil standard; lawyers are not a special case.**

10. **Administrative sanctions and fines should be published to create peer pressure and cement public confidence.**

The proposals

11. The Bar Standards Board (BSB) has consulted previously on a number of separate, but related, issues:

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

12. This consultation draws these different elements together in order to have one clear publication that summarises its new approach across the board. Some proposals have changed since they were originally consulted on; in particular the Code of Conduct has changed significantly in structure and presentation and its reach has been extended to apply to all BSB regulated persons.

13. There is a separate consultation addressing the compliance and enforcement aspects of the BSB's proposed entity regulation regime.

The Panel's response

14. The Panel responded to the last two consultations referred to above (the first preceded the Panel's existence). We also responded to consultations on the public access rules, review of CPD and authorisation to practise arrangements, which are linked to the present exercise. The analysis below does not repeat the points we made in response to these earlier consultations, which still remain our views.

15. For the sake of transparency, it is important that we state at the outset that this includes decisions made by the BSB, which key proposals in this current consultation exercise flow from, with which we disagree. These policy decisions include:

    - The BSB's decision not to regulate multi-disciplinary practices, which we still consider is unduly cautious; and
    - Unregistered barristers – we remain of the view that only persons holding a practising certificate should be able to call themselves barristers in order to avoid misleading consumers.

16. The current consultations are substantial documents covering a wide range of issues. Given our limited resources, we have focused our response on areas of concern. Therefore, it is important for us to state at the outset that we welcome key decisions which the BSB has made to extend choice for consumers, such as enabling barristers to conduct litigation. We also support many of the new features being consulted on, such as the proposals around risk-based regulation including the focus on consumer vulnerability within this.

Presentation to consumers

17. Clients need to be clear what they can and cannot expect of their barrister. This means that the Handbook serves as guide for consumers about the duties of barristers as well as a document aimed at barristers. Therefore, we welcome steps to make the code more user-friendly, to simplify and remove rules, and the use of outcomes to help explain what the mandatory elements are intended to achieve.

18. However, it remains unlikely that all but the most persistent clients will refer to the Handbook itself. We therefore encourage

the BSB to consider how best to inform consumers about what they should expect and the protections they have when using the services of a barrister. This might take the form of a short, simple document that sets out the key elements of the code that is made available on the BSB's website or information that barristers are required to give to clients at the time of engagement.

19. There are many options for achieving this, and we do not wish to be prescriptive. Our key point is that the BSB itself, as well as barristers, have a responsibility to help clients to understand the role of barristers and what can be legitimately expected of them. This is important given the often stressful situations in which clients deal with barristers. Such knowledge would help clients to get the most from their interaction with barristers and help minimise disputes.

Relationship between outcomes, core duties, rules and guidance

20. The Panel welcomes the move towards outcomes-focused regulation, although we take a balanced view as to the benefits and risks. On the plus side, it frees up those being regulated to innovate and deliver better services to consumers. It provides a catch-all safety net to capture practices that fall between gaps in rules. Perhaps the greatest intended benefit is to reinforce the right cultural behaviours, by requiring judgements to be made and responsibility taken by individual practitioners and senior managers to ensure the objectives behind regulation are fully embedded within their thinking and everyday practices. On the risk side, paralysis might ensue if there is too much uncertainty about what professionals can and cannot do. The scope for different interpretation of outcomes-focused rules creates challenges for enforcement. However, on balance the Panel considers that the benefits outweigh the risks and that outcomes-focused regulation can be made to work in the legal services market.

21. The BSB's proposal is to make the core duties and rules mandatory, with the outcomes intended to be descriptive and help explain the rationale for and aid the understanding of the rules. The BSB would not bring misconduct charges or impose fines for breach of the outcomes alone.

22. The litmus test should be whether each outcome is adequately captured within the core duties and rules. If the outcomes are purely descriptive of the mandatory elements, as seems intended, then it should be the case that non-delivery of an outcome, where this relates to an act or omission by a barrister, will have involved a breach of the core duties or rules. For example, if clients are not adequately informed as to the terms on which work is to be done (section D3) this should be seen as a failure to provide competent service to clients (core duty 7). It is of key importance that the BSB is prepared to enforce on the basis of the breach of the core duties alone, as to do otherwise would defeat the purpose of outcomes-focused regulation.

23. In our view, the Handbook is not entirely successful in this. 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. One of the benefits of outcomes-focused regulation is that lawyers cannot solely focus on compliance with specific rules, but

instead must consider the wider intent of regulation. Another key advantage of this approach is that the outcomes are worded from the client perspective and so make it clear to barristers what it is they need to achieve to fulfil the core duties. This leads us to conclude that it would be appropriate for the BSB to take enforcement action where achievement of the outcomes has been frustrated due to a barrister's actions.

Vulnerable consumers

24. We would like to see a strong emphasis on vulnerable clients within the mandatory elements of the Handbook. 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. For example, the Intellectual Property Regulation Board's code includes the following guidance: "*Extra care should be taken when dealing with potentially vulnerable clients such as private individuals and in particular where there may be risk factors related to a person's circumstances (e.g. bereavement, illness or disability etc.) which increase the likelihood of the client being at a disadvantage or suffering detriment.*"

25. We applaud the BSB for building consumer vulnerability considerations into its new risk framework; this needs to be translated into explicit code requirements for barristers. The Panel recently wrote to the BSB to ask it to consider adopting a British Standard on consumer vulnerability, which should assist you in developing appropriate provisions.

Separate business rule

26. The Panel has previously commented on the separate business rule when the SRA applied to become a licensing authority. We said that the rule's main purpose is to prevent solicitors from avoiding regulation by establishing a separate entity to conduct unreserved activities. It is vital to retain the rule given the existing reserved activities are very narrowly defined. Without the rule, the logical response of solicitors would surely be to establish unregulated entities to carry out the majority of their work and sub-contract the small reserved element to separate regulated entities. This might be acceptable if the list of reserved activities was based on consumer needs, but this is patently not the case given what we know about the history of why the activities were reserved. Should the separate business rule be removed, consumers would lose the protections they currently enjoy without any proper analysis of whether these protections should be retained.

