LSB reference: 20140606

From:	Adewale Kadiri
To:	[redacted]
Cc:	Julie Myers
Subject:	Response to your freedom of information request
Date:	18 June 2014 12:44:00
Attachments:	130723_mou_lsb-sdt-tls.pdf enforcement_policy_statement.pdf LSB_investigation_into_bar_council_influencing_of_the_BSB_(25-11-13).pdf

Dear [redacted]

I write in response to your email of 6 June 2014 in which you requested information about the LSB's legal department, memoranda of understanding with other organisations and complaints made to the LSB. I can confirm that the LSB holds some of the information that you have requested.

LEGAL DEPARTMENT

1a. ..How many persons are employed in your legal department.

b...what are their position and terms of reference.

c....what are their ethnicity

The LSB is a small organisation of about 30 staff. We do not have a legal department, but legal support is provided by our Legal Director and a Legal Adviser. They are both permanent employees of the organisation.

I am not in a position to disclose their ethnicity to you as this constitutes sensitive personal data pursuant to section 2(a) of the Data Protection Act 1998, and is therefore exempt from disclosure under section 40(2) of the Freedom of Information Act 2000.

MEMORANDUM OF UNDERSTANDING -

SDT / BSB/ CPS/ DPP/ LAW SOCIETY METROPOLITAN POLICE(MP)

2a. ..What, process, practice, procedure and policies, exist with the above?

b. ..Please provide a copy of those MOU.

The LSB has a Memorandum of Understanding with the Solicitors Disciplinary Tribunal (SDT), and this is attached below. This memorandum is reviewed every three years and was last reviewed in July 2013. We do not have an MOU with any of the other organisations that you mentioned.

COMPLAINTS MADE TO LSB

1a. .For the last 12 months how many complaints were made to you by consumers regarding SRA and BSB?

b....Please provide a copy of ... process, practice, procedure and policies documents you have in place for dealing with those complaints and their processes from inception to finalisation/determination and its appeal processes?

c....Please confirm if you have received complaints from clients of solicitor firms who reported to the SRA about those defaulting solicitors (exampleS...

closing their practices and making off with clients money and papers;

solicitors giving professional undertakings,

not concluding them but closing their practices and ignoring them completely: other very serious fraudulent conduct

RUN OFF INSURANCE COVER

PRACTICE - CLIENT BANK ACCOUNT / PRACTICE OFFICE BANK ACCOUNT

PRIOR NOTIFICATION TO CLIENTS

SOLICITORS FAIULING TO COMPLY WITH THEIR CLOSURE OBLIGATIONS

COLP ROLE IN CLOSURE OBLIGATIONS

COFA ROLE IN CLOSURE OBLIGATIONS

SOLICITORS CLOSING PRACTICES AND WALKING AWAY FROM THEIR CLOCKED UP FINANCIAL OBLIGATIONS AND CLIENT'S DUTIES

)..AND SRA TURNING A BLIND EYE or taking no steps to obtain redress against those defaulting solicitors having regard to their regulatory obligations and objectives?

The LSB is not a complaint handling organisation. We are an oversight regulator charged by the Legal Services Act 2007 with overseeing the work of the eight approved regulators who between them regulate the approximately 163,000 lawyers practising in England and Wales. The Legal Services Act prohibits the LSB from becoming involved in the handling of individual complaints. Complaints by consumers about the service that have received from lawyers are dealt with by the Legal Ombudsman (http://www.legalombudsman.org.uk/), while the Bar Standards Board (BSB), the Solicitors Regulation Authority (SRA) and the other approved regulators deal with complaints alleging professional misconduct.

YOUR POWER AGAINST SRA / BSB

3a. ..What, process, practice, procedure and policies, exist for you to bring to book the SRA/BSB to comply with their regulatory objectives?

b...in the last 12 months when did you had to use it and against who.

c.....please provide a copy of 3b.

Sections 31 to 44 of the Legal Services Act (the Act) provide the LSB with a range of enforcement powers to be used, as appropriate, in the event that we have evidence that the acts or omissions of an approved regulator has had or is likely to have an adverse effect on one or more of the regulatory objectives. The LSB may:

- Set one or more performance targets relating to the performance by an approved regulator of any of its regulatory functions
- Direct an approved regulator to take such steps as required to counter or mitigate the adverse effect
- Publish a statement censuring the approved regulator
- Impose a financial penalty in respect of the failure
- Make an intervention direction such that the regulatory function is to be exercised by the LSB or its nominee
- Cancel an approved regulator's designation

I attach for your attention the LSB's Statement of Policy on Compliance and Enforcement, prepared pursuant

to section 49(1) of the Act, which sets out the approach that the LSB will take in deciding how and when it will use these powers.

Between June and October 2013, the LSB carried out an investigation into the Bar Council's involvement in the Bar Standard Board's application to the LSB for approval of changes to the Code of Conduct in relation to the "Cab Rank Rule". The report of this investigation is attached below. This is the only occasion on which we have used our formal enforcement powers in the last twelve months.

PARLIAMENTARY OMBUDSMAN

4a. ..What, process, practice, procedure and policies, exist for working with and co-ordinating your duties and obligations with the parliamentary Ombudsman(PO)?

b. ..In the last 12 months how many referrals were made by consumers to PO about LSB mal administration?

c.....What were the results of 4b above?...

I await your reply with thanks and ask that you email me the above data.

The LSB is not subject to the jurisdiction of the Parliamentary and Health Service Ombudsman. It is not included on the list of departments subject to investigation as set out in Schedule 2 to the Parliamentary Commissioner Act 1967.

I trust that this satisfactorily addresses your request for information. However if you are dissatisfied with this response, you have the right to ask for an internal review or submit a complaint in line with our Freedom of information – Complaints procedure which can be found at:

http://www.legalservicesboard.org.uk/can_we_help/lsb_policies_procedures/freedom_of_information/index.htm)

Yours sincerely

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Memorandum of Understanding ("MOU")

Parties

This MOU is dated 23RD day of JULY 2013 and is made between the Legal Services Board (the "LSB"), the Solicitors Disciplinary Tribunal (the "SDT"), the Solicitors Disciplinary Tribunal Administration Ltd. (the "Administration Company") and the Law Society (the " Law Society") (together " parties" and each a "party").

1. Purpose

1.1 This MOU sets out the process which the parties have agreed to follow in order to fulfill their respective obligations and duties under Section 46A of the Solicitors Act 1974 (the "SA") inserted into the SA by Paragraph 48 of Schedule 16 to the Legal Services Act 2007 (the "LSA") (attached at Annex A)

1.2 The parties agree that this MOU shall be in the public domain.

2. Definitions

Additional Funding Application – the SDT's application to the Law Society for funding over and above the Approved Amount.

Annual Budget Application – the SDT's annual application to the LSB setting out the amount the SDT considers necessary to operate in a calendar year.

Approved Amount – the amount of money that the LSB approves having considered the SDT's Annual Budget Application.

Required Information – such information as the LSB might require from the SDT and the Law Society before approving any part of the SDT's Annual Budget Application.

SDT's Budget - the amount of money provided for the SDT to operate in a calendar year.

Statutory Procedure – the procedure contained in Section 46A of the SA.

3. The Respective Roles of the Parties

3.1 The LSB is responsible for overseeing legal regulators in England and Wales. It is independent of Government and of the legal profession. It oversees the "Approved Regulators" each of whom, together with the LSB must act in a way that is compatible with the eight regulatory objectives set out in the LSA and which it considers most appropriate in meeting those objectives.

3.2 At the date of this MOU the SDT is constituted as an independent statutory tribunal under the SA. Its primary duties are to protect the public and the good reputation of the solicitors' profession in exercise of its jurisdiction over solicitors, registered foreign lawyers, registered European lawyers, recognised bodies, persons employed or remunerated by solicitors and former solicitors and has the power, inter alia, to strike off, suspend or fine and, in the case of an unadmitted person, to order that his or her employment within the profession be restricted. It has power to restore a struck-off solicitor to the Roll, bring an indefinite period of suspension to an end and revoke an order made in respect of an unadmitted person. The SDT has the power to award costs. The SDT has power to hear and determine appeals under section 44E SA, paragraph 14C of Schedule 2 of the Administration of Justice Act 1985 and under Part 5 of the Legal Services Act 2007. Appeals against substantive decisions of the SDT lie to the High Court.

3.3 The administration of the SDT, including the management of financial resources, is conducted through the Administration Company which is a company limited by guarantee. The Administration Company is obliged to comply with the Companies Acts including the obligation to file audited annual accounts with Companies House.

3.4 The Law Society is the professional body for solicitors in England and Wales. The Law Society represents solicitors' interests, including through negotiation and lobbying of the profession's regulators, Government and others. The Law Society also offers training and advice to its members, and seeks generally to help, protect and promote solicitors across England and Wales. Under the LSA, the Law Society is an Approved Regulator, and is responsible for making the arrangements for the regulation of solicitors.

4. Core Principles

4.1 The parties agree that in fulfilling their respective obligations and duties under the Statutory Procedure, they will adhere to the following core principles:

- Mutual respect and trust – each party acknowledges the other parties' statutory basis and independence and their respective obligations and duties under the Statutory Procedure.
- Evidence-based approach – each party shall adopt an evidence-based approach in fulfilling their respective obligations and duties under the Statutory Procedure.
- Communication – the parties agree that they will use their best endeavors to ensure that they communicate meaningfully with each other in a manner which promotes an understanding of, and addresses, the other parties' respective concerns.
- Reasonableness – all parties will act reasonably in their dealings with each other.
- Timely information provision – the parties agree to provide information to each other in a timely manner to assist the other parties in complying with their respective obligations and duties under the Statutory Procedure.
- Confidentiality – each party shall respect the confidentiality of any information provided to it by another party.

5. The Agreed Procedure

Annual Budget Application

5.1 The SDT must submit an annual budget application each year to the Law Society, which has been approved by the LSB ("Annual Budget Application").

5.2 A budget for a year is a statement of the amount of money which the SDT estimates that it will require to meet all of its expenditure in the next calendar year (having regard to any amounts received but not spent).

5.3 The SDT shall submit its Annual Budget Application to the LSB and shall include the following:

- The amount of money being sought by the SDT to conduct its business in the following calendar year, specifying also a breakdown of the amount sought by such individual line items as may be appropriate under the following headings:
    - salary and related costs;
    - general administration costs;
    - building costs;
    - contingency;
    - irrecoverable VAT;
    - total costs.
- The factors that are determining the SDT's likely case load for the following year. This shall include consideration of the:
    - estimated case load the SDT may receive from the Solicitors' Regulation Authority;
    - estimated case load the SDT may receive from other sources (such as, cases being carried through from previous calendar years and enquiries and cases from sources other than the Solicitors Regulation Authority); and
    - estimated amount of time the SDT will require to consider its estimated cases.
- Explanation for individual line items of the amount of money being sought, including:
    - descriptions of what are included in the line items;
    - explanation for any variances over or under five per cent, or more than £10,000 in difference, between the current year's funding levels and the amount being sought; and
    - explanation for the addition or removal of any line items from the budget application as compared with the current year's budget.

- A comparison of the current year's actual expenditure with the current year's budget with explanation for any variances, for each line item, over or under five per cent or more than £10,000 in difference.
- The final out-turn of the previous year's budget following the format and the line item breakdown utilised when the Annual Budget Application for the current year was submitted in the previous year, including explanation for any variance over or under five per cent, or more than £10,000 in difference, between the previous year's year end out-turn and the previous year's budget.

5.4 In preparing its Annual Budget Application, the SDT shall share such information that it considers relevant, acting reasonably, with the Law Society and the Law Society shall be entitled to make reasonable requests for further information, which the SDT can consider reasonably.

Additional Funding Applications

5.5 Under the SA, the Law Society may pay the SDT such other amounts as the Law Society considers appropriate.

5.6 If the SDT considers that additional funding is required, it will submit an additional funding application ("Additional Funding Application") to the Law Society that shall include the following information:

- an explanation of the requirement for the additional funding;
- an explanation why the additional funding was not included in the Annual Budget Application;
- an analysis of what the likely impact of the non-approval of the additional funding will be if not approved; and
- when the SDT requires the additional funding to be approved and paid.

5.7 In preparing its Additional Funding Application, the SDT shall share such information that it considers relevant, acting reasonably, with the Law Society and the Law Society shall be entitled to make reasonable requests for further information, which the SDT can consider reasonably.

5.8 The Law Society will assess the Additional Funding Application and decide to

approve, all or part of, the funding sought as soon as reasonably practicable and in any event within 40 business days from the date when it received the Additional Funding Application, giving reasons for its decision.

5.9 In making its decision whether or not to approve the Additional Funding Application, the Law Society shall consider the LSB's views on the application.

5.10 Upon its approval, in whole or in part of the Additional Funding Application, the Law Society will pay the approved Additional Funding Amount to the SDT on a date as agreed between the SDT and the Law Society, and in any event not later than 60 business days from the date of such approval.

General

5.11 The Administration Company will provide its monthly management accounts to the Law Society by the end of the month following the month to which the monthly management account relates. The Law Society may seek clarification from the Administration Company on any matters with regard to the monthly management accounts.

5.12 The SDT will provide a preliminary estimate of the likely amount to be sought in its Annual Budget Application to the Law Society no later than 30th May of each year.

5.13 The SDT will prepare its Annual Budget Application and submit it to the LSB with a copy to the Law Society no later than 10th September in each year.

5.14 The SDT has developed annual Key Performance Indicators as part of a methodology to measure its performance. It intends to continue to develop its annual performance measures and will consult on any changes it proposes from time to time with the LSB.

5.15 The SDT will report to the LSB on its performance against its Key Performance Indicators in a calendar year by the end of February in the following year. The annual report in respect of 2013 shall be made by the end of February 2014.

6. Procedure for the approval of the SDT's Annual Budget Application

6.1 Upon receiving the Annual Budget Application, the LSB will assess it and decide whether to approve all, or part, of the estimated amount of funding being sought.

6.2 In upholding the core principles referred to in paragraph 4, the LSB will assess the Annual Budget Application on an evidence-based approach. For the avoidance of doubt, the LSB shall not approve, or shall only partially approve, the Annual Budget Application if it considers, acting reasonably, that it does not have sufficient information in respect of the matters referred to in paragraphs 5.3 and 5.15 (the "Required Information") to enable it to discharge its obligations under the Statutory Procedure and the LSA generally.

6.3 Under the Statutory Procedure, the LSB must consult the Law Society prior to making its decision whether or not to approve the Annual Budget Application.