27. The BSB considers that the new Handbook includes sufficient safeguards – in relation to criteria for authorisation, associations with others and outsourcing – to mitigate the risks to consumers. The risks identified by the BSB, especially with regard to consumer confusion, mirror those identified by the Panel in its response to the SRA.

28. The BSB's decision to be 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 Guidance statement on page 121 of the consultation document states that the factors which the BSB will

take into account when assessing applications include the nature and extent of non-reserved activities which the entity is intending to provide. Also, paragraph 34.1 states that the BSB may impose licence conditions in terms of the non-reserved activities to be carried on. However, we can find no specific reference within the authorisation regime in relation to establishing *separate* business structures to carry out non-reserved activities. Should the Handbook not include a separate business rule, considerations of the risks to consumers identified by the BSB should be an explicit part of the authorisation process.

29. We are satisfied that the Handbook section on associations with others should provide adequate information to clients about such arrangements, although we note the limited effectiveness of information requirements and the historic degree of non-compliance with other information provision rules, e.g. on complaints-handling. Furthermore, it will be difficult to break the assumptions held by consumers that all legal work is regulated.

30. In short, we consider the risks to consumers of separate business structures to be high and consider them undesirable in general. We think it is vital that the BSB take a view about proposed business structures at the authorisation stage and impose licence conditions as appropriate. Once a licence is granted, active supervision on information and other requirements is also needed.

Managing client affairs

31. Self-employed barristers may not currently 'undertake the management administration or general conduct of a lay client's affairs'. The BSB proposes to retain this prohibition due to risks that a barrister's independence may be compromised, there might be a greater risk of conflicts of interests or that barristers might work in areas outside of their competence, and the scope of a barrister's practice might go beyond what the BSB has capacity to regulate.

32. The consultation lists these risks but does not offer any explanation for why they might transpire. Nor is there any discussion of the potential benefits to consumers of lifting this restriction and thus no cost/benefit analysis. There would seem to be clear benefits for consumers in terms of a one-stop shop and greater competition with solicitor practices. Should the litigation restrictions be relaxed managing client affairs would be one of the few remaining activities that barristers could no longer carry out. The restriction has greater significance for competition in this context. Neither are we convinced that the risks are as great as the BSB suggests. The Panel considers that the arguments are similar to those in relation to the litigation developments and sees that the BSB could manage the risks in much the same way, for example through appropriate training, management systems and insurance.

Reporting misconduct

33. We welcome the previous decision that the revised code will include a positive duty on barristers to report serious misconduct and support also the proposed extension to place a duty on barristers to report any personal failure to comply with the rules applicable to them.

34. Our concern is with the proposed rule that serious misconduct by another barrister must only be reported where it is in the

public interest to do so. We challenge the BSB to list some circumstances when it would not be in the public interest to report serious misconduct. In our view, this offers a convenient get-out clause for barristers to hide behind. It also potentially places the barrister in an invidious position of weighing up public interest considerations and will no doubt produce inconsistent approaches.

35. The simplest approach, and that most likely to foster public confidence, is to require all cases of serious misconduct to be reported. It would then be for the BSB in its role as guardian of standards to decide whether it would be in the public interest to proceed. It would do this by applying consistent and transparent criteria in each case.

Insurance and holding client money

36. The Panel notes that rules on insurance for employed barristers will be replaced by guidance. The guidance states that employed barristers should consider whether they need to take appropriate cover available on the open market. The wording of this particular piece of guidance should be more explicit. It should state unambiguously that where a barrister is not covered by their employer's insurance they must ensure they have in place appropriate cover themselves. It is the responsibility of the barrister to ensure that cover is in place. This raises the issue of how consumers would be compensated should a barrister breach this regulatory requirement.

37. The BSB is considering authorising a third party to provide a payment service for holding client money, something which the Panel supported further investigation of in a previous consultation response.

Technology exists to allow a payment service to operate a pooled bank account with virtual sub-accounts in the names of individual clients. Clients could pay directly into the relevant account and barristers and entities would not have control over moving the money. The scheme is similar to that used by the French bars, with some differences.

38. The consultation document sets out a number of requirements which any such payment service would need to meet in order to address risks. The Panel supports the principle of establishing separate accounts for holding client money and considers it could have a number of advantages, particularly in minimising any risk to consumers that funds could be misappropriated from successful court awards, for example.

39. However, we would like to see more evidence of how any such scheme would work and be monitored in practice. For example, the BSB states that it would need to be satisfied that a payment service provider has systems and checks in place to verify instructions to release funds and deal with instructions relating to the payment account. Any such system is likely to be complex in the way it operates in practice and the BSB has stated that the operation of any scheme would be designed by the provider. We would therefore 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.

40. The BSB sets out in the consultation document that any payment service provider would be monitored by the BSB but would also have to comply with Financial Services Authority (FSA) regulations under the Payment Services Regulations 2009 (PSRs). This is a regulatory requirement and will mean that service providers are dual-regulated. However, it adds a further layer of complexity and the Panel is concerned that this could create 'enforcement gaps' where the FSA and the BSB each rely on the other to take action. The FSA have stated they take a complaints-led approach to the conduct of business supervision of payment service providers. However, consumers of legal services may be unaware that they can complain to the FSA if something does go wrong plus this could also cause intelligence to fall through the gaps. There is nothing in the consultation document about whether the BSB will work together and share information with the FSA in order to stop this from happening. We would like to see this point addressed.

41. For these reasons the Panel also considers it is important that any such scheme is run by a single not-for-profit organisation which is independent and subject to full scrutiny by the BSB. Large numbers of small providers could create further difficulties in effective monitoring and therefore place consumers at risk.

42. There appears to be 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.

43. The Panel notes 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.

Special bodies

44. The Panel will be responding to the LSB's consultation on regulating special bodies shortly. We suggest it may 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 to this exercise. The Act enables special bodies to request 'special treatment' from licensing authorities so such changes were envisaged when the regulatory architecture was being designed.

Standard of proof

45. The BSB is proposing to move to a civil standard of proof (balance of probabilities) for administrative sanctions, but to retain the criminal standard (beyond reasonable doubt) for the Determination by Consent procedure and Disciplinary Tribunals. While we welcome the use of the civil standard for administrative sanctions, we are disappointed that the criminal standard will remain for the other procedures.

46. 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. A failure to enforce rules could leave consumers at continued risk of detriment and undermine public confidence in the regulatory system. Whilst the impact on the practitioner concerned must also be considered, disciplinary action would not affect the person's liberty. 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. The SRA Board has rejected the argument that lawyers require a higher standard of proof in their disciplinary proceedings, whilst we note that CILEX and the CLC use the civil standard.

Publication of decisions

47. The BSB is proposing that administrative sanctions and fines should be recorded but not be published. Findings and sentences resulting from the use of the Determination by Consent procedure will be published to the same extent as such publication would have taken place following a finding and sentence following a Disciplinary Tribunal.

48. We consider that administrative sanctions and fines should be published. This is unlikely to have a major influence on consumer choice, but the effect of publication on a barrister's reputation among peers could serve as an effective deterrent against the behaviours leading to such sanctions. 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 – every breach of the Handbook would potentially be capable of being dealt with administratively and the increase in maximum fine amounts – makes the case for publication stronger than in the past.

June 2012

Entity regulation consultation
Bar Standards Board
289-293 High Holborn
London
WC1V 7HZ

5 September 2014

Dear Sir/Madam,

Bar Standards Board consultation on entity regulation

The Panel is pleased to respond to this consultation. Our response has been informed by particularly focussing on a number of the consumer principles including: safety – (consumers will feel more confident about using legal services if they are properly indemnified against loss), fairness (regulation should ensure that all consumers have an equal opportunity to obtain redress) and of course redress itself (regulation should ensure that consumers can be adequately compensated for harm or loss they suffer as a result of failures of service).

Our response has also benefited from our meeting with BSB officials in August. This response should be read in conjunction with our previous submissions to BSB consultations on aspects of the proposed entity regulation regime.

Minimum cover amount

The BSB proposes to build on the existing Handbook provisions by including a general duty for all entities to put adequate insurance in place. This is an overarching principle that means the minimum cover amount will be just that; higher risk entities will need to purchase higher cover as required. We support this proposal, and likewise welcome the requirement for entities to undertake an annual risk assessment and the BSB's intention that its Supervision Department will scrutinise an entity's risk analysis to determine the level of cover.

The BSB propose a minimum level of cover of £500,000 for entities, which is the current level for the self-employed Bar. Its starting point is that the insurance required for entities should be broadly similar to that currently provided to the self-employed Bar unless there is a regulatory reason to treat them differently. The BSB also wishes to avoid regulatory arbitrage should the approved regulators adopt significantly different terms.

In the Panel's view, the BSB has overstated the regulatory arbitrage point. The risk profile of lawyers differs between approved regulators and so

different cover amounts would be consistent with risk-based regulation. This reasoning explains our objection to the SRA's proposal to reduce its minimum PII cover to £500,000, yet why we felt able to support ICAEW's proposal for the same cover amount. Each situation should be treated on a case by case basis, with a firm emphasis on evidence.

It is difficult for us to take an informed view on whether £500,000 is the right amount for BSB-regulated entities. On the positive side, the BSB regulates a relatively small number of providers when compared to solicitors, and historically it seems the Bar Mutual Indemnity Fund (BMIF) has provided an adequate level of consumer protection. The need to avoid entry barriers for small entities also carries force of argument and this affects consumers in terms of the breadth of choice in the market.

Against this, the BSB anticipates entities having a higher risk profile than self-employed barristers. It expects entities to offer a wider range of legal work and run on a larger scale – with greater volumes of work, turnover and complexity of structure as a result. We understand that BMIF premiums are calculated by reference to fee income and areas of practise. Therefore, should the minimum cover amount not have a significant influence on premiums, the issues around barriers to entry and cost of legal services become less relevant. A lack of evidence that promised cost savings would follow a reduction in the minimum cover amount featured in the LSB's recent warning notice on the SRA's PII proposals.

Furthermore, in the absence of BMIF claims data and in light of other recent BSB changes which change the risk profile of the profession, for example public access and litigation work, it is hard for us to assess if £500,000 is right for self-employed barristers, let alone entities. Our 2013 publication on *Financial Protection Arrangements*[1] called for greater transparency and open channels for information sharing between regulators and those who hold data. However, we understand the BSB still do not have access to data collected by BMIF. Of course such information may be commercially sensitive and insurers would not want it to be widely disseminated. Yet surely, some arrangement must be possible to allow the regulator to have access to data which would allow it to make informed decisions on the right levels of cover.

We note the possible future requirement for both the self-employed bar and entities to carry whichever is the higher of a minimum level of insurance or a multiple of turnover. This is one way of ensuring that small firms carrying out low risk activities obtain an appropriate level of cover, whilst at the same time making sure that large firms or those carrying out high risk work (with potentially high levels of financial risk) hold an amount of cover which adequately protects consumers. We urge the BSB to conduct further research into the costs and benefits of this proposal, as it may provide a better way of identifying the optimum levels of cover.

[1] Legal Services Consumer Panel, *Financial Protection Arrangements*, June 2013. http://www.legalservicesconsumerpanel.org.uk/ourwork/Financial%20Protection/FPAs%202013%2006%2010%20final.pdf.

Aggregation of claims

We have concerns over the proposal to allow aggregation of claims. The risk to consumers is that where large losses arise there is a possibility that individual claims may not be met and this would happen on an arbitrary basis. Further, the definition of what is to count as one claim is broadly drawn, in particular the clause allowing insurers to aggregate 'similar' acts or omissions could be abused by insurers. The ongoing case of Godiva Mortgage Ltd v Travelers Insurance Company case turns on the interpretation of the definition of 'any one claim' in the SRA's rules.