6.4 If requested to do so by the LSB, the SDT and the Law Society will provide information to assist its understanding of the Annual Budget Application in a timely manner.

6.5 In making its decision, the LSB will advise the SDT and the Law Society the reasons for approving all, or part, of the estimated amount of funding being sought ("Approved Amount").

7. Payment of Funds

7.1 The Law Society will pay the Administration Company a quarter of the Approved Amount on each of 1st January, 1st April, 1st July and 1st October in each year, or as otherwise agreed with the SDT.

7.2 Should the Administration Company's expenditure prove to be lower than the funding sought the amount of the underspend may be deducted from the next due quarterly payment to be made to the Administration Company in the following year, or as otherwise agreed between the Administration Company and the Law Society.

8. List of Agreed Dates

- By 30th May – the SDT to provide its preliminary budget estimate to the Law Society.
- By 10th September - the SDT to submit its Annual Budget Application to

the LSB. The LSB to consult the Law Society on the Annual Budget Application, allowing no less than 28 days for comments.

- By 31st October - the LSB to approve the Annual Budget Application.
- By 30th November - the SDT to submit its approved Annual Budget Application to the Law Society.
- 1st January, 1st April, 1st July and 1st October - one quarter of the Approved Amount to be paid by the Law Society to the Administration Company on each of these dates, or as agreed between the Law Society and the SDT.

9. Contact points

9.1 Each party to appoint a person to serve as the official contact and to coordinate the activities of the parties to this MOU. The parties will notify each other immediately when there is any change in the appointed person and a list of contact details will be circulated each year.

10. Meetings

10.1 The parties will meet should any one party request this.

11. Effective date and review

11.1 This MOU may be amended only by the written agreement of all parties.

11.2 The parties will review this MOU every three years.

12. Signatures

David Edmonds

Chair

Legal Services Board

Date: 22/07/2013

Andrew Spooner

President

Solicitors Disciplinary Tribunal

Date: 23/7/2013

Andrew Spooner

Chairman

Solicitors Disciplinary Tribunal Administration Ltd

Date: 23/7/2013

Nick Fluck

President

The Law Society

Date: 23/07/2013

Annex A

Section 46A of the Solicitors Act 1974 as inserted by Paragraph 48 of Schedule 16 to the Legal Services Act 2007

46A Funding of the Tribunal

(1) The Tribunal must submit to the Society in respect of each year a budget for the year approved by the Legal Services Board.

(2) A budget for a year is a statement of the amount of money which the Tribunal estimates is required to enable it to meet all of its expenditure in that year (having regard to any amounts received but not spent in previous years).

(3) Before approving a statement for the purposes of subsection (1) the Legal Services Board must consult the Society.

(4) The budget for a year must be submitted to the Society under subsection (1) no later than the date in the preceding year specified by the Society for the purposes of this subsection.

(5) Before specifying a date for this purpose the Society must consult the Tribunal.

(6) The amount specified in a budget submitted under subsection (1) must be paid by the Society to the Tribunal—

(a) in such instalments and at such times as may be agreed between the Society and the Tribunal, or

(b) in the absence of such agreement, before the beginning of the year to which the budget relates.

(7) The Society may pay the Tribunal such other amounts as the Society considers appropriate.

(8) In this section "year" means a calendar year.

LEGAL SERVICES BOARD

Compliance and Enforcement: Statement of Policy

Decision document on compliance and enforcement strategy and Statement of Policy on enforcement powers

10 December 2009

Contents

1. Executive Summary

1.1. The Legal Services Board (the "**LSB**") was created by the Legal Services Act 2007 (the "**Act**") and is responsible for overseeing legal regulators, (referred to as the Approved Regulators in the Act) in England and Wales. The LSB's mandate is to ensure that regulation in the legal services sector is carried out in the public interest and that the interests of consumers are placed at the heart of the system.

1.2. The Act gives the LSB and the Approved Regulators the same Regulatory Objectives and a requirement to have regard to the Better Regulation Principles.

1.3. The Act requires the LSB to make a Statement of Policy about how it will use the enforcement powers that the Act gives it. We are also required to set the maximum financial penalty that we can impose on an Approved Regulator.

1.4. In August 2009 we consulted about what should be in our Statement of Policy, at what level we should set the maximum financial penalty and the content of our enforcement rules generally; the consultation closed in October. This Document sets out our Statement of Policy and explains how we have considered the main points raised in response to the consultation and the changes we consider it appropriate to make in the light of those responses.

1.5. Our starting point throughout is that we expect to work in partnership with the Approved Regulators to achieve the Regulatory Objectives. Given that those objectives are shared between us, we expect questions of statutory enforcement to arise only rarely.

1.6. When such questions do arise, our priority will be to ensure that corrective action is taken rapidly to return the Approved Regulator concerned to compliance. Our first approach is therefore likely to be to seek to reach agreement informally on the necessary action and to monitor its implementation closely.

1.7. However, the Act envisages that there may be circumstances when a wider range of sanctions are necessary to ensure proper protection of the public and to minimise risk to the Regulatory Objectives. The Statement of Policy in Section 2 of this Document therefore sets out how we would use our powers in a proportionate way to ensure that Approved Regulators discharge their obligations.

2. Section 49(1) of the Legal Services Act 2009: Statement of Policy

2.1 This Statement of Policy sets out the way in which the LSB will exercise the enforcement functions given to it by the Act. It also explains the approach we are likely to take to enforcement and how we will conduct our investigations, including how we will gather evidence and information in order to inform our decisions.

2.2 As an oversight regulator the LSB's focus will be on the activities of the Approved Regulators [1]. We will be concerned particularly with the outcome that Approved Regulators' activities have on consumers and those who are regulated.

2.3 The LSB must make certain rules about aspects of its enforcement functions. These are included as Annexes to this Document and are cross-referenced in the relevant Sections. Where the Act allows the making of oral and/or written representations in relation to the LSB's enforcement functions, the rules applying to them are at Annex 1.

Background

2.4 The Act provides the LSB with a range of enforcement tools that it can use when it identifies that:

- an act or omission by an Approved Regulator has had or is likely to have an adverse impact on one or more of the Regulatory Objectives;
- an Approved Regulator has not complied with any requirement under the Act (including a direction by the LSB) or any other enactment;
- an Approved Regulator has failed to ensure its regulatory functions are not prejudiced by its representative functions;
- an Approved Regulator has failed to ensure that decisions relating to the exercise of its regulatory functions are, so far as reasonably practicable,

[1] For the avoidance of doubt, other than cancellation of designation as an Approved Regulator, this Statement of Policy will also apply to the way in which the LSB will, in due course, exercise its enforcement powers against Approved Regulators in their capacity as Licensing Authorities for Alternative Business Structures. The LSB is consulting separately on its Statement of Policy on the cancellation of designation as a Licensing Authority.

taken independently from decisions relating to the exercise of its representative functions; and/or

- an Approved Regulator has failed to comply with practising fee or internal governance rules.

2.5 The Act says that the LSB must make a Statement of Policy about the exercise of its enforcement powers of:

- performance targets and monitoring;
- directions;
- public censure;
- financial penalties;
- intervention directions; and
- cancellation of designation as an Approved Regulator.

2.6 An overview of these enforcement powers in diagrammatic form is set out at Annex 7.

2.7 The Act also obliges the LSB to make a Statement of Policy about the cancellation of designation of a body as a Licensing Authority. The LSB is consulting separately on this Statement of Policy.

2.8 In preparing this Statement of Policy, the LSB has:

- had regard to the principle that its principal role is the oversight regulator of the Approved Regulators;
- taken into account the desirability of resolving informally matters which arise between the LSB and an Approved Regulator;
- specified how we will comply with the requirement to be proportionate, consistent, targeted only at cases where action is needed, etc; and
- had regard to the principle that it should only exercise its enforcement power if the act or omission of an Approved Regulator was unreasonable.

The LSB's approach to compliance and enforcement action

2.9 The LSB's approach to compliance and enforcement is to seek to achieve an appropriate balance between informal and formal action, based on best practice. We consider that this will enable us to improve regulatory performance by the Approved Regulators so that:

- consumers are more confident in accessing the legal services market and can make better informed decisions about purchases; and
- cultures and systems of quality assurance are embedded throughout the legal services sector to give consumers confidence in the services they purchase.

2.10 We want the public, as consumers and citizens, to be confident that their advisors are proportionately regulated by bodies which, as we set out in our Business Plan for 2009-10:

- keep constantly modernising and updating registration and education requirements to reflect changing social and consumer needs and promote diversity in, and wider access to, the profession;
- maintain and enhance standards of professional conduct in the light of changing circumstances and best practice elsewhere;
- ensure that robust and independent systems of quality assurance are in place;
- themselves monitor and, where necessary, take appropriate enforcement action to ensure that professional standards are put into action at ground level; and
- are accessible and responsive to concerns put to them.

2.11 We also want to ensure that those who provide regulated activities (now and in the future) are confident that their regulators are:

- proportionate and consistent in their decision making, monitoring and enforcement activities;
- well-governed and cost-effective; and
- up to date in their professional thinking and management practice.

Considerations of unreasonableness

2.12 This Section of the Policy Statement expands materially on the test for unreasonableness that the LSB will use compared to its consultation document which did not offer an interpretation of the unreasonableness test.

2.13 In deciding whether it is appropriate to exercise its formal enforcement powers, the LSB must have regard to the principle that it should only use them if the act or omission of the Approved Regulator was unreasonable. In most circumstances it is unlikely that the LSB would consider an act or omission to be unreasonable merely because we would have acted differently. We will, where appropriate, consider the rationale for the act and omission by the Approved Regulator and encourage a review of the situation if we consider, for example, that all options have not been fully explored or the views of consultees were not properly weighed. That, however, is not the same thing as substituting one view for another.

2.14 However, the LSB does not consider that it has to satisfy the public law test of Wednesbury unreasonableness in order to conclude that an act or omission was unreasonable.

2.15 For example, the LSB might consider that an act or omission was unreasonable if it was carried out by an Approved Regulator, notwithstanding that the Approved Regulator knew (or could be expected to know) that the act or omission was likely to have an adverse impact on one or more of the Regulatory Objectives. In reaching a conclusion that the act or omission of the Approved Regulator was unreasonable, the LSB would consider all the circumstances of the case which would include reasons and evidence from the Approved Regulator and/or others.

The Enforcement Process

2.16 The subsequent sections describe the process that the LSB will in general follow when dealing with enforcement issues. Where required to do so by the Act, the LSB will, in the first instance use its judgement to decide if an act or omission (or a series of them) by an Approved Regulator has breached, or is likely to breach on one or more of the conditions specified . In doing it will take account of the evidence available to it which is likely to come from many different sources including Approved Regulators, other stakeholders and consumer research. As explained in paragraphs 2.25 – 2.33 below, it will then decide whether to seek to resolve the issues informally in the first instance.

2.17 In the event that such an attempt at informal resolution fails or is inappropriate in given circumstances, the LSB may then determine that it is satisfied that the conditions set out in the Act have been met for it to exercise its formal enforcement powers. Part of this process will be consideration of whether that the act or omission of the Approved Regulator was unreasonable. It will also consider whether it would be proportionate and consistent to exercise one of the enforcement powers.

2.18 In some circumstances, the LSB must satisfy itself that its less onerous enforcement powers will not adequately address the matter before it uses its more onerous enforcement powers. In addition financial penalties can only be used in certain circumstances. However the Act places requirements to only use financial penalties in certain circumstances and to ensure that less onerous enforcement powers will not "adequately address" a matter before using more onerous ones but does not otherwise prohibit the LSB from using combinations of enforcement powers. In the event that we decide to take formal enforcement action, we will consider whether a combined approach is the best means of achieving compliance. In order to ensure the rapid mitigation of risks to consumers and citizens, it may well be appropriate to institute a range of measures at an early stage, rather than progress step-by-step. However, our approach will always be proportionate and we will always explain why we have chosen a particular approach. Where we choose to consider the exercise of two or more enforcement powers together then we will ensure that the process that we follow prior to exercise of the power(s) complies with the requirements specified in the Act for all of the enforcement powers that we are considering.

Monitoring and information gathering

2.19 This section does not differ materially from the consultation document.

2.20 The LSB expects to gather information about Approved Regulators from a number of different sources, including as part of its day to day work. The LSB will normally consider if data gathered for one purpose (such as practising fee approval or rule change applications) may also be relevant to another purpose (such as assessing compliance with Section 28 or the Regulatory Objectives). A non exhaustive list of examples of the sources include:

- admission of non-compliance by act or omission (e.g. by failing to publish adequate data) by the Approved Regulator by proactive notification to the LSB;

- information from other Approved Regulators or stakeholders;

- outcomes from the review process that the LSB intends to develop to assess the performance of the Approved Regulators[2];
- issues that arise in discussions with Approved Regulators;
- information from the regulated community or other stakeholders;
- identification of issues through research and analysis;
- information from the Office of Legal Complaints (the "**OLC**"); and
- concerns raised by the Consumer Panel.

2.21 The LSB will assess the information available and come to a decision about whether to proceed with informal or formal action. If it needs more information it may use its formal information gathering powers[3] to obtain it. Alternatively, if it is appropriate to do so, it will continue to gather information on an informal basis.

2.22 The LSB will always take into account relevant information and evidence that it receives during its consideration of whether or not to pursue an issue, and if it does the type of action that is appropriate. However, in the event that there is insufficient or contradictory information, we will use our judgement as to the best course of action.

2.23 Once the LSB considers it has all the information it needs (or it is practical to obtain), the LSB will decide whether (and if so what) action is appropriate. In doing so, it will take into account some or all of the following:

- the actual or potential adverse impact on one or more of the Regulatory Objectives (which include the Professional Principles)[4], and the impact of that impact;

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[2] See the LSB's Business Plan 2009-10 at Section 5D
[3] See Section 55 of the Act
[4] Section 1(3) of the Act states that the Professional Principles are:
(a) that authorised persons should act with independence and integrity;
(b) that authorised persons should maintain proper standards of work;
(c) that authorised persons should act in the best interests of their clients;
(d) that persons who exercise before any court a right of audience, or conduct litigation in relation to proceedings in any court, by virtue of being authorised persons should comply with their duty to the court to act with independence in the interests of justice;
(e) that the affairs of the client should be kept confidential.

- this Statement of Policy;
- its position as an oversight regulator and its duties under the Act;
- best regulatory practice including the requirement that its activities must be proportionate, consistent, transparent, accountable and targeted only at cases in which action is needed;
- whether it considers that the Approved Regulator's act or omission has been unreasonable through being for example:
    - a contravention of a requirement in the Act or other statutes (such as competition law) including a failure to act compatibly with Section 28 of the Act or with the Regulatory Objectives;
    - a failure to have regard to the Better Regulation Principles or other best regulatory practice;
    - an act or omission which has taken place over a long time or which is part of a series of the same or similar actions or which appears to be deliberate or vexatious or which follows a failure to resolve the matter informally in a way that the LSB considers satisfactory;
- the seriousness of the act or omission and the impact (or likely impact) of it on consumers and those being regulated);
- the desired outcome for consumers of taking action and whether that outcome is likely to be significantly beneficial compared to the impact of not taking action;
- the likely impact on those being regulated by the Approved Regulator and the likely impact on the wider provision of legal services;
- whether the resource requirements needed are proportionate to achieving the desired results;
- whether it has previously taken informal or formal action over the same or similar issues; and
- any other matters that it appears appropriate to take into account.

2.24 If the LSB decides that the matter should be pursued it may:

- seek to resolve the matter informally with the Approved Regulator; or
- pursue one or more of the other enforcement powers.

Informal resolution

2.25 This Section of the Statement of Policy differs materially from the consultation document and explains in more detail how the LSB will resolve matters informally.

2.26 The LSB must, in preparing this Statement of Policy, take into account the desirability of resolving informally matters that arise between the LSB and the Approved Regulators. This Section sets out how we are likely to approach that requirement.

2.27 The LSB will always consider whether it is appropriate, in the circumstances of the case, to resolve matters informally and will usually seek to do so before considering more formal intervention.

2.28 We recognise the importance of considering whether it is appropriate to resolve matters informally. If an informal approach is successful, it is likely to lead to quicker resolution of the particular issue and impose lower costs on the LSB, Approved Regulators and others. The Act does not require us to come to a view on whether an Approved Regulator's act or omission is unreasonable before deciding to pursue informal resolution. That requirement only applies when we are considering whether to use one of the formal powers.

2.29 However, we recognise that an informal approach may not be appropriate in all cases. For example if the impact of the issue is immediate, serious and/or widespread or in other circumstances that the LSB considers are not suitable for informal resolution because, in its judgement, they are not compatible with the delivery of the Regulatory Objectives.

2.30 The LSB does not consider that the Act requires it to seek an informal resolution before commencing a formal enforcement process. If the first attempt at informal resolution does not achieve an outcome that, in the LSB's judgement, is appropriate, then the LSB will consider what further action it should take. In doing so, it may seek further information from the Approved Regulator or others or take further informal measures, but is not compelled to do so. The approach adopted will depend on the circumstances of the individual case.

2.31 However, if the LSB decides that it is appropriate to take formal enforcement action it will always be open to the Approved Regulator to propose a way to achieve compliance or to present fresh evidence that could not reasonably

have been made available earlier to demonstrate that a breach had not occurred. Making such a proposal does not fetter the LSB's discretion to continue with enforcement action but the Approved Regulator's actions in proposing to achieve resolution are likely to be taken into account by the LSB in deciding whether, and if so what, further action is needed.

2.32 In taking account of the desirability of resolving informally matters which arise between the LSB and an Approved Regulator, the LSB will comply with the requirement to ensure that its actions are transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed. In undertaking the informal resolution route, the LSB anticipates that all communications will be made public except in exceptional circumstances. This will assist in ensuring that the LSB is accountable for its activities and that consumers and others understand the reasons for its approach in each particular case. Our approach to informal resolution will be proportionate to the circumstances of the particular case, but, in doing so, we will have regard, where it is relevant to do so, to other experiences of informal enforcement action.

2.33 The timescale for resolving matters informally in general will depend on the circumstances of the case. We will ensure that any timescales agreed are proportionate to the circumstances in question and, in particular, are sufficient so as to mitigate any detriment persons affected by the issue may suffer. As a guide, we will normally expect an Approved Regulator to follow the timescales below when dealing with a matter informally:

- acknowledgement of the notification within 4 working days and including in the acknowledgement a time line for assessment of the issue within 20 further working days; and

- a resolution of the issue or a detailed proposal for remedying the issue being provided within what the LSB considers to be a reasonable time, to be provided to the LSB within the assessment time line.

Performance targets and monitoring (Section 31 of the Act)

2.34 This section does not differ materially from the consultation document.

2.35 The LSB is likely to use performance targets and monitoring when an investigation by the LSB has identified the need for action to improve performance and raise standards. They are likely to be used when an Approved Regulator is failing or is likely to fail in a specific area with a clear impact (or likely impact) on the Regulatory Objectives. This form of enforcement may be combined with or precede other forms of enforcement.

For example the greater certainty of delivery given by a direction may be necessary to underpin a target.

2.36 We will always seek to gain agreement by the Approved Regulator to performance targets and monitoring. However where this is not possible and where merited under the conditions specified in Section 31 we will impose performance targets on an Approved Regulator. Any performance target will need to be transparent – by this we mean its intention is clearly understood and its measurement is not disproportionately costly. It will need to be consistent with any other performance targets we have imposed to the extent that the cases are comparable.

2.37 The LSB will always consider the facts of the case as to whether it is appropriate to combine this form of enforcement with other enforcement powers. In general we will take a combined approach where we believe that amore effective route to compliance is needed since this approach is likely to deliver the the achievement of the desired outcomes. It would also enable more certain escalation (if appropriate) to more severe forms of enforcement such as a intervention because failure to deliver performance targets would be evidence that the measure had not delivered the required change in performance.

Directions (Section 32 of the Act)

2.38 This section does not differ materially from the consultation document.

2.39 The LSB is likely to use directions when it wants to ensure that specific actions are carried out by an Approved Regulator in order to rectify an act or omission (including a failure to comply with the Act or with law generally) that has been identified. Directions may be combined with other enforcement tools and may precede other forms of enforcement action. For example, where an Approved Regulator does not deliver the requirements of the direction, it will be open to the LSB to pursue imposing a financial penalty where it is appropriate to do so.

2.40 Where it is appropriate to do so, we will consider all the circumstances of the case to judge whether it is appropriate for the Approved Regulator to be directed to spend money on a particular issue in order to, for example, benefit consumers and/or those being regulated.

2.41 In seeking to direct an Approved Regulator to spend money or take a particular set of actions we will ensure that that we have acted proportionately. For example, where it is reasonable to do so, we will take into account the other operational costs of an Approved Regulator in a particular year before setting what must be delivered under a direction. We will endeavour to ensure

that any direction we set is clearly understood by the Approved Regulator to ensure that it achieves its aim. In setting a direction we will have regard, where it is relevant to do so, to the experiences of setting directions during other enforcement action. Our use of directions will be based our actions on evidence of regulatory failure and placed the reasons for our actions in the public domain.

Censure (Section 35 of the Act)

2.42 This section does not differ materially from the consultation document.

2.43 Censure is likely to be used (either on its own or combined with other forms of enforcement) to draw particular attention to the act or omission by the Approved Regulator. The LSB would always take into account, both in using censure and in its general provision of information about enforcement proceedings, the possible perceptions that consumers, potential market entrants and those being regulated would be given, recognising that some forms of publicity may damage confidence in regulation and so lead to less satisfactory outcomes. However, the LSB strongly believes that one of the aims of its compliance powers is to ensure that confidence is maintained in the legal services market. Providing consumers with clear evidence that steps are being taken to address consumer detriment is part of that process.

2.44 The aim of the censure statement is to change the behaviour of the Approved Regulator. In general, organisations value their reputation and the censure will identify failures of performance. The LSB believes that used appropriately censure can act as a catalyst for a change in behaviour that leads to improved performance of an Approved Regulator.

Financial Penalties (Section 37 of the Act)

2.45 This Section does not differ materially in terms of the LSB's approach to using financial penalties. However, the level of the maximum has change significantly from the original proposal and this is explained in detail at paragraphs 4.32 of Section 4.

2.46 The Act allows the LSB to impose a financial penalty when an Approved Regulator fails to comply with: (i) internal governance rules, (ii) a direction by the LSB or (iii) practising fee rules. Financial penalties are likely to be used when, in the LSB's judgement, it is appropriate to impose one to seek to change the unreasonable behaviour of the Approved Regulator by penalising the specific act or omission that has been identified. A further aim is to deter future non-compliance by the Approved Regulator on which the penalty is imposed and on other Approved Regulators. A financial penalty will only be imposed in serious circumstances and the aim will be to set the level such that

it is likely to give consumers and those being regulated confidence that issues which cause them detriment will be dealt with by the regulatory regime.

2.47 The LSB believes that it is important that those who pay for the Approved Regulator through their practising fees should be able to influence the Approved Regulator's behaviour, including its approach to compliance. Even if this is not currently possible, it may be that, over time as new Approved Regulators are designated, the threat of those it regulates being able to switch to another Approved Regulator starts to influence Approved Regulator behaviour and its approach to compliance. It is likely, therefore, that the LSB will consider it reasonable in the circumstances that the members of an Approved Regulator may have to pay (at least in part) for their Approved Regulator's failure to comply. If there is more than one Approved Regulator for a reserved legal activity and the authorised person can therefore switch to another Approved Regulator, this approach may also provide an incentive to Approved Regulators to improve their compliance. As explained in paragraph 2.18 above, the LSB may consider that it is appropriate to impose a financial penalty at the same time as using its other enforcement powers.

Maximum financial penalty

2.48 The LSB considers that, to act as a credible deterrent, the maximum penalty has to be able to have a significant impact on the Approved Regulator. A high maximum level gives a regulator the flexibility to exercise its discretion and judgement in setting a penalty in a way that enables it to take into account the likely wide variation in the outcomes of investigations that it will encounter.

2.49 It is not the objective of the LSB to impose penalties which have the effect of making it impossible for an Approved Regulator to fulfil its regulatory functions. We would therefore regard any attempt by an Approved Regulator to pay a penalty in a way which had such an impact as, of itself, raising issues in relation to compliance with internal governance rules.

2.50 If the LSB is investigating a number of breaches by an Approved Regulator as separate investigations (for example one investigation into a breach of directions concerning internal governance rules and a separate investigation into a breach of rules controlling practising fees), it may be appropriate for each investigation to impose a separate penalty, in each case of up to the maximum amount.

Process for setting a penalty

2.51 The LSB will be guided by the principles of better regulation when it uses its reasonable discretion and judgement in setting the level of a financial penalty. However, the LSB does not consider that it is appropriate to set out in

advance the exact mechanism by which it will decide on the appropriate level of a penalty since this is likely to vary on a case by case basis and a prescriptive approach is unlikely to be able to be applied in all cases.

2.52 The LSB will consider whether there are any aggravating factors when it sets the level of the penalty. Aggravating factors it may consider could include (but not be limited to) the seriousness of the failure, the extent to which it was deliberate or reckless[5], the impact on consumers and whether the actions have resulted in an actual or potential loss to anyone (for example by preventing them from participating in certain types of business opportunities), the duration of the act or omission and whether there was a lack of co-operation by the Approved Regulator with the LSB's investigation.

2.53 The LSB will also consider whether any mitigating factors should reduce the level of penalty. These could include (but not be limited to) whether the failure was accidental in nature or the result of a genuine misunderstanding, the presence of good controls or procedures, and the extent of impact on the Regulatory Objectives, the professional principles and consumers, co-operation by the Approved Regulator with the investigation, whether directions have been issued that require the Approved Regulator to spend money on a particular issue, and whether there were any genuine proposals by the Approved Regulator to resolve the matter during the course of the investigation.

2.54 Finally, the LSB will consider whether, in all the circumstances, the amount of the proposed penalty is reasonable, again guided by the principles of better regulation. In doing this, it will take into account the resources of the Approved Regulator. The LSB will also check that the proposed penalty does not exceed the maximum amount.

Intervention Directions (Section 41 of the Act)

2.55 This section does not differ materially from the consultation document.

2.56 The LSB regards the use of intervention directions (with the related powers to enter premises under warrant and seize documents) as an extreme measure which will only be used in serious circumstances relating to the Approved Regulator's regulatory functions where none of the other enforcement measures are adequate to address the matter. These circumstances are likely to be where there has been a serious and persistent act or omission by the Approved Regulator that has had or is likely to have an adverse impact on

[5] See Section 49(5) of the Act

one or more of the Regulatory Objectives. Intervention directions may also be used if, for whatever reason, the Approved Regulator faces a risk to its organisational viability which puts in jeopardy the continuing effective discharge of its regulatory functions. It is also likely that the act or omission would be having (or be likely to have) a demonstrable harmful impact on consumers and/or those regulated by the Approved Regulator. It may also be appropriate to use this power if an Approved Regulator became insolvent.

2.57 The aim of using intervention directions would be, to the extent necessary, to stop the Approved Regulator from behaving in the harmful manner which has been identified, to obtain any documents that would be necessary for the person who is either tasked with directing the Approved Regulator's behaviour or who would be given the Approved Regulator's former functions to carry them out effectively and to prevent further adverse impact on the Regulatory Objectives.

2.58 Before issuing an intervention direction the LSB will have carefully assessed that this is a proportionate response. It will have considered all the circumstances of the case and ensured it had the necessary evidence to demonstrate that issuing an intervention was a reasonable response. In issuing an intervention direction the LSB will have regard, where it is relevant to do so, to the experiences of using intervention directions during other enforcement action it has taken.

2.59 An intervention direction can be revoked by the LSB following a request by the Approved Regulator. In considering whether to revoke the intervention direction the LSB will take into account all the relevant information and evidence that it has, including the views of those it must consult (including the Office of Fair Trading and the Consumer Panel).

2.60 The rules that the LSB must make on intervention directions are at Annex 3; those concerning revocation of an intervention direction are at Annex 4. The rules about making representations in relation to this power are at Annex 1.

Cancellation of designation as an Approved Regulator (Section 45 of the Act)

2.61 This section does not differ materially from the consultation document.

2.62 An Approved Regulator's designation can be cancelled in relation to one or more of the reserved legal activities that it regulates. The cancellation can be effected either following a request by the Approved Regulator, or as a result of enforcement action by the LSB. This Statement of Policy only refers to cancellation as a result of enforcement action by the LSB, However the LSB

has, as required by the Act, made rules about the process of cancellation following a request by an Approved Regulator; these are at Annex 5.