The Godiva case illustrates the possible risk that consumers could be left out of pocket due to the use of caps on claim aggregation. The case concerns a partner at a law firm who was involved in a number of allegedly fraudulent property transactions. When the losses came to light numerous claims were brought against the firm, including by the claimant, Godiva, a lender. The law firm has gone into liquidation and cannot meet the claims. The insurer asserts that all the activities from the partner's involvement in alleged fraudulent activity can be aggregated as one claim and capped at £2 million (the Solicitors Regulation Authority's current cap). However, the total losses in the case could exceed £50 million in reality. The Law Society and the SRA have been given permission to intervene in the case by the High Court. The case was due to be heard in the first half of 2014 but is now listed for November 2014.

In addition, we note that the aggregation limit, as currently drafted, would be the limit of cover held by the firm. The BSB supervision team will take into account whether the entity is carrying out types of work which could result in claims being aggregated when they are assessing whether the level of cover the firm holds is appropriate. Nonetheless this means that in some circumstances the aggregation limit could be as low as £500,000. Further, the breadth of the current clause means it is unclear whether multiple consumers, who have used different entities, yet encounter the same or similar issues could have their claims aggregated. An example could be widely used defective software which results in poor quality work. Because, unlike some other regulators, the BSB does not have a compensation fund which such claims might be able to fall back on, the impact on consumers would be even greater.

Nature of clients

We disagree with the BSB's intention that the proposed minimum terms should apply to all clients. Corporates and other large buyers are better able to assess risks and suffer less from the information asymmetries present for smaller consumers, such as individuals, small businesses and small charities. Although there may be some practical difficulties, these should not be insurmountable. Experienced or wealthy clients should be capable of negotiating the terms of cover they require. Furthermore, we believe scarce regulatory resources should be directed towards those who are less able to protect themselves.

Individuals, small businesses and small charities should be treated in the same way. However, Bar Mutual currently allows a defendant to demand security costs from a company claimant to be held against the barrister's

costs in the event the claimant should lose. This may have a chilling effect on those small businesses who wish to bring a justified claim.

Other issues

The Panel agrees with the BSB's analysis around intervention, and that it would be in the client's interest for the BSB to have the power to intervene if and when required. We note the BSB will consult on the policy issues at a later date. For the moment we are content with the proposed interim Handbook rules before the BSB gains statutory powers.

We recognise that the current terms of cover do not need to deal with successor practices, although there is still provision for run-off cover. The new provisions will require a successor entity to have insurance in place which covers claims relating to the previous practice. Otherwise the entity will need to enter run-off. The Panel is content with these proposals, and agrees that the duration of run-off should cover at least the statutory limitation period of six years.

We note with interest the proposal to find different ways of managing exit, for example by holding run-off deposits in escrow accounts. The Panel made a similar proposal in our publication on *Financial Protection Arrangements*[2] and we would certainly be supportive of innovative ideas like this being scoped out in more detail.

We are content with the proposals around misrepresentation and non-disclosure, as these will ensure a good level of consumer protection.

I hope these brief comments are helpful. Please contact Harriet Gamper, Consumer Panel Associate, with any enquiries.

Yours faithfully

Elisabeth Davies
Chair

[2] Legal Services Consumer Panel, *Financial Protection Arrangements*, June 2013, p. 38. http://www.legalservicesconsumerpanel.org.uk/ourwork/Financial%20Protection/FPAs%202013%2006%2010%20final.pdf .

LEGAL SERVICES CONSUMER PANEL

Consultation response

BSB: Regulating Entities

Overview

1. **Overall, the Panel supports the BSB's proposal to be a specialist advocacy regulator. However, this decision may have wider implications for the BSB's approach to regulation which should be considered.**

2. **The Panel supports permitting barristers to conduct litigation. However, accreditation and practical experience must be required before authorisation is granted due to the significant consumer detriment that can result from poorly conducted litigation.**

3. **The BSB must ensure that barristers have the skills to deal directly with lay clients, as this will be a new experience for some advocates. Client care should infuse its regulatory arrangements – in the training of advocates, code of practice and in monitoring compliance.**

4. **The extension of the cab-rank rule to entities is important for ensuring access to justice for unpopular clients. However, increasing direct access to advocates may mean the BSB should consider whether the rule could also apply to lay client instructions.**

The proposals

5. The BSB is proposing that it become a specialist regulator of entities which focus on advocacy and related services, including ancillary litigation services.

- BSB regulated entities would be subject to ownership and management restrictions:
  - No external ownership (i.e. all owners would need to be managers)
  - Non-lawyers comprising no more that 10-25% of ownership and management; and
  - The majority of managers would need to practice as advocates in higher courts.
- The BSB would not regulate multi-disciplinary practices
- Barrister managers and employees would be permitted to conduct litigation
- Restrictions on self-employed barristers conducting litigation would be lifted
- Entities would not be permitted to hold client money but could manage funds through a third-party 'custodian' (e.g. a single client account managed externally from the entity).
- Entities would have to develop appropriate systems to identify and manage conflicts of interest

- The statutory non-discrimination rule for acceptance of instructions would apply to all advocates in any entity
- The cab-rank rule would apply to entities in the same way as for self-employed barristers (that is, for instructions from professional clients for named advocates only)
- BSB would introduce an interventions scheme (still to be developed)
- Entity-wide professional indemnity insurance would be required, subject to minimum terms and conditions.

The Panel's response

6. Given the breadth of issues being considered, the Panel has limited its comments to those areas likely to have a direct impact on consumers.

Implications for the regulatory framework

7. The consultation paper considers in detail the practical implications of regulating entities. Before commenting on these proposals, the Panel briefly discusses the possible implications of this move for the BSB's overall regulatory framework.

8. The BSB has previously agreed to permit barristers to work in entities regulated by other approved regulators and to work in Barrister Only Entities (BOEs). The Panel was not constituted when these decisions were consulted on, but we welcome them as positive steps towards opening up the market to extend choice for consumers. The starting point should be to give barristers freedom to choose the business models that make them most attractive to potential clients subject to suitable safeguards to protect consumers.

9. In this context, the Panel supports the BSB's proposal to become a specialist advocacy regulator. Ideally, we would prefer the BSB to be the only regulator of advocacy services as we are sceptical that regulatory competition benefits consumers. Whilst it is designed to facilitate an efficient regulatory regime and so minimise costs that are passed on to clients, practitioners are likely to be attracted to the lowest cost option, which may provide insufficient consumer protection. This might lead to a race to the bottom.

10. However, regulatory competition is a fact of legal services regulation. With this in mind, the BSB faces a balancing act in terms of its regulatory jurisdiction. Certainly it should only regulate those business structures for which it has the expertise and resources. Nonetheless, if the BSB is too restrictive in the business structures that it is prepared to regulate, advocates may be tempted towards other regulatory regimes. Through its continued reluctance to regulate MDPs the BSB is arguably being unduly cautious.

11. Regulating entities has implications for the BSB's style of regulation. The existing regime is based on a detailed set of rules and requirements. Whilst this may work satisfactorily for regulating individual practitioners, an outcomes-based approach is better suited for regulating entities as management systems need more freedom to cater for a diverse set of business arrangements. In a changing market, and one in which advocates will have greater contact with lay clients, entities require the flexibility to innovate and develop more

consumer focused services and deliver these through a range of different business models. A prescriptive, rules-based approach is reactive and could restrict innovation that benefits consumers, whereas an outcomes-based approach would enable the BSB to future-proof its regulatory requirements and still afford consumers sufficient protection. The Panel has set out the wider advantages of outcomes-based regulation in its responses to SRA consultations on the issue[1].

12. Finally, regulating entities throws up a series of different challenges to those to which the BSB is accustomed when regulating individuals. The BSB must understand organisations as well as the practice of advocacy. It is important that the BSB builds up the knowledge and skills required for this task, so that there can be confidence about the organisation's ability to protect consumers. This expertise should be found at executive and board levels.

Litigation services

Risks to consumers from poorly conducted litigation

13. The Panel supports barristers being permitted to conduct litigation. The option of a one-stop-shop advocacy and litigation service should have benefits for consumers by delivering greater choice and driving competition.

14. However, if barristers are to conduct litigation, the BSB must introduce robust quality assurance measures, as poorly conducted litigation can have a major impact on case outcomes. Furthermore, litigation involves strict processes and procedures which, if conducted incorrectly, can have major repercussions for consumers, including cases dismissed due to missed time limits, and unnecessary expenses for clients due to inefficient systems. Most barristers will have to learn from scratch the processes and procedures, whilst the BSB will need ways of verifying their competence.

Direct contact with lay clients

15. A key outcome of the proposed changes is that barristers will need to become '*accustomed to receiving instructions from – and dealing directly with – lay clients'*. In conducting litigation, barristers will be taking on new roles and responsibilities with clients. These include providing advice about the merits of litigation, negotiating settlements (instead of simply acting as the advocate and advisor when the case reaches court), and developing ongoing relationships with clients.

16. The Panel's work on quality assurance[2] found that consumers want their lawyers to be empathetic, to explain the legal process, to be efficient and professional, and to tailor their knowledge proactively to the specific situation. The BSB must ensure that individuals and entities meet consumer expectations around client care, in addition to providing technically sound advice and advocacy. This requires the BSB to incorporate greater emphasis on client care in its regulatory regime, with client care becoming central to the code of conduct and to BSB compliance monitoring. The inclusion of lay client care skills in training or accreditation is welcome[3].

17. The Panel raised these issues in relation to the Quality Assurance for Advocates (QAA) scheme for criminal advocates[4] but it applies across all advocacy areas.

18. QAA will be mandatory for criminal advocates and may be extended to other practice areas. Whilst a mandatory scheme ensures that advocates can only offer services to clients for the level of complexity they are authorised to provide, this is not true outside of this regime where clients can exercise a wider degree of choice. Solicitors, as professional clients of advocates, should have the required knowledge and experience to identify an appropriate advocate, and therefore filter the market for their lay clients. However, if direct access for barristers increases, the BSB will need to explore mechanisms, such as consumer education and quality assurance, which can help to match clients with suitably qualified advocates.

Authorisation and accreditation

19. The Panel is pleased that the BSB has recognised the quality issues involved in allowing barristers to conduct litigation. In particular, paragraph 1.40 notes that '*many barristers will not have any training in the skills required to conduct litigation*'.

20. On this basis, the Panel strongly supports the BSB requiring both accreditation and practical experience before litigation authorisation is granted to any barrister. In practice, this means that entities are licensed by activity (i.e. they must be pre-approved to conduct litigation). Furthermore, an individual barrister would need to be authorised by the BSB before being able to conduct litigation, or be working within an entity under the supervision of an authorised and experienced litigation barrister. The Panel suggests that any entity seeking to conduct litigation must have at least one manager who is authorised to conduct litigation, has a strong record of experience, and who can take responsibility for delivering services that meet the required standards.

21. In the case of self-employed barristers, this may require an alternative accreditation path with supervised practice hours, that must be fulfilled before authorisation to litigate is given. Litigation services are not just about skills but also case management. Should self-employed barristers choose to become single-person entities offering litigation, there is a risk of insufficient administrative support for the complex procedures. The Panel strongly agrees that the BSB would need to satisfy itself that suitable arrangements were in place before any authorisation[5], and encourages it to ensure that risks associated with small entities are fully considered.

22. Notwithstanding the above, barristers should have the option of not providing litigation services, particularly in the context of the public access scheme. The option of clients being able to act as the litigant themselves, with barristers then providing solely advocacy, could reduce costs. If clients no longer wanted to act as litigants, then it is likely self-employed barristers will just choose not to offer this option. However, if there is demand, there is no reason why such a service should not be available.

Costs of litigation services

23. The Panel welcomes the competition with solicitors from barristers offering litigation. This could reduce costs and make services more efficient for consumers through packaged delivery. The Panel notes the BSB's concern around increased overheads but is not convinced that allowing barristers to conduct litigation would increase the overall costs to consumers, thus reducing access to justice.

24. Whilst barristers providing litigation may have increased overheads, the packaged costs of combining litigation and advocacy services should be no more than if the client had to pay solicitors for litigation services (with the associated overheads) plus advocacy from a self-employed barrister. The change will enable barristers to compete with solicitor advocates, who already offer packaged services.