2.63 As with intervention directions, the LSB regards a decision to recommend cancellation of an Approved Regulator's designation as extremely serious. It will only be used in exceptional circumstances when the LSB is satisfied that none of its other enforcement powers would adequately address the issues,. In using this power, the LSB's aim would be to try to ensure as smooth a transition as possible to the new body taking over regulation of the former Approved Regulator's members. The LSB would also try to ensure appropriate provision of information to the public in order to reassure consumers about those providing legal advice to them.

2.64 The LSB's rules about cancellation of designation as a result of enforcement action are at Annex 6. The rules about the way in which representations can be made about a proposed cancellation are at Annex 1.

3. The LSB's Consideration of Responses to its Consultation on its Enforcement Policy Statement

Introduction

3.1 This Section of the Document sets out:

- details of the responses that the LSB received to its consultation on its Enforcement Policy Statement; and

- a statement made in accordance with Section 50(4) of the Act as to the material difference between the Enforcement Policy Statement contained in the original consultation document and the Policy Statement set out in Section 2 of this Document.

3.2 Section 4 sets out details of the responses that the LSB received to its consultation on its Enforcement Rules. **This section does not form part of the LSB's Statement of Policy**.

The LSB's approach to compliance and enforcement

Main issues raised by respondents

3.3 Several respondents agreed with the proposed compliance and enforcement strategy. One respondent said that it was reasonable and fair in its approach. Other respondents did not agree. Some respondents said that the strategy as it was currently drafted suggested that the LSB had prioritised the Regulatory Objectives. One respondent said that this approach amounted to the LSB imposing this view on the Approved Regulators which was inappropriate within the scheme of the Act. Another respondent said that they were not convinced that it was appropriate for the LSB to use its enforcement strategy as a means of imposing particular practices on an Approved Regulator because this set the level at which the LSB could intervene and seek to use its enforcement powers at too low a level. Another respondent said that the LSB had had regard to the fact that it is an oversight regulator in preparing the draft policy statement. One respondent welcomed the recognition of consumer outcomes as the main focus in the delivery of the compliance and enforcement strategy.

3.4 One respondent said that the approach to compliance and enforcement should encourage an open approach where problems could be addressed collaboratively. Another respondent said that it was inappropriate to compare

legal regulators with commercial profit making organisations such as utility companies. Consequently the LSB had not justified the approach to using its enforcement powers. One respondent said that in determining the reasonableness of an Approved Regulator's acts or omissions it was important to view any failure to adhere to the principles of better regulation as a particularly important trigger for enforcement action.

The LSB's response

3.5 The full Statement of Policy in Section 2 sets out how the LSB will use its enforcement powers. This includes our approach to resolving matters informally, the maximum financial penalty and how we will apply the test for unreasonableness.

Informal resolution

3.6 In preparing its Statement of Policy, the LSB is required by the Act to take account of the desirability of resolving informally matters which arise between the LSB and an Approved Regulator.

Main issues raised by respondents

3.7 Most welcomed the requirement to consider the desirability of using an informal route. One respondent said that it should be particularly supported where it was likely to result in a satisfactory outcome for consumers more quickly than the formal process might bring. Some respondents suggested that the LSB needed to place more emphasis on the role of the informal resolution process in its enforcement policy statement. One respondent said that the informal route should always be explored first except where urgent action was needed to "avoid an imminent risk of substantial damage to the regulatory objectives". Several respondents believed that in the event of informal enforcement action the LSB should make a decision whether or not to publish information about the event on a case by case basis. Some respondents expressed concern about the timescales proposed for the informal approach particularly for small organisations. Others said that an informal approach should not be constrained by timescales. There was a wide range of opinions regarding the appropriateness of publishing information about the outcome of the resolution of informal enforcement action. Several agreed that the approach should be always to publish except in certain, exceptional circumstances. Others suggested that confidentiality was an important incentive in gaining informal resolution – especially since the LSB is likely to publish all relevant documentation in other types of enforcement action. Several respondents recognised that there was likely to be benefit from sharing information about informal resolutions.

The LSB's response

3.8 We recognise that it may be quicker to resolve a matter informally and consider that it is helpful for the LSB and Approved Regulators to put a timescale around doing so in order to ensure that the informal process is not used to prolong satisfactory resolution of an issue. However we recognise that each matter under consideration is likely to be different and we will need to be flexible in determining the most appropriate timescale for resolving matters informally. It remains the view of the LSB that while it will generally be preferable to use the informal route as a means of resolving enforcement issues, this may not be the most appropriate route in all circumstances, in particular if the issue being considered is immediate, serious and/or widespread or in other circumstances that the LSB considers are not suitable for informal resolution because, in its judgement, they are not compatible with the delivery of the regulatory objectives..

3.9 We will always explain why we have taken a particular course of action. Learning from the process of informal resolution should help to inform the LSB's judgement – and others' understanding of our approach – for subsequent cases and we therefore consider that except in cases that we consider to be exceptional we should put all communication in the public domain. This is in line with Freedom of Information principles and also the principles of better regulation since it encourages accountability and transparency.

Monitoring and information gathering

Main issues raised by respondents

3.10 One respondent suggested that the information gathered from the sources that the LSB expects to use could be employed for more constructive purposes than those identified in the consultation document. This respondent also suggested that there was a presumption that if more information was needed then the formal route would be adopted when it would be more logical to use other routes. One respondent suggested that there should be more detail about different information strands that the LSB might use and how it might use them. The Consumer Panel welcomed its inclusion in the list of agencies to be included as an information source, as well as other consumer agencies. One respondent suggested that the final policy statement should also refer to the information gathering powers of the Office of Legal Complaints and how they will interact with those of the LSB. One respondent said that the list of matters to be taken into account by the LSB when considering the information it needs, while broad, were not sufficient to take

account of the appearance of new regulatory risks or equality and diversity issues.

LSB's response

3.11 We will, where it is appropriate to do so, seek to use informal means of gathering information. However the Act recognises that this may not always be possible or it may be the case that an Approved Regulator refuses to provide information on a voluntary basis. Where we consider it is appropriate to do so, we will use our formal information gathering powers provided by Section 55 of the Act. Creating and maintaining a list of how we will use different forms of information is likely to be an inefficient use of resources since each enforcement event is likely to be very different and information will be used in different ways however we recognise that we need to be clear and open at the time of collecting information about what purposes the information will or might be being put to and whether such use will be confidential or public and attributably or non attributably sourced in order to be fair to the people from whom we are collecting the data. We agree with the statement about the need to ensure that we understand how our own information gathering powers interact with those of OLC including under Section 152(3)(b) of the Act which allows the OLC to disclose restricted information to the LSB for the purpose of enabling it to exercise any of its function and we anticipate that this will be included in the Memorandum of Understanding between us. We consider that the list of what the LSB will need to take account of in considering if it is appropriate to take enforcement action and, if it is, what type of enforcement action to take, covers the issues of equality and diversity (under Regulatory Objective (f) – see Section 1(1)(f) of the Act) and the issue of the appearance of new regulatory risks (as a consequence of our functions as an oversight regulator).

Performance targets and monitoring

Main issues raised by respondents

3.12 In general respondents viewed performance targets as one of the most positive enforcement measures available to the LSB. One respondent suggested that the aim should be to arrive at performance targets through consensus and collaboration. Being able to do so would be likely to avoid the need for quicker routes to compliance. Respondents provided advice as to how performance standards should be structured. Ideas included that they should avoid being prescriptive, take account of available resources, be easily measureable, clearly defined and achievable. One respondent raised the wider issue of on-going performance management so that problems could be identified at the earliest opportunity. There were mixed views about whether or

not performance standards should be used in combination with other enforcement tools. One respondent said that it was possible while another said that it should be rare that the LSB needs to use a combination of its enforcement tools.

The LSB's response

3.13 We recognise that it would be beneficial if performance targets and monitoring could be agreed between an Approved Regulator and the LSB. However, this may not be possible in all circumstances. Therefore it remains appropriate for the LSB to be able to impose performance targets in cases where agreement cannot be reached and to monitor their implementation. We will ensure that any performance targets have regard to the principles of better regulation.

Directions (Section 32 of the Act)

Main issues raised by respondents

3.14 Several respondents suggested that directions formed part of a hierarchy of the LSB enforcement tools. Some respondents expressed concern that the LSB might require an Approved Regulator to spend money in a particular way. One respondent suggested that directing funds to be spent in a particular way was no guarantee that it would be used effectively. Another said that directions should prescribe what needed to be achieved rather than directly requiring money to be spent. Being too prescriptive in setting a direction may act as a barrier to more innovative and efficient solutions. Some concern was expressed about the ability to budget for a direction to spend money mid-year and the impact it might have on existing activities. There was a general view that directions were a more positive enforcement tool for the LSB particularly if it was used as a means of restoring the harm caused to consumers. Some respondents said that it would be most appropriate to use directions in the event that an Approved Regulator unreasonably withheld budget from its regulatory arm. Some respondents expressed the view that the LSB would not be able to issue a direction where there was a difference of policy view between the two organisations, only in the event that the Approved Regulator had acted unreasonably.

The LSB's response

3.15 It remains the view of the LSB that, except in relation to financial penalties, the enforcement tools provided to us by the Act do not form a sequential hierarchy, although we recognise that before we use some of the powers we must be satisfied that the matter cannot be adequately addressed using the alternatives. We believe it is appropriate for the LSB to be able to consider

whether or not a combined approach (for example using performance standards with a direction) is the best means of restoring compliance. It may also be appropriate, subject to the restrictions in Section 37 of the Act, in the circumstances of a particular case, to move directly to a financial penalty.

3.16 In deciding whether to issue directions, we will consider the circumstances of the case and whether it is appropriate to direct an Approved Regulator to deliver a particular outcome or whether the LSB should specify that a particular amount of money should be spent. We will take into account when setting a direction the circumstances of the case and apply the principles of better regulation in arriving at the most appropriate outcome. We may also take into account the impact any enforcement activity may itself have on the Regulatory Objectives.

Censure (Section 35 of the Act)

Main issues raised by respondents

3.17 Most respondents viewed the tool of censure as one to be used only in the most serious circumstances. Respondents recognised the serious impact that carrying out a censure would likely have on an Approved Regulator. Some said that censure could undermine consumer confidence in the Approved Regulator and the legal system as a whole. Some viewed censure as one of the more negative enforcement tools in that in of itself it did not bring change or resolve compliance failures.

The LSB's response

3.18 We do not believe, if used appropriately, that the tool of censure will undermine confidence. Rather, we believe that it will give more confidence in the regulatory system that in the event of a compliance failure action is being taken to address the problem.

Financial Penalties (Section 37 of the Act)

Main issues raised by respondents

3.19 Several respondents said that the aim of the financial penalty should be to act as a deterrent for the individual Approved Regulator or the regulated community as a whole against future non-compliance. One respondent said that the public sanction from levying the penalty had a greater impact on changing behaviour than the amount of the penalty. Most respondents said that there was limited if any choice currently for approved persons to switch their Approved Regulator. The threat of switching could not then function as an incentive to Approved Regulators to improve compliance. One respondent

suggested that this could be misinterpreted as permission for a representative controlled regulator to improperly influence the regulatory arm's discharge of its duties through control of resources. Another respondent suggested that impact of a high maximum penalty would be to put an Approved Regulator out of business which it said was inappropriate. Two respondents said that the aim of the penalty should be to give consumers confidence in the regime. A respondent said that the aim of the financial penalty should be for it to be used only where it was reasonable.

The LSB's response

3.20 It is important for the LSB to have sufficient flexibility in imposing financial penalties to reflect the likely variation in seriousness of an Approved Regulator's behaviour. Setting a high maximum does not necessarily mean that a penalty will always be at or near the maximum; the impact on the Approved Regulator of the penalty would be one factor that the LSB would take into account in using its judgement to decide what level of penalty was appropriate. We recognise that currently there may be no choice available to lawyers in terms of who regulates them. However, the LSB considers that this will not always be the case and over time as new Approved Regulators are designated, it may be that people are able to choose their regulator. One factor in making such a choice might be that the LSB had taken enforcement action against the Approved Regulator. We do not consider that exercising choice in these circumstances would amount to undue influence; it would be a legitimate choice for the approved person to make and the threat of people being able to make that choice should act as an incentive on an Approved Regulator to improve its approach to compliance, thereby reducing the risk of future enforcement action. We agree that the aim of the financial penalty should be to act as a deterrent against future non-compliance by the Approved Regulator on which the penalty has been imposed and other Approved Regulators. We agree that the aim of the penalty should also be to give consumers confidence in the regulatory regime.

Maximum amount of a financial penalty

3.21 The Act requires the LSB to set the maximum amount of financial penalty that it can impose on an Approved Regulator.

Main issues raised by respondents

3.22 The majority of respondents expressed concern about the level at which it was proposed to set the maximum financial penalty. Several said that the proposed level was disproportionate and would have the effect of leading to bankruptcy were it to be used. Respondents also said that if it were the

intention to cause an Approved Regulator to go out of business then the ability to cancel designation was a more appropriate tool to use. The majority of respondents said that it was inappropriate to draw comparison to the process by which financial penalties were set in utility markets or in competition cases. The majority also said that any comparison with GDP was also inappropriate because each Approved Regulator's contribution was different. Several respondents proposed the adoption of the form used in the setting of financial penalties by the Legal Services Complaints Commissioner (the "**LSCC**") both in terms of the methodology and the levels of the penalty currently in place. Some respondents said that the level of the penalty should be directly linked to the size of the Approved Regulator. Some respondents expressed concern at the impact the maximum penalty would have on consumers as a consequence of pass through of costs to authorised persons and onto consumers. Another expressed concern about the impact of a high financial penalty on authorised persons and suggested that LSB should look at this in more detail. One respondent said that the window of 21 days for making representations about the penalty was too short.

The LSB's response

3.23 We understand the argument that the level of the penalty may, in absolute terms, be less relevant when considered against the reputational damage to the Approved Regulator and the power to cancel an Approved Regulator's designation. However, we consider that the ability to impose a penalty has a deterrent effect and that it would therefore be inappropriate to reduce it to a mere "token" amount. Nevertheless, we recognise the importance of considering whether there is a practical level above which the penalty in practice becomes meaningless because it would either bankrupt the Approved Regulators and/or impose an unjustifiable level of cost on those regulated and, possibly, to consumers. In balancing the options of whether to impose a penalty or cancel an Approved Regulator's designation, we consider that a low level of maximum penalty may in practice make it more likely that the LSB would decide to cancel an Approved Regulator's designation because the LSB would be unable to ensure that the penalty was proportionate to the seriousness of the act or omission.