Client money

25. The Panel notes that satisfactory systems operate for the payment of fees and disbursements through the Public Access Scheme. Experience suggests that lay clients are more reliable in making payments than professional clients and barristers are able to pursue clients who do not pay. Staged payments on completion of milestones already help barristers to manage risk where there are large fees. Therefore, the Panel sees no need to provide additional arrangements for payments to barristers in relation to litigation, by enabling them to hold client money. Both payment in arrears and staged payments should be permitted to enable client choice.

26. The Panel accepts that the risk of non payment by clients is greater in relation to handling settlements and court awards. Furthermore, there are risks to the client of the barrister misappropriating funds in a successful claim. The proposed approach of using a third party is supported as it removes the fraud issues that have faced solicitors in relation to client funds.

27. The Panel supports the BSB investigating this option further. The main concern is that the 'custodian' must be independent and able to be fully scrutinised by the BSB. Furthermore, clients should expect service standards around payment, particularly around timeliness, as delay could lead to financial detriment, such as loss of interest. As the client's contractual relationship would be with the barrister entity, clients should be able to seek redress from the Legal Ombudsman.

Managing conflicts of interest

28. The Panel supports the BSB's analysis that regulating entities should not reduce access to justice due to the commercial incentives. This debate was resolved in a previous consultation and the Panel does not wish to expand on this point.

29. The Panel welcomes the emphasis on requiring firms to have appropriate systems to manage conflicts and to consider whether any conflicts arise before accepting instructions. However, it is unclear from the brief discussion of the issue how the BSB intends this regime to operate in practice and, in particular, how it intends to monitor compliance. The Panel would welcome further development of the BSB's thinking in this area.

30. There is an opportunity to learn from the SRA. An outcomes-based approach, supported by guidance, is more likely to protect consumers than detailed prescriptive rules which cannot foresee every potential conflict. However, increased freedom for entities to interpret which course of action would be in the best interests of clients should be accompanied by tough sanctions for those who abuse this position of trust.

Cab-rank rule

31. The Panel welcomes the proposal to extend the cab-rank rule to entities. The rule is vital to ensuring access to justice for unpopular clients and to upholding the rule of law. The survey evidence shows that 63% of barristers stated that maintenance of the rule was important or very important. Rather than seeing this as significant support for the rule, the Panel is alarmed that more than one-third of barristers gave an alternative response.

32. The consultation proposes that the cab-rank rule apply to entities in the same way as to self-employed barristers, that is, for instructions from professional clients for named advocates only. This approach made sense in the context of minimal direct access to barristers. However, with increasing direct access via entities, this would mean that an advocate would be obliged to take a case for a specific client who approaches them through a solicitor but would not be so obliged if the same client approached them directly. The Panel is concerned this could inhibit consumer choice; the BSB may need to give further consideration to this matter.

Insurance

33. The development of appropriate consumer protection through professional indemnity insurance is increasingly difficult in the legal services market. In looking to develop new PII arrangements for entities, the BSB should consider the challenges facing the SRA, including which clients are covered by mandatory insurance.

December 2010

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[1] Legal Services Consumer Panel, *Consultation response – Solicitors Regulation Authority: Achieving the right outcomes*, February 2010.

[2] Legal Services Consumer Panel (2010) *Quality in Legal Services*, http://www.legalservicesconsumerpanel.org.uk/ourwork/QualityAssurance.html

[3] Para 1.56

[4] http://www.legalservicesconsumerpanel.org.uk/publications/consultation_responses/documents/2010-11-12_JAG_QAAScheme.pdf

[5] Para 1.69

LEGAL SERVICES CONSUMER PANEL

Consultation response

BSB: New BSB Handbook

Overview

1. **The BSB should take enforcement action where achievement of the outcomes has been frustrated due to the actions or omissions of a barrister.**

2. **There should be a stronger emphasis on vulnerable clients within the mandatory elements of the Handbook.**

3. **The BSB should take steps, such as producing a short summary of the key Handbook requirements, to help clients understand what they are entitled to expect from a barrister.**

4. **The Panel considers separate business structures to be undesirable in general. The BSB should take a view about such structures at the authorisation stage, as we are sceptical that information rules will mitigate consumer confusion risks.**

5. **The prohibition of barristers managing client affairs should be removed.**

6. **It should be mandatory for barristers to have their own insurance cover in place should they not be covered by their employer's insurance. We support the proposed third party payment service, although we raise issues around monitoring and enforcement gaps between the BSB and FSA regimes. The service should be run by a single and independent not for profit organisation.**

7. **Interest earned while client money is held by the payment service should be returned to clients. If this is impractical, the interest could be pooled and given to a cause benefiting all consumers, such as public legal education initiatives.**

8. **Serious misconduct should always be reported to the BSB, leaving it to the BSB to decide whether it would be in the public interest to pursue matters further.**

9. **The civil standard of proof should apply to all disciplinary proceedings. Public protection is undermined if the BSB is unable to act due to the evidentiary burden being disproportionate. This would leave consumers at risk of harm and undermine confidence in the BSB. Other professions are moving to the civil standard; lawyers are not a special case.**

10. **Administrative sanctions and fines should be published to create peer pressure and cement public confidence.**

The proposals

11. The Bar Standards Board (BSB) has consulted previously on a number of separate, but related, issues:

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

12. This consultation draws these different elements together in order to have one clear publication that summarises its new approach across the board. Some proposals have changed since they were originally consulted on; in particular the Code of Conduct has changed significantly in structure and presentation and its reach has been extended to apply to all BSB regulated persons.

13. There is a separate consultation addressing the compliance and enforcement aspects of the BSB's proposed entity regulation regime.

The Panel's response

14. The Panel responded to the last two consultations referred to above (the first preceded the Panel's existence). We also responded to consultations on the public access rules, review of CPD and authorisation to practise arrangements, which are linked to the present exercise. The analysis below does not repeat the points we made in response to these earlier consultations, which still remain our views.

15. For the sake of transparency, it is important that we state at the outset that this includes decisions made by the BSB, which key proposals in this current consultation exercise flow from, with which we disagree. These policy decisions include:

    - The BSB's decision not to regulate multi-disciplinary practices, which we still consider is unduly cautious; and
    - Unregistered barristers – we remain of the view that only persons holding a practising certificate should be able to call themselves barristers in order to avoid misleading consumers.