3.24 We do not consider that setting the maximum penalty at the same level as the LSCC's is appropriate. The LSCC regulates one sub-section of the current activities of the Law Society – handling second-tier complaints. We do not therefore believe that it provides an appropriate reference point. It is the LSB's responsibility to oversee regulation of all the regulatory activities of all the Approved Regulators and to ensure that sufficient sanctions and deterrents are in place to deter major systemic regulatory failure and to ensure its rapid

correction if and when it occurs. The areas where this might be apparent include:

- putting in place education and training requirements that have a discriminatory impact;

- poor standards of regulatory enforcement on professional issues which undermine public confidence and so threaten the professional principles and the rule of law;

- underfunding their regulatory activities resulting in performance is significantly degraded;

- breaching the independence rules, thereby subverting public confidence in regulation.

3.25 Therefore, having considered the responses and other options for setting the maximum financial penalty set out above the LSB's preferred option is to set the maximum financial penalty at 5% of all income which the Approved Regulator derives from its "regulatory functions" (as defined in Section 27 of the Act). We believe that this takes account of the views put to us that utility regulation is not a wholly appropriate comparator, whilst still recognising that existing practice also fails to provide the right benchmark, given differing levels of risk.

3.26 In our consultation document, we were concerned that because Approved Regulators set out their accounts in different ways, the concept of total income would be difficult to define. Having considered this further, we believe that the above formulation, which limits the income to that relating to the Approved Regulator's regulatory functions, will allow for a maximum level of fine to be applied consistently notwithstanding the differences in Approved Regulators' accounts.

Process for setting a penalty

Main issues raised by respondents

3.27 Respondents were generally content with the process outlined for setting a financial penalty. Some agreed that it was inappropriate to set out the detail of the mechanism the LSB will use to set the appropriate level of the penalty. One respondent said it endorsed the flexible approach outlined in the consultation which said that each situation would be dealt with on a case by case basis. One respondent said that there should be more detail on how the LSB the examples of various factors may impact on the final amount of the

penalty and said that it would be helpful to have further guidance on how LSB will judge the relevance of factors it will take into account. Another respondent said that the process was appropriate but that there should be an ability to appeal against both the decision to levy a penalty and its amount. One respondent suggested that it would be useful for the LSB to provide guidance as to how it will exercise its reasonable discretion when setting the level of the financial penalty.

The LSB's response

3.28 It remains the view of the LSB that it would be inappropriate to set out exhaustive detail of the means by which we will arrive at the setting of a financial penalty. The LSB will use its judgement on the facts of the particular case to decide what is an appropriate level of penalty. Having a formulaic approach to setting a penalty is likely to be unduly restrictive. In determining that the discretion we use is reasonable when setting a penalty we will be guided by the requirements of the Better Regulation Principles, in particular proportionality and transparency. We will always explain how we arrived at the amount of any penalty, including the factors we have taken into account. The grounds for appeal are set out in the Act (section 39(4)); any appeal is made to the High Court.

Intervention Directions (Section 41 of the Act)

Main issues raised by respondents

3.29 Most respondents who commented on the use of intervention directions agreed with the approach set out by the LSB in the consultation document. One respondent emphasised that the LSB must only intervene in the event that the Approved Regulator is failing. Two respondents said that LSB needed to provide more detailed policy on how the competency of those approved to take over the operation of an Approved Regulator will be assessed. For example the LSB needed to ensure that no one was appointed with a conflict of interest. In addition they suggested that the competency levels of the Judge or Justice that issues the warrant for entry should also be stipulated.

The LSB's response

3.30 It may be appropriate for the LSB to issue an intervention direction where an Approved Regulator is not in danger of failing in terms of financial or organisational viability but because the circumstances are such that its continued operation poses a grave danger to the delivery of the Regulatory Objectives. We do not consider that it will be practical for us to publish generic guidance about who we might appoint to take over the function of an

Approved Regulator. This is because the circumstances in which we are likely to use an intervention direction are likely to be unique to the Approved Regulator concerned and general guidance is unlikely to be helpful. The Rules we propose to make state that the person we appoint might include another Approved Regulator or other competent person, such as a professional adviser (for example an accountancy firm). We would always explain the reason why we considered the person or body to be competent. Consideration of any conflict of interest is likely to be part of our decision-making process.

Cancellation of designation as an Approved Regulator

Main issues raised by respondents

3.31 Those who responded to this question on the whole agreed with the aim of LSB policy with regard to the cancellation of designation. One respondent said that cancellation was a bigger threat to the Approved Regulator than financial penalties. Several respondents agreed that cancellation should be only used as a last resort. One respondent said that the important issue for consideration in the event of cancellation was continuity and consumer protection.

The LSB's response

3.32 We agree with the views of respondents. We accept that cancellation of designation using our enforcement powers should only be used as a last resort. We agree that it is important that continuity of regulation is maintained and that consumers are protected. The Act (section 46) sets out the transfer arrangements that can be made on cancellation of designation to ensure that each approved person is treated as authorised either by another Approved Regulator or by the LSB.

Section 50(4) Statement

3.33 Any material changes to the Policy Statement have been discussed throughout this Document but in summary, and to comply with Section 50(4) of the Act, the material changes between the Policy Statement consulted on and our final Policy Statement are as follows:

- **Unreasonableness:** our final Policy Statement expands materially on the test that the LSB will use compare to its consultation document which did not offer an interpretation of the unreasonableness test. See paragraphs 2.12. - 2.15 of Section 2 for more details.

- **Informal resolution:** our final Policy Statement expands materially from the consultation document and explains in more detail how the LSB will resolve matters informally. See paragraphs 2.25 -2.33 of Section 2 for more details.

4. The LSB's Consideration of Responses to its Consultation of its Enforcement Rules

Introduction

4.1 This Section of the Document sets out:

- details of the responses that the LSB received to its consultation on its Enforcement Rules; and
- a statement made in accordance with Section 205(5) of the Act as to the material difference between the Enforcement Rules contained in the original consultation document and the final Enforcement Rules referred to below and included as Annexes to this Document.

4.2 Section 3 sets out details of the responses that the LSB received to its consultation on its Enforcement Policy Statement. **This section does not form part of the LSB's Statement of Policy**.

Directions Rules

4.3 Section 32 of the Act allows the LSB to impose directions on an Approved Regulator. In determining whether the LSB should impose a direction, the Act provides that the LSB should take account of certain oral and written representations made by the relevant Approved Regulator. In doing this, paragraphs 2(5) and 10(3) of Schedule 7 to the Act explicitly require the LSB to make rule governing the making of such oral and written representations.

4.4 The consultation document included a draft of the rules that the LSB proposed to make to govern the making or oral and written representations and invited representations from consultees about the proposals.

Main issues raised by respondents

4.5 Subject to some minor drafting suggestions, the vast majority of respondents approved of the approach we had taken in drafting these rules.

The LSB's response

4.6 We note that the majority of respondents agree with the approach we have taken with these rules.

4.7 The rules have been subject to some amendments to deal with minor drafting points suggested by respondents to the consultation and have also been amended to deal with changes that have been suggested to our rules generally as a result of responses we received to our consultations on rules designating new Approved Regulators and approving rule changes and rules governing the making of representations and the giving of evidence on the scope of the reserved legal activities.

4.8 In accordance with Section 205(6) of the Act a final draft of the rules governing the making of oral and written representations is set out at Annex 1. These rules will take effect from 1 January 2010 when the LSB takes up its full powers.

Financial Penalty Rules

4.9 As noted in Sections 2 and 3 of this Document, Section 37(4) of the Act provides that the LSB must make rules prescribing the maximum amount of a penalty that be impose under Section 37.

4.10 These rules can only be made with the consent of the Lord Chancellor and must be made by way of a statutory instrument.

Main issues raised by respondents

4.11 As noted in paragraph 3.22 of Section 3 of this Document, the vast majority of respondents to our consultation did not agree with the policy we suggested for the maximum financial penalty rules.

The LSB's response

4.12 As noted in paragraphs 3.23 - 3.26 of Section 3 of this Document, we have considered respondents concerns and have revised our policy for setting the maximum financial penalty. A drafted of the revised statutory instrument in relation to this is set out at Annex 2.

4.13 The rules contained within this statutory instrument have been consented to by the Lord Chancellor. The statutory instrument will now go through the parliamentary process with the intention that it will come into force on 1 January 2010 when the LSB takes up its full powers.

Intervention Direction Rules

4.14 Section 41 of the Act allows the LSB to impose intervention directions on an Approved Regulator. The Act provides that the LSB must make certain rules in relation to the processes it undertakes in deciding whether to make an intervention direction.

4.15 The rules that the LSB is required to make are as follows:

- Section 41(5) of the Act – The LSB must make rules as to the persons it may nominate for the purposes of exercising the regulatory function of an Approved Regulator pursuant to an intervention direction;

- Section 42(10) of the Act – The LSB must make rules as to the persons a specified person may appoint to apply for a warrant to enter and search premises;

- Paragraphs 2(5), 10(5) and 21(5) of Schedule 8 – The LSB must make rules governing the making of oral and written representations; and

- Paragraph 13(2)(a) of Schedule 8 – The LSB must make rules in relation to the form and manner of an application by an Approved Regulator to revoke an intervention direction.

4.16 The consultation document included drafts of the rules that the LSB proposed to make to govern these areas and invited representations from consultees about the proposals.

Main issues raised by respondents

4.17 Subject to some minor drafting suggestions, the vast majority of respondents approved of the approach we had taken in drafting these rules.

The LSB's response

4.18 We note that the majority of respondents agree with the approach we have taken with these rules.

4.19 The rules have been subject to some amendments to deal with minor drafting points suggested by respondents to this consultation and have also been amended to deal with changes that have been suggested to our rules generally as a result of responses we received to our consultations on rules designating new approved regulators and approving rule changes and rules governing the making of representations and the giving of evidence on the scope of the reserved legal activities.

4.20 In accordance with Section 205(6) of the Act a final draft of the rules in relation to Sections 41(5) and 42(10) of the Act is set out at Annex 3. These rules will take effect from 1 January 2010 when the LSB takes up its full powers.

4.21 In relation to the oral and written representation rules required under paragraphs 2(5) and 10(5) of Schedule 8 of the Act, the LSB proposes to use the same rules that is proposes in respect of oral and written representations relating to directions. As referred to above, a draft of these rules is set out at Annex 1.

4.22 In accordance with Section 205(6) of the Act a final draft of the rules in relation to applications to revoke an intervention direction is set out at Annex 4. These rules also include the rules that the LSB proposes to make in relation to the making of oral and written representations under paragraph 21(5) of Schedule 8.These rules will take effect from 1 January 2010 when the LSB takes up its full powers.

Cancellation of Designation Rules

4.23 Section 45 of the Act provides that the Lord Chancellor may by order cancel a body's designation as an Approved Regulator in accordance with a recommendation by the LSB. The Act provides that the LSB can make such recommendation as part of its enforcement powers (in which case Section 45(5) must be satisfied) or if an Approved Regulator applies to the LSB for its designation to be cancelled. The Act provides that the LSB must make certain rules in relation to the processes it undertakes in deciding whether to make a recommendation to the Lord Chancellor.

4.24 The rules that the LSB is required to make are as follows:

- Section 45(3) – The LSB needs to prescribe rules as to the form and manner of an application by an Approved Regulator to cancel a designation. These rules must specify the amount of the "prescribed fee" and must be made with the consent of the Lord Chancellor;

- Section 48(9) - The LSB must make rules as to the persons it may appoint to apply for a warrant to enter and search premises; and

- Paragraphs 2(5) and 9(5) of Schedule 9 – The LSB must make rules governing the making of oral and written representations.

4.25 The consultation document included drafts of the rules that the LSB proposed to make to govern these areas and invited representations from consultees about the proposals.

Main issues raised by respondents

4.26 Subject to some minor drafting suggestions, the vast majority of respondents approved of the approach we had taken in drafting these rules.

The LSB's response

4.27 We note that the majority of respondents agree with the approach we have taken with these rules.

4.28 The rules have been subject to some amendments to deal with minor drafting points suggested by respondents to this consultation and have also been amended to deal with changes that have been suggested to our rules generally as a result of responses we received to our consultations on rules designating new approved regulators and approving rule changes and rules governing the making of representations and the giving of evidence on the scope of the reserved legal activities. The main amendment to note is the inclusion of the mechanism for calculating the "prescribed fee" for an application. If the application is in respect of the cancellation of some but not all Reserved Legal Activities, the fee if £4,500. If the application is in respect of all Reserved Legal Activities, the fee is £6,000. The fee can be uplifted in certain specified circumstances. This formulation is consistent with that used for the "prescribed fee" in relation to applications to become an Approved Regulator and has been consented to by the Lord Chancellor

4.29 In accordance with Section 205(6) of the Act a final draft of the rules in relation to Sections 45(3) to the Act is set out at Annex 5. These rules will take effect from 1 January 2010 when the LSB takes up its full powers.

4.30 In accordance with Section 205(6) of the Act a final draft of the rules in relation to Sections 48(9) the Act is set out at Annex 6. These rules will take effect from 1 January 2010 when the LSB takes up its full powers.

4.31 In relation to the oral and written representation rules required under paragraphs 2(5) and 9(5) of Schedule 9 of the Act, the LSB proposes to use the same rules that is proposes in respect of oral and written representations relating to directions. As referred to above, a draft of these rules is set out at Annex 1.

Section 205(5) Statement

4.32 Any material changes to the Enforcement Rules have been discussed throughout this Document but in summary, and to comply with Section 205(5)

of the Act, the material changes between the draft rules consulted on and our final rules are as follows:

- **Maximum Financial Penalty:** there has been a significant change in the level of the maximum financial penalty (and thus the statutory instrument that relates to this). The consultation document proposed a maximum penalty of the greatest of: (i) an amount equal to £250 per individual that an Approved Regulator regulates; (ii) an amount equal to £5,000 per entity that an Approved Regulatory regulates; or (iii) £10 million. As discussed in this Document, this proposal was not widely supported and so the LSB has amended its proposal for the maximum financial penalty to being an amount equal to 5 per cent. of all income which an Approved Regulator has derived from the exercise of its "regulatory functions" (as defined in Section 27 of the Act) in respect of the most recent accounting period;

- **Prescribed Fee:** as discussed at paragraph 4.28 above, our rules for cancellation of designation applications now include a formulation for the "prescribed fee". As stated in our consultation document, we have used a formulation that is consistent with the "prescribed fee" for applications to become an Approved Regulator. The level of this fee has been consented to by the Lord Chancellor.