16. The current consultations are substantial documents covering a wide range of issues. Given our limited resources, we have focused our response on areas of concern. Therefore, it is important for us to state at the outset that we welcome key decisions which the BSB has made to extend choice for consumers, such as enabling barristers to conduct litigation. We also support many of the new features being consulted on, such as the proposals around risk-based regulation including the focus on consumer vulnerability within this.

Presentation to consumers

17. Clients need to be clear what they can and cannot expect of their barrister. This means that the Handbook serves as guide for consumers about the duties of barristers as well as a document aimed at barristers. Therefore, we welcome steps to make the code more user-friendly, to simplify and remove rules, and the use of outcomes to help explain what the mandatory elements are intended to achieve.

18. However, it remains unlikely that all but the most persistent clients will refer to the Handbook itself. We therefore encourage

the BSB to consider how best to inform consumers about what they should expect and the protections they have when using the services of a barrister. This might take the form of a short, simple document that sets out the key elements of the code that is made available on the BSB's website or information that barristers are required to give to clients at the time of engagement.

19. There are many options for achieving this, and we do not wish to be prescriptive. Our key point is that the BSB itself, as well as barristers, have a responsibility to help clients to understand the role of barristers and what can be legitimately expected of them. This is important given the often stressful situations in which clients deal with barristers. Such knowledge would help clients to get the most from their interaction with barristers and help minimise disputes.

Relationship between outcomes, core duties, rules and guidance

20. The Panel welcomes the move towards outcomes-focused regulation, although we take a balanced view as to the benefits and risks. On the plus side, it frees up those being regulated to innovate and deliver better services to consumers. It provides a catch-all safety net to capture practices that fall between gaps in rules. Perhaps the greatest intended benefit is to reinforce the right cultural behaviours, by requiring judgements to be made and responsibility taken by individual practitioners and senior managers to ensure the objectives behind regulation are fully embedded within their thinking and everyday practices. On the risk side, paralysis might ensue if there is too much uncertainty about what professionals can and cannot do. The scope for different interpretation of outcomes-focused rules creates challenges for enforcement. However, on balance the Panel considers that the benefits outweigh the risks and that outcomes-focused regulation can be made to work in the legal services market.

21. The BSB's proposal is to make the core duties and rules mandatory, with the outcomes intended to be descriptive and help explain the rationale for and aid the understanding of the rules. The BSB would not bring misconduct charges or impose fines for breach of the outcomes alone.

22. The litmus test should be whether each outcome is adequately captured within the core duties and rules. If the outcomes are purely descriptive of the mandatory elements, as seems intended, then it should be the case that non-delivery of an outcome, where this relates to an act or omission by a barrister, will have involved a breach of the core duties or rules. For example, if clients are not adequately informed as to the terms on which work is to be done (section D3) this should be seen as a failure to provide competent service to clients (core duty 7). It is of key importance that the BSB is prepared to enforce on the basis of the breach of the core duties alone, as to do otherwise would defeat the purpose of outcomes-focused regulation.

23. In our view, the Handbook is not entirely successful in this. 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. One of the benefits of outcomes-focused regulation is that lawyers cannot solely focus on compliance with specific rules, but

instead must consider the wider intent of regulation. Another key advantage of this approach is that the outcomes are worded from the client perspective and so make it clear to barristers what it is they need to achieve to fulfil the core duties. This leads us to conclude that it would be appropriate for the BSB to take enforcement action where achievement of the outcomes has been frustrated due to a barrister's actions.

Vulnerable consumers

24. We would like to see a strong emphasis on vulnerable clients within the mandatory elements of the Handbook. 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. For example, the Intellectual Property Regulation Board's code includes the following guidance: "*Extra care should be taken when dealing with potentially vulnerable clients such as private individuals and in particular where there may be risk factors related to a person's circumstances (e.g. bereavement, illness or disability etc.) which increase the likelihood of the client being at a disadvantage or suffering detriment.*"

25. We applaud the BSB for building consumer vulnerability considerations into its new risk framework; this needs to be translated into explicit code requirements for barristers. The Panel recently wrote to the BSB to ask it to consider adopting a British Standard on consumer vulnerability, which should assist you in developing appropriate provisions.

Separate business rule

26. The Panel has previously commented on the separate business rule when the SRA applied to become a licensing authority. We said that the rule's main purpose is to prevent solicitors from avoiding regulation by establishing a separate entity to conduct unreserved activities. It is vital to retain the rule given the existing reserved activities are very narrowly defined. Without the rule, the logical response of solicitors would surely be to establish unregulated entities to carry out the majority of their work and sub-contract the small reserved element to separate regulated entities. This might be acceptable if the list of reserved activities was based on consumer needs, but this is patently not the case given what we know about the history of why the activities were reserved. Should the separate business rule be removed, consumers would lose the protections they currently enjoy without any proper analysis of whether these protections should be retained.

27. The BSB considers that the new Handbook includes sufficient safeguards – in relation to criteria for authorisation, associations with others and outsourcing – to mitigate the risks to consumers. The risks identified by the BSB, especially with regard to consumer confusion, mirror those identified by the Panel in its response to the SRA.

28. The BSB's decision to be 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 Guidance statement on page 121 of the consultation document states that the factors which the BSB will

take into account when assessing applications include the nature and extent of non-reserved activities which the entity is intending to provide. Also, paragraph 34.1 states that the BSB may impose licence conditions in terms of the non-reserved activities to be carried on. However, we can find no specific reference within the authorisation regime in relation to establishing *separate* business structures to carry out non-reserved activities. Should the Handbook not include a separate business rule, considerations of the risks to consumers identified by the BSB should be an explicit part of the authorisation process.

29. We are satisfied that the Handbook section on associations with others should provide adequate information to clients about such arrangements, although we note the limited effectiveness of information requirements and the historic degree of non-compliance with other information provision rules, e.g. on complaints-handling. Furthermore, it will be difficult to break the assumptions held by consumers that all legal work is regulated.