5. Impact Assessments

5.1 Two impact assessments are provided with this Document.

5.2 The first impact assessment, attached at Annex 7, is based on the Ministry of Justice template for impact assessments and is in respect of the LSB's overall Statement of Policy on enforcement.

5.3 The second impact assessment, attached at Annex 8, is in the Ministry of Justice template and is the impact assessment that relates specifically to the statutory instrument for the maximum amount of the financial penalty. This impact assessment, the one that accompanied the statutory instrument when it was laid in Parliament.

5.4 **This section does not form part of the LSB's Statement of Policy.**

Annex 1 – Enforcement processes: rules on oral and written representations

A. PREAMBLE

1. These Rules are made by the Board (as defined below) under section 7 of the Act (as defined below) and paragraphs 2(5) and 10(3) of schedule 7, paragraphs 2(5) and 10(5) of schedule 8 and paragraphs 2(5) and 9(5) of schedule 9 to the Act (as defined below).

B. DEFINITIONS

2. Words defined in these Rules have the following meanings:

Act	the Legal Services Act 2007
Approved Regulator	has the meaning given in section 20(2) of the Act
Board	the Legal Services Board
Representing Person	an Approved Regulator or any other person who can make representations to the Board in accordance with section 38(2) and schedules 7 to 9 to the Act

C. WHO DO THESE RULES APPLY TO?

3. These Rules are the rules that the Board has made to govern the making of oral and written representations by a Representing Person in accordance with:

   a) section 38(2) of the Act (**Financial Penalties**);

   b) paragraphs 2(5) and 10(3) of schedule 7 to the Act (**Directions**);

   c) paragraphs 2(5) and 10(5) of schedule 8 to the Act (**Intervention Directions**); and

   d) paragraphs 2(5) and 9(5) of schedule 9 to the Act (**Cancellation of Designation as Approved Regulator**).

4. The Board reserves the right to amend these Rules from time to time. If the amendments made to the Rules are, in the opinion of the Board, material the

Board will publish a draft of the amended Rules and will invite consultations in accordance with section 205 of the Act.

D. FORM OF REPRESENTATIONS

Written representations

5. Subject to Rules 6 and 8, all representations made to the Board must be in writing and must be submitted to the Board either by email, post or courier to the relevant address shown below:

   a) if by email to : contactus@legalservicesboard.org.uk

   b) if by post or courier to:

   Address: Legal Services Board
   7th Floor Victoria House
   Southampton Row
   London WC1B 4AD

   For the attention of: Enforcement Administrator

6. The Representing Person must, unless otherwise agreed with the Board, submit all written representations to the Board using the online tool at www.legalservicesboard.org.uk, once this has been developed.

7. All representations must be received by the Board within the relevant period set out in the Act. Representations out of this time will not be considered unless, exceptionally and at the sole discretion of the Board, they appear to raise matters of substance relevant to the process in question which are not already under consideration.

Oral representations

8. The Board may, at its sole discretion authorise a Representing Person to make oral representations. The Representing Person must bear its own costs in relation to any such representations. On grounds of cost, efficiency, transparency and consistency of treatment between Representing Persons, the Board will not normally accept oral representations unless the particular circumstances of the Representing Person or the complexity of the issue merit an exception to the normal process in individual cases. If the Board grants such an exception, it will publish its reasons for doing so.

9. Should the Board authorise a Representing Person to make oral representations, the representations will take place at a hearing to be held either by telephone, video conference or in person. The Board will give the Representing Person not less than ten business days notice that there will be a hearing. If the hearing is to be held in person, the notice will specify the place and time at which the hearing will be held. If the hearing is to be held by telephone or video conference, the notice will specify the time of the telephone call or video conference and also the arrangements for facilitating the telephone call or video conference.

10. Hearings conducted in person (rather than by telephone or video conference) will normally be open to the public. However, within the period ending four business days prior to the scheduled date of the hearing, the Representing Person may submit to the Board a request, with reasons, that aspects of the hearing be held in private. The Board will consider the reasons given and will then publish the reasons for any decision that it reaches. Where the hearing is held in private, the Board will only admit persons, other than representatives of the Representing Person and the Board, after obtaining the agreement of the Representing Person.

11. The Representing Person must appear at the hearing, either in person, by telephone or by video conference (as the case may be) and may be represented by any persons whom it may appoint for the purpose. The proceeding of the hearing will be recorded on behalf of the Board and will be transcribed onto paper.

12. Where oral representations are made, the Board will prepare a report of those representations which will be based on the transcription of the hearing made in accordance with Rule 11. Before preparing the report, the Board:

    a) must give the Representing Person a reasonable opportunity to comment on a draft of the report; and

    b) must have regard to any comments duly made by the Representing Person.

13. Subject to complying with the requirements of the Act, the Board reserves the right to extend processes to take account of the need to transcribe and verify oral submissions and to require the Representing Person to directly pay the transcription provider for the cost of the transcription service.

14. The Board may from time to time adjourn the hearing.

E. FURTHER INFORMATION

15. If you have any questions about the process for making oral or written representations you should contact the Board at:

Address:	Legal Services Board 7th Floor Victoria House Southampton Row London WC1B 4AD
Email:	contactus@legalservicesboard.org.uk
Telephone:	020 7271 0050

Annex 2 – Financial penalties: maximum penalty statutory instrument

STATUTORY INSTRUMENTS

2009 No.

LEGAL SERVICES, ENGLAND AND WALES

The Legal Services Act 2007 (Maximum Penalty for Approved Regulators) Rules 2009

Made - - - -	*8th December 2009*
Laid before Parliament	***
Coming into force - -	*1st January 2010*

The Legal Services Board with the consent of the Lord Chancellor makes the following Rules in exercise of the powers conferred by sections 37(4) and 204(2), (3) and (4)(b) of the Legal Services Act 2007([a]).

The Legal Services Board has complied with the consultation requirements in section 205 of that Act.

Citation and commencement

1.—a) These Rules may be cited as the Legal Services Act 2007 (Maximum Penalty for Approved Regulators) Rules 2009.

(1) These Rules come into force on 1st January 2010.

Maximum penalty

2.—b) For the purposes of section 37(3) of the Legal Services Act 2007 (financial penalties), the maximum amount of any financial penalty which the Legal Services Board may impose on an approved regulator is an amount equal to 5 per cent. of all income which the regulator derived from its regulatory functions in respect of its most recent accounting period.

(1) The reference to the approved regulator's most recent accounting period is to the most recent accounting period—

a) which ended before the imposition of the financial penalty; and

b) for which the regulator has audited accounts which have been drawn up in accordance with generally accepted accounting practice.

(2) The amount of the income referred to in paragraph (1) is to be determined by reference to the audited accounts referred to in paragraph (2)(b).

([a]) 2007 c.29.

Made by the Legal Services Board at its meeting on 30th November 2009

Terence Connor
Stephen Green
Rosemary Martin
Bill Moyes
Barbara Saunders OBE
Nicole Smith
Andrew Whittaker
David Wolfe
Chris Kenny

I consent
Signed by authority of the Lord Chancellor

Name
Parliamentary Under Secretary of State
Date Ministry of Justice

EXPLANATORY NOTE

(This note is not part of the Rules)

These Rules set out the method to be used in determining the maximum amount of the penalty which the Legal Services Board may impose under section 37(3) of the Legal Services Act 2007 (c. 29) on an approved regulator. Section 37 of that Act provides for the imposition of financial penalties on approved regulators for failure to comply with any requirement imposed on them by or under certain specified provisions of that Act (namely, section 30 (rules relating to the exercise of regulatory functions), section 32 (directions) and section 51 (control of practising fees charged by approved regulators)).

Annex 3 – Intervention directions: Section 41(5) and 42(10) rules

A. PREAMBLE

1. These Rules are made by the Board (as defined below) under sections 41(5) and 42(10) of the Act (as defined below).

B. DEFINITIONS

2. Words defined in these Rules have the following meanings:

Act	the Legal Services Act 2007
Approved Regulator	has the meaning given in section 20(2) of the Act
Board	the Legal Services Board
Intervention Direction	a direction given by the Board to an Approved Regulator in accordance with section 41 of the Act
Specified Person	has the meaning given in section 42(9) of the Act

C. WHO DO THESE RULES APPLY TO?

3. These Rules are the rules that the Board has made in compliance with:

   a) section 41(5) of the Act in order to specify the persons that the Board may nominate for the purposes of section 41(2)(a) of the Act;

   b) section 42(10) of the Act in order to specify the persons that a Specified Person may appoint for the purposes of section 42(3) of the Act.

4. The rules that the Board has made in accordance with paragraphs 2(5) and 10(5) of schedule 8 to the Act in relation to Intervention Directions and the making of oral and written representations are in the Board's rules on the making of oral and written representations which can be found at "Enforcement Rules: Rules on Oral and Written Representations".

5. The rules that the Board has made in accordance with paragraph 13(2) of schedule 8 to the Act in relation to the revocation of an Intervention Direction are in the Board's rules on the revocation of Intervention Directions which can be

found at "Intervention Directions: Rules for Applications to Revoke".

6. The Board reserves the right to amend these Rules from time to time. If the amendments made to the Rules are, in the opinion of the Board, material the Board will publish a draft of the amended Rules and will invite consultations in accordance with section 205 of the Act.

D. NOMINATIONS FOR THE PURPOSES OF SECTION 41(2)(a)

7. The Board may nominate such person as it considers to be fit and competent to exercise the regulatory function of the Approved Regulator, and this may include another Approved Regulator or other competent person, such as a professional adviser (for example an accountancy firm).

E. APPOINTMENTS FOR THE PURPOSES OF SECTION 42(3)

8. A Specified Person may appoint any person that it considers competent to be able to:

   a) enter and search the premises of an Approved Regulator;

   b) take possession of any written or electronic records found on the premises.

9. In considering whether a person is suitable for appointment under Rule 8, the Specified Person must have regard to the extent to which the person has experience of exercising entry and search functions.

F. FURTHER INFORMATION

10. If you have any questions about these Rules you should contact the Board at:

Address:	Legal Services Board 7th Floor Victoria House Southampton Row London WC1B 4AD
Email:	contactus@legalservicesboard.org.uk
Telephone:	020 7271 0050

Annex 4 – Intervention directions: rules for applications to revoke

A. PREAMBLE

1. These Rules are made by the Board (as defined below) under paragraphs 13(2) and 21(5) of part 2 of schedule 8 to the Act (as defined below).

B. DEFINITIONS

2. Words defined in these Rules have the following meanings:

Act	the Legal Services Act 2007
Applicant	an Approved Regulator who submits an Application
Application	an application to revoke an Intervention Direction that is submitted to the Board in accordance with these Rules
Approved Regulator	has the meaning given in section 20(2) of the Act
Board	the Legal Services Board
Consultees	the Mandatory Consultees and any Optional Consultee
Consumer Panel	the panel of persons established and maintained by the Board in accordance with section 8 of the Act
Intervention Direction	a direction given by the Board to an Approved Regulator in accordance with section 41 of the Act
Mandatory Consultees	the Lord Chancellor, the OFT, the Consumer Panel and the Lord Chief Justice
OFT	the Office of Fair Trading
Optional Consultee	any person (other than a Mandatory Consultee) who the Board considers it reasonable to consult regarding an Application
Regulatory Objectives	has the meaning given in section 1 of the Act

Representative Body	a body that represents persons authorised by the Applicant to carry on activities which are Reserved Legal Activities
Reserved Legal Activity	has the meaning given in section 12 of and schedule 2 to the Act

C. WHO DO THESE RULES APPLY TO?

3. These are the Rules that apply if an Approved Regulator wishes to apply to the Board, under part 2 of schedule 8 to the Act, for the Board to revoke an Intervention Direction given to the Approved Regulator.

4. These Rules set out:

   a) the required content of any Application to the Board and some guidance in relation to that content (**see Section D**);

   b) the processes and procedures that the Board will undertake in considering the Application (**see Section E**);

   c) the manner in which the Applicant and any Representative Body can make representations to the Board about an Application (**see Section F**); and

   d) who an Approved Regulator should contact if it has a question in relation to the Application process (**see Section G**).

5. The Board reserves the right to amend these Rules from time to time. If the amendments made to the Rules are, in the opinion of the Board, material the Board will publish a draft of the amended Rules and will invite consultations in accordance with section 205 of the Act.

D. CONTENTS OF APPLICATION

6. An Application must include such information as the Applicant believes necessary to satisfy the Board that:

   a) all the issues relating to the act or omission which resulted in the imposition of the Intervention Direction have been appropriately dealt with; and

   b) it is appropriate for the Board to revoke the Intervention Direction in all the circumstances of the case (including in particular the impact of revoking the Intervention Direction on the Regulatory Objectives).

7. Information provided in accordance with Rule 6 may include evidence of:

   a) the remedies that have been taken by the Applicant to correct the act or omission in question;

   b) the mechanisms that have been put in place by the Applicant to mitigate against a repeat act or omission or similar or more serious act or omission.

E. PROCESSES AND PROCEDURE

Sending the Application

8. Subject to Rule 9 below, the Applicant must submit their Application either by email, post or courier to the relevant address shown below:

   a) If by email to: contactus@legalservicesboard.org.uk

   b) If by post or courier to:

   Address: Legal Services Board
   7th Floor Victoria House
   Southampton Row
   London WC1B 4AD

   For the attention of: Enforcement Administrator

9. The Applicant must, unless otherwise agreed with the Board, submit their Application to the Board using the online tool at www.legalservicesboard.org.uk, once this has been developed.

10. On receipt of the Application, an acknowledgement email will be sent to the Applicant by the Board.

11. The Board will consider the Application and may ask the Applicant for such additional information as the Board may reasonably require.

12. The Board has the discretion to refuse to consider, or to continue its consideration of, an Application. The Board will exercise this discretion if it believes that it has not received all the information it requires.

Obtaining advice

13. On receipt of an Application, and all further information that the Board may require under Rule 11, the Board will send a copy of the Application (together

with any further information received) to the Consultees.

14. The Board will specify to the Lord Chancellor, the OFT, the Consumer Panel and any Optional Consultee a time period in which each body must provide their advice on the Application to the Board. The Board intends to request that these bodies provide their advice within a time period which is reasonable, published and variable dependent on the volume and complexity of the Application received.

15. The Lord Chancellor, the OFT, the Consumer Panel and any Optional Consultee will then each consider the Application within the specified time period and will provide their advice to the Board.

16. The Board will then provide the advice it receives from the Lord Chancellor, the OFT, the Consumer Panel and any Optional Consultee to the Lord Chief Justice and will specify to the Lord Chief Justice a time period in which he must provide his advice on the Application to the Board. Again, the time period that the Board will specify will depend on the particular circumstances of the Application.

17. The Lord Chief Justice will then consider the Application and will provide his advice to the Board.

18. In providing their advice to the Board, each Consultee may ask the Applicant (or any other person) to provide them with such additional information as they may require.

Publication of Advice

19. Once the Board has received the advice of the Lord Chief Justice, it will:

    a) provide a copy of all the advice that has been given by the Consultees to the Applicant;

    b) publish a copy of all the advice that has been given by the Consultees on its website.

Representations

20. The Applicant and any Representative Body has **28 days** beginning on the day on which a copy of the advice referred to in Rule 19 has been published on the Board's website, or such longer period as the Board may specify in a particular case, to make representations to the Board about the advice. Any representations made by the Applicant or any Representative Body must be made in accordance with Section F of these Rules.

Publication of Representations

21. As soon as practicable after the end of the period within which representations under Rule 20 may be made, subject to Rule 22, the Board will publish on its website, any written representations duly made by the Applicant or any Representative Body (and any reports of oral representations prepared under Rule 34).

22. Prior to the publication of any written representations (and any report of oral representations prepared under Rule 34) the Board will ensure, so far as practicable, that such materials exclude any matter which relates to the private affairs of a particular individual the publication of which, in the opinion of the Board, would or might seriously and prejudicially affect the interests of that individual.

The Board's Decision

23. After considering the Application (and any additional information received under Rule 11), the advice received from the Consultees and any representations by the Applicant or any Representative Body and any other information that the Board considers relevant to the Application, the Board will decide whether to grant the Application.

24. If the Board decides to grant the Application, it will notify the Applicant and will state the time from which the revocation of the Intervention Direction is to take effect.

25. If the Board decides not to grant the Application, the Board will write to the Applicant with the reasons for its decision.

26. The Board will publish on its website a copy of any decision that it gives to the Applicant.

F. FORM OF REPRESENTATIONS

Written representations

27. Subject to Rules 28 and 30, all representations made to the Board must be in writing and must be submitted to the Board either by email, post or courier to the to the relevant address set out at Rule 8.

28. The Applicant or Representative Body must, unless otherwise agreed with the Board, submit all representations to the Board using the online tool at www.legalservicesboard.org.uk, once this has been developed.

29. All representations must be received by the Board within the period set out in Rule 20. Representations out of this time will not be considered unless, exceptionally and at the sole discretion of the Board, they appear to raise matters of substance relevant to the Application which are not already under consideration.

Oral representations

30. The Board may, at its sole discretion authorise an Applicant or any Representative Body to make oral representations at their own expense. On grounds of cost, efficiency, transparency and consistency of treatment between Applicants and Representative Bodies, the Board will not normally accept oral representations unless the particular circumstances of the Applicant or Representative Body or the complexity of the issues merit an exception to the normal process in individual cases. If the Board grants such an exception, it will publish its reasons for doing so.

31. Should the Board authorise an Applicant or Representative Body to make oral representations, the representations will take place at a hearing to be held either by telephone, video conference or in person. The Board will give the Applicant or Representative Body not less than ten business days notice that there will be a hearing. If the hearing is to be held in person the notice will specify the place and time at which the hearing will be held. If the hearing is to be held by telephone or video conference, the notice will specify the time of the telephone call or video conference and also the arrangements for facilitating the telephone call or video conference.

32. Hearings conducted in person (rather than by telephone or video conference) will normally be open to the public. However, within the period ending four business days prior to the scheduled date of the hearing, the Applicant or Representative Body may submit to the Board a written request, with reasons, that aspects of the hearing be held in private. The Board will consider the reasons given and will then publish the reasons for any decision that it reaches. Where the hearing is held in private, the Board will only admit persons other than representatives of the Applicant or the Representing Body (as relevant) and the Board, after obtaining the agreement of the Applicant of the Representing Body (as relevant).

33. The Applicant or Representative Body must appear at the hearing, either in person or by telephone (as the case may be), and may be represented by any persons whom they may appoint for the purpose. The proceeding of the hearing will be recorded on behalf of the Board and will be transcribed onto paper.

34. Where oral representations are made, the Board will prepare a report of those representations which will be based on the transcription of the hearing made in

accordance with Rule 33. Before preparing the report, the Board:

a) must give the Applicant or Representative Body a reasonable opportunity to comment on a draft of the report; and

b) must have regard to any comments duly made by the Applicant or Representative Body.

35. Subject to the requirements of the Act, the Board reserves the right to extend processes to take account of the need to transcribe and verify oral submissions and to require the Applicant or Representative Body to directly pay the transcription provider for the reasonable cost of the transcription service.

36. The Board may from time to time adjourn the hearing.

F. FURTHER INFORMATION

37. If you have any questions about the Application process or the preparation of an Application, you should contact the Board at:

Address:	Legal Services Board 7th Floor Victoria House Southampton Row London WC1B 4AD
Email:	contactus@legalservicesboard.org.uk
Telephone:	020 7271 0050

Annex 5 – Cancellation of designation: rules for applications to cancel

A. PREAMBLE

1. These Rules are made by the Board (as defined below) under sections 45(3) of the Act (as defined below). In accordance with section 45(4) of the Act (as defined below), the consent of the Lord Chancellor has been given in respect of these Rules.

B. DEFINITIONS

2. Words defined in these Rules have the following meanings:

Act	the Legal Services Act 2007
Affected Authorised Person	an Authorised Person who is regulated by the Applicant in relation to a Reserved Legal Activity which is the subject of an Application
Applicant	a body who submits an Application
Application	an application to cancel a body's designation as an Approved Regulator in relation to one or more Reserved Legal Activity that is submitted to the Board in accordance with these Rules
Approved Regulator	has the meaning given in section 20(2) of the Act
Authorised Person	has the meaning given in section 18 of the Act
Board	the Legal Services Board
Cancellation Notice	the notice published by the Applicant in accordance with Section F of these Rules
Prescribed Fee	the fee that must accompany an Application as described in Section E of these Rules
Reserved Legal Activity	has the meaning given in section 12 of and schedule 2 to the Act

C. WHO DO THESE RULES APPLY TO?

3. These are the Rules that apply if a body wishes to apply to the Board, under section 45(3) of the Act, for the Board to make a recommendation to the Lord Chancellor that an order be made cancelling a body's designation as an Approved Regulator in relation to one or more Reserved Legal Activity.

4. These Rules set out:

   a) the required content of any Application to the Board (**see Section D**);

   b) the amount of the Prescribed Fee that must accompany any Application (**see Section E**);

   c) the Board's requirements in relation to the Applicant's publication of a notice giving details of the Application in accordance with section 45(3)(c) of the Act (**see Section F**);

   d) the processes and procedures that the Board will undertake in considering the Application (**see Section G**); and

   e) whom a body should contact if it has a question in relation to the Application process (**see Section H**).

5. The Board reserves the right to amend these Rules from time to time. If the amendments made to the Rules are, in the opinion of the Board, material the Board will publish a draft of the amended Rules and will invite consultations in accordance with section 205 of the Act.

D. CONTENTS OF APPLICATION

6. An Applicant must include the following information in their Application:

   a) the name, address, telephone number and email address of the person whom the Board should contact in relation to the Application;

   b) details of the Reserved Legal Activity or Activities to which the Application relates;

   c) details of why the Applicant is making the Applicant;

   d) details of any alternative courses of action, besides cancellation of designation, that have been considered or explored by the Applicant;

e) details of the Affected Authorised Persons and whether any communication as been had with such persons in relation to the Application;

f) details of what arrangements the Applicant proposes in relation to:

i) the transfer of the regulation of the Affected Authorised Persons to another relevant Approved Regulator and whether that Approved Regulator has consented to such transfer;

ii) the transfer of amounts held by the Applicant which represent amounts paid to it by way of practising fees by the Affected Authorised Persons to another relevant Approved Regulator and whether that Approved Regulator has consented to such transfer;

g) if the Applicant is planning on winding-up all its activities, details of how it proposes to do so in an orderly manner.

E. PRESCRIBED FEE

7. Any Application must be accompanied by the Prescribed Fee set out in Rule 8 below. The Prescribed Fee must be paid by electronic funds transfer to the following bank account:

Bank:	HM Paymaster General
Sort code:	10-14-99
Account No:	10610000
Account Name:	Legal Services Board
Reference:	[*Insert Applicant name*]/ Cancellation Application

8. The Prescribed Fee that must accompany an Application will depend on the type of Application being made. The different levels of the Prescribed Fee are as follows:

a) if the Application is in respect of the cancellation of some but not all of the Reserved Legal Activities regulated by the Applicant, the Prescribed Fee is £4,500;

b) if the Application is respect of the cancellation of all of the Reserved Legal Activities regulated by the Applicant, the Prescribed Fee is £6,000.

9. The amounts specified in Rule 8 are each the average costs that the Board anticipates it will incur in considering these different types of Application. In respect of the Prescribed Fee set out in Rule 8(a) this is based on a day rate of £562 over 8 business days. In respect of the Prescribed Fee set out in Rule 8(b) this is based on day rate of £562 over 11 business days.

10. The Board reserves the right to charge an amount in excess of the amounts set out in Rule 8 in the following circumstances:

    a) if the Board requests further information from the Applicants in accordance with Rule 16, and the Board's costs in processing this information exceeds the relevant specified in Rule 8. In these circumstances, any such additional costs will be charged at the day rate of £562;

    b) the nature of the Application means that the Board has to seek external advice and the cost of this advice would mean that the Board's cost in processing the Application would exceed the relevant amount specified in Rule 8.

F. NOTICE REQUIREMENTS

11. On submitting an Application to the Board, an Applicant must publish a Cancellation Notice giving the following information:

    a) the date on which the Application to the Board was made;

    b) details of the Reserved Legal Activity or Activities to which the Application relates;

    c) details of why the Application is being made;

    d) details of the Affected Authorised Persons;

    e) details of what arrangements the Applicant proposes in relation to:

        i) the transfer of the regulation of the Affected Authorised Persons to another relevant Approved Regulator;

        ii) the transfer of amounts held by the Applicant which represent amounts paid to it by way of practising fees by the Affected Authorised Persons to another relevant Approved Regulator.

12. Any Cancellation Notice given in accordance with Rule 11 must be published:

    a) on the Applicant's website on the same day on which an Application is submitted to the Board; and

    b) in any publication that the Board may specify from time to time within 5 business days of the Application being submitted to the Board.

G. PROCESSES AND PROCEDURE

Sending the Application

13. Subject to Rule 14 below, the Applicant must submit their Application (and, proof of transmission of the Prescribed Fee) either by email, post or courier to the relevant address shown below:

    a) If by email to: contactus@legalservicesboard.org.uk

    b) If by post or courier to:

    Address: Legal Services Board
    7th Floor Victoria House
    Southampton Row
    London WC1B 4AD

    For the attention of: Cancellation Administrator

14. The Applicant must, unless otherwise agreed with the Board, submit their Application (and, proof of transmission of the Prescribed Fee) to the Board using the online tool at www.legalservicesboard.org.uk, once this has been developed.

15. On receipt of the Application and the Prescribed Fee, an acknowledgement email will be sent to the Applicant by the Board.

16. The Board will consider the Application and may ask the Applicant for such additional information as the Board may reasonably require.

The Board's Decision

17. After considering the Application (and any additional information received under Rule 16) and after satisfying itself that the requirements of Section G have been complied with, the Board will recommend to the Lord Chancellor that an order be

made to cancel the Applicant's designation as an Approved Regulator in relation to the one or more Reserved Legal Activities set out in the Application.

G. FURTHER INFORMATION

18. If you have any questions about the Application process or the preparation of an Application, you should contact the Board at:

Address:	Legal Services Board 7th Floor Victoria House Southampton Row London WC1B 4AD
Email:	contactus@legalservicesboard.org.uk
Telephone:	020 7271 0050

Annex 6 – Cancellation of designation: Section 48(9) rules

A. PREAMBLE

1. These Rules are made by the Board (as defined below) under section 48(9) of the Act (as defined below).

B. DEFINITIONS

2. Words defined in these Rules have the following meanings:

Act	the Legal Services Act 2007
Board	the Legal Services Board

C. WHO DO THESE RULES APPLY TO?

3. These Rules are the rules that the Board has made in compliance with section 48(9) of the Act in order to specify the persons that the Board may appoint for the purposes of section 48(3) of the Act.

4. The Board reserves the right to amend these Rules from time to time. If the amendments made to the Rules are, in the opinion of the Board, material the Board will publish a draft of the amended Rules and will invite consultations in accordance with section 205 of the Act.

D. APPOINTMENTS FOR THE PURPOSES OF SECTION 48(3)

5. The Board may appoint any person that it considers competent to be able to:

   a) enter and search the premises of an Approved Regulator; and

   b) take possession of any written or electronic records found on premises.

6. In considering whether a person is suitable for nomination under Rule 5, the Board will have regard to the extent to which the person has experience of exercising entry and search functions.