30. In short, we consider the risks to consumers of separate business structures to be high and consider them undesirable in general. We think it is vital that the BSB take a view about proposed business structures at the authorisation stage and impose licence conditions as appropriate. Once a licence is granted, active supervision on information and other requirements is also needed.

Managing client affairs

31. Self-employed barristers may not currently 'undertake the management administration or general conduct of a lay client's affairs'. The BSB proposes to retain this prohibition due to risks that a barrister's independence may be compromised, there might be a greater risk of conflicts of interests or that barristers might work in areas outside of their competence, and the scope of a barrister's practice might go beyond what the BSB has capacity to regulate.

32. The consultation lists these risks but does not offer any explanation for why they might transpire. Nor is there any discussion of the potential benefits to consumers of lifting this restriction and thus no cost/benefit analysis. There would seem to be clear benefits for consumers in terms of a one-stop shop and greater competition with solicitor practices. Should the litigation restrictions be relaxed managing client affairs would be one of the few remaining activities that barristers could no longer carry out. The restriction has greater significance for competition in this context. Neither are we convinced that the risks are as great as the BSB suggests. The Panel considers that the arguments are similar to those in relation to the litigation developments and sees that the BSB could manage the risks in much the same way, for example through appropriate training, management systems and insurance.

Reporting misconduct

33. We welcome the previous decision that the revised code will include a positive duty on barristers to report serious misconduct and support also the proposed extension to place a duty on barristers to report any personal failure to comply with the rules applicable to them.

34. Our concern is with the proposed rule that serious misconduct by another barrister must only be reported where it is in the

public interest to do so. We challenge the BSB to list some circumstances when it would not be in the public interest to report serious misconduct. In our view, this offers a convenient get-out clause for barristers to hide behind. It also potentially places the barrister in an invidious position of weighing up public interest considerations and will no doubt produce inconsistent approaches.

35. The simplest approach, and that most likely to foster public confidence, is to require all cases of serious misconduct to be reported. It would then be for the BSB in its role as guardian of standards to decide whether it would be in the public interest to proceed. It would do this by applying consistent and transparent criteria in each case.

Insurance and holding client money

36. The Panel notes that rules on insurance for employed barristers will be replaced by guidance. The guidance states that employed barristers should consider whether they need to take appropriate cover available on the open market. The wording of this particular piece of guidance should be more explicit. It should state unambiguously that where a barrister is not covered by their employer's insurance they must ensure they have in place appropriate cover themselves. It is the responsibility of the barrister to ensure that cover is in place. This raises the issue of how consumers would be compensated should a barrister breach this regulatory requirement.

37. The BSB is considering authorising a third party to provide a payment service for holding client money, something which the Panel supported further investigation of in a previous consultation response.

Technology exists to allow a payment service to operate a pooled bank account with virtual sub-accounts in the names of individual clients. Clients could pay directly into the relevant account and barristers and entities would not have control over moving the money. The scheme is similar to that used by the French bars, with some differences.

38. The consultation document sets out a number of requirements which any such payment service would need to meet in order to address risks. The Panel supports the principle of establishing separate accounts for holding client money and considers it could have a number of advantages, particularly in minimising any risk to consumers that funds could be misappropriated from successful court awards, for example.

39. However, we would like to see more evidence of how any such scheme would work and be monitored in practice. For example, the BSB states that it would need to be satisfied that a payment service provider has systems and checks in place to verify instructions to release funds and deal with instructions relating to the payment account. Any such system is likely to be complex in the way it operates in practice and the BSB has stated that the operation of any scheme would be designed by the provider. We would therefore 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.

40. The BSB sets out in the consultation document that any payment service provider would be monitored by the BSB but would also have to comply with Financial Services Authority (FSA) regulations under the Payment Services Regulations 2009 (PSRs). This is a regulatory requirement and will mean that service providers are dual-regulated. However, it adds a further layer of complexity and the Panel is concerned that this could create 'enforcement gaps' where the FSA and the BSB each rely on the other to take action. The FSA have stated they take a complaints-led approach to the conduct of business supervision of payment service providers. However, consumers of legal services may be unaware that they can complain to the FSA if something does go wrong plus this could also cause intelligence to fall through the gaps. There is nothing in the consultation document about whether the BSB will work together and share information with the FSA in order to stop this from happening. We would like to see this point addressed.

41. For these reasons the Panel also considers it is important that any such scheme is run by a single not-for-profit organisation which is independent and subject to full scrutiny by the BSB. Large numbers of small providers could create further difficulties in effective monitoring and therefore place consumers at risk.

42. There appears to be 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.

43. The Panel notes 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.

Special bodies

44. The Panel will be responding to the LSB's consultation on regulating special bodies shortly. We suggest it may 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 to this exercise. The Act enables special bodies to request 'special treatment' from licensing authorities so such changes were envisaged when the regulatory architecture was being designed.

Standard of proof

45. The BSB is proposing to move to a civil standard of proof (balance of probabilities) for administrative sanctions, but to retain the criminal standard (beyond reasonable doubt) for the Determination by Consent procedure and Disciplinary Tribunals. While we welcome the use of the civil standard for administrative sanctions, we are disappointed that the criminal standard will remain for the other procedures.

46. 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. A failure to enforce rules could leave consumers at continued risk of detriment and undermine public confidence in the regulatory system. Whilst the impact on the practitioner concerned must also be considered, disciplinary action would not affect the person's liberty. 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. The SRA Board has rejected the argument that lawyers require a higher standard of proof in their disciplinary proceedings, whilst we note that CILEX and the CLC use the civil standard.

Publication of decisions

47. The BSB is proposing that administrative sanctions and fines should be recorded but not be published. Findings and sentences resulting from the use of the Determination by Consent procedure will be published to the same extent as such publication would have taken place following a finding and sentence following a Disciplinary Tribunal.

48. We consider that administrative sanctions and fines should be published. This is unlikely to have a major influence on consumer choice, but the effect of publication on a barrister's reputation among peers could serve as an effective deterrent against the behaviours leading to such sanctions. 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 – every breach of the Handbook would potentially be capable of being dealt with administratively and the increase in maximum fine amounts – makes the case for publication stronger than in the past.

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