E. FURTHER INFORMATION

7. If you have any questions about these Rules you should contact the Board at:

Address: Legal Services Board
7th Floor Victoria House

Southampton Row
London WC1B 4AD

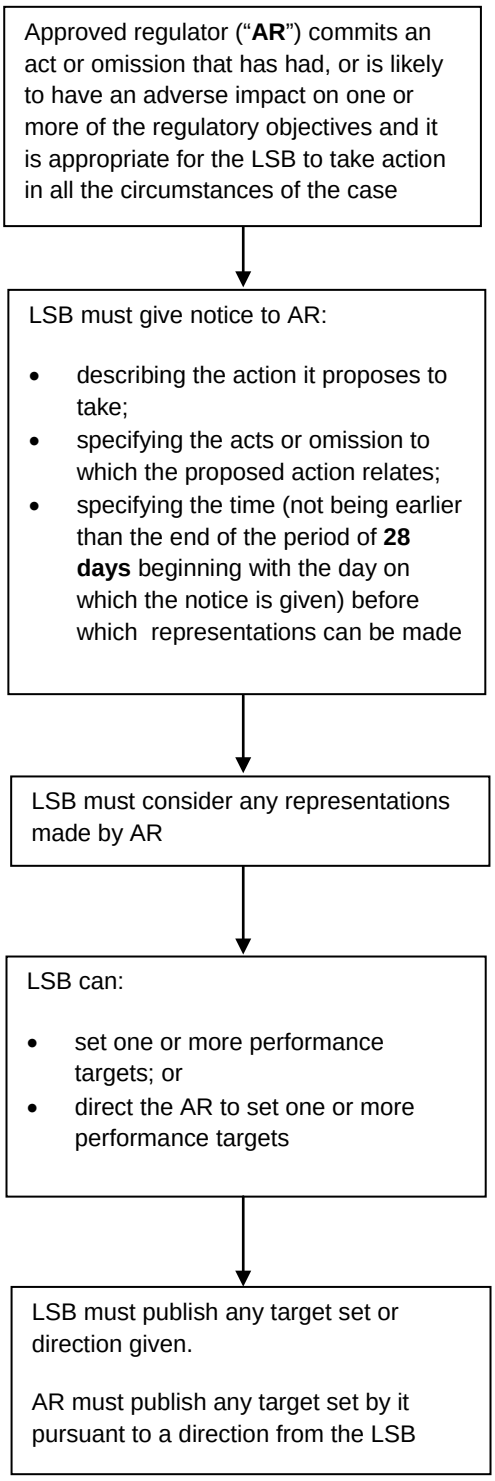
Email: contactus@legalservicesboard.org.uk

Telephone: 020 7271 0050

Annex 7 – Enforcement processes

Note: Appeals processes shown are those set out in the Act

Performance targets and monitoring (Section 31)



Directions (Section 32)

LSB is satisfied:

- that an act or omission of an authorised regulator ("**AR**"), has had, or is likely to have, an adverse impact on one or more of the regulatory objectives;
- that an AR has failed to comply with any requirement imposed on it by or under the Act or any other enactment;
- that an AR: (i) has failed to ensure that the exercise of its regulatory functions is not prejudiced by any of its regulatory functions; or (ii) has failed to ensure that decisions relating to the exercise of its regulatory functions are, so far as reasonably practicable, taken independently from decisions relating to the exercise of its regulatory functions

LSB gives the AR a notice ("warning notice") accompanied by a copy of the proposed direction. The "warning notice" must specify a period of not less than **14 days** within which the AR can make written representations

The Board has the discretion to also allow oral representations. Where oral representations are allowed, the Board must prepare a report of those representations. The AR must have opportunity to comment on a draft of such report

LSB must give copies of the "warning notice", any written representations (and any report of oral representations) to:

- the Lord Chancellor ("**LC**");
- Office of Fair Trading ("**OFT**");
- the Consumer Panel;
- the Lord Chief Justice ("**LCJ**"); and
- any such other person as the Board considers it reasonable to consult (a "**Consultee**")

The Board must also give these bodies (other than the LCJ) a notice specifying a period in which they must give their advice

The LC, OFT, Consumer Panel and Consultee (if any) provide advice to LSB

LSB provides advice given by the LC, OFT, Consumer Panel and Consultee (if any) to the LCJ. The Board must also give the LCJ a notice specifying a period in which they must give their advice.

The LCJ provides advice to LSB

LSB provides copies of advice received to AR who then has **28 days** to make written representations about advice

The Board has the discretion to also allow oral representations. Where oral representations are allowed, the Board must prepare a report of those representations. The AR must have opportunity to comment on a draft of such report

LSB must publish any advice and any written representations from the AR (and also the report of oral representations (if any))

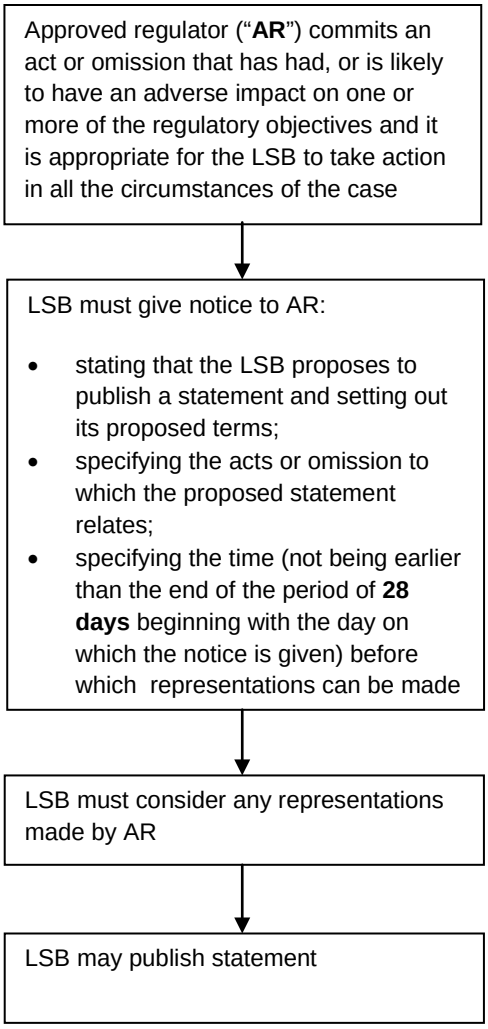
LSB considers advice and written and oral (if any) representations and decides whether to give the direction

LSB must give notice of its decision to the AR. Where the LSB decides to give the direction, the notice must:

- contain the direction;
- state the time at which the direction is to take effect; and
- specify the LSB's reasons for giving the direction

LSB must publish the notice

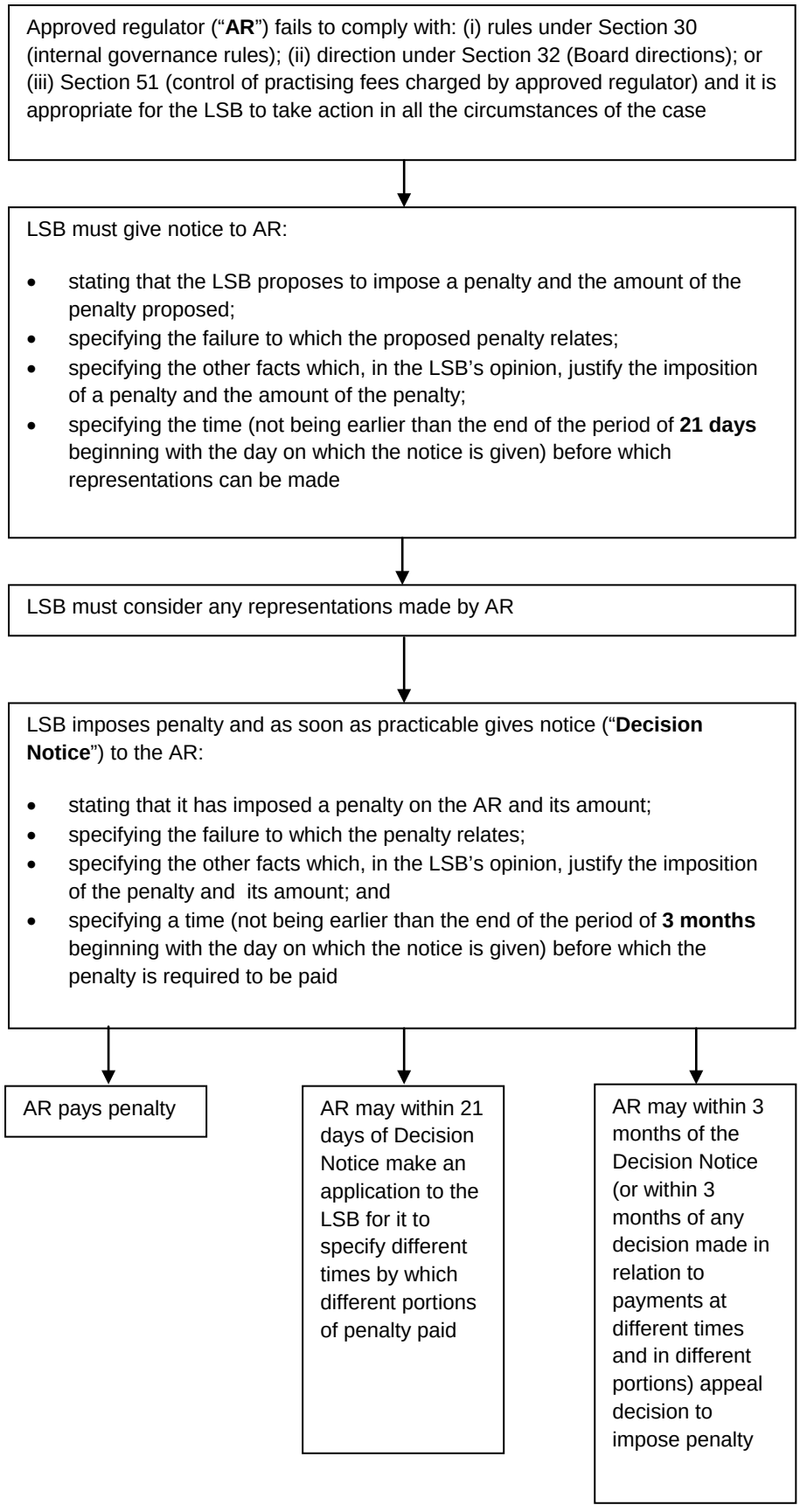
Public censure (Section 35)



If the Board wishes to vary the proposed statement set out in the notice, it must give notice to the AR:

- setting out the variation and the reason for it;
- specifying the time (not being earlier than the end of the period of **28 days** beginning with the day on which the notice is given) before which representations can be made

Financial penalties (Section 37)



If the Board wishes to vary the amount of the proposed penalty set out in the notice, it must give notice to the AR:

- setting out the variation and the reason for it;
- specifying the time (not being earlier than the end of the period of **21 days** beginning with the day on which the notice is given) before which representations can be made

Intervention directions (Section 41)

The LSB may only give an intervention direction if it is satisfied that the matter cannot be adequately addressed by exercising the LSB's powers to impose performance targets and monitoring, directions, public censure and financial penalties

Approved regulator ("**AR**") commits an act or omission that has had, or is likely to have an adverse impact on one or more of the regulatory objectives and it is appropriate for the LSB to take action in all the circumstances of the case

LSB gives the AR a notice ("**warning notice**") accompanied by a draft of the proposed intervention direction. The "warning notice" must specify a period of not less than **28 days** within which the AR can make written representations

The Board has the discretion to also allow oral representations. Where oral representations are allowed, the Board must prepare a report of those representations. The AR must have opportunity to comment on a draft of such report

LSB must give copies of the "warning notice", any written representations (and any report of oral representations) to:

- the Lord Chancellor ("**LC**");
- Office of Fair Trading ("**OFT**");
- the Consumer Panel;
- the Lord Chief Justice ("**LCJ**"); and
- any such other person as the Board considers it reasonable to consult (a "**Consultee**")

The Board must also give these bodies (other than the LCJ) a notice specifying a period in which they must give their advice

The LC, OFT, Consumer Panel and Consultee (if any) provide advice to LSB

LSB provides advice given by the LC, OFT, Consumer Panel and Consultee (if any) to the LCJ. The Board must also give the LCJ a notice specifying a period in which they must give their advice

The LCJ provides advice to LSB

LSB:

- provides copies of advice to AR; and
- publishes advice and any written representations from the AR (and also the report of oral representations (if any))

The Board has the discretion to also allow oral representations. Where oral representations are allowed, the Board must prepare a report of those representations. The person who made oral representations must have opportunity to comment on a draft of such report

AR (and any body representing persons authorised by the AR) has **28 days** in which to make written representations

LSB must publish any written representations (and also the report of oral representations (if any))

LSB considers advice and written and oral (if any) representations and decides whether to give the direction

LSB must give notice of its decision to the AR. Where the LSB decides to give the intervention direction, the notice must:

- contain the intervention direction;
- state the time at which the intervention direction is to take effect; and
- specify the LSB's reasons for giving the intervention direction

Cancellation of designation as approved regulator (Section 45)

The LSB may only give a recommendation if it is satisfied that the matter cannot be adequately addressed by exercising the LSB's powers to impose performance targets and monitoring, directions, public censure, financial penalties and intervention directions

Approved regulator ("**AR**") commits an act or omission that has had, or is likely to have, an adverse impact on one or more of the regulatory objectives and it is appropriate for the LSB to take action in all the circumstances of the case

LSB gives the AR a notice ("**warning notice**") accompanied by a draft of the proposed recommendation. The "warning notice" must specify a period of not less than **28 days** within which the AR can make written representations

The Board has the discretion to also allow oral representations. Where oral representations are allowed, the Board must prepare a report of those representations. The AR must have opportunity to comment on a draft of such report

LSB must give copies of the "warning notice", any written representations (and any report of oral representations) to:

- Office of Fair Trading ("**OFT**");
- the Consumer Panel;
- the Lord Chief Justice ("**LCJ**"); and
- any such other person as the Board considers it reasonable to consult (a "**Consultee**").

The Board must also give these bodies (other than the LCJ) a notice specifying a period in which they must give their advice

The OFT, Consumer Panel and Consultee (if any) provide advice to LSB

LSB provides advice given by the OFT, Consumer Panel and Consultee (if any) to the LCJ. The Board must also give the LCJ a notice specifying a period in which they must give their advice

The LCJ provides advice to LSB

LSB:

- provides copies of advice to AR; and
- publishes advice and any written representations from the AR (and also the report of oral representations (if any))

AR (and any body representing persons authorised by the AR) has **28 days** in which to make written representations

The Board has the discretion to also allow oral representations. Where oral representations are allowed, the Board must prepare a report of those representations. The person who made oral representations must have opportunity to comment on a draft of such report

LSB must publish any written representations (and also the report of oral representations (if any))

LSB considers advice and written and oral (if any) representations and decides whether to give the recommendation

LSB must give notice of its decision to the Lord Chancellor and the AR. Where the LSB decides to make the proposed recommendation, the notice must:

- contain the recommendation; and
- specify the LSB's reasons for giving the recommendation

LSB must publish the notice

Lord Chancellor makes order to cancel designation

Annex 8 – Impact Assessment: Statement of Policy on Enforcement

Introduction

1. The LSB is undertaking an impact assessment on the requirements imposed by it under the Act to make a Statement of Policy about its enforcement powers. The overall impact will depend on the extent of compliance by those the LSB regulates (the Approved Regulators). A separate impact assessment has been published on the LSB's powers to impose financial penalties on Approved Regulators (see Annex 9).

What is the problem under consideration? Why is intervention necessary?

2. The Act requires the LSB to publish a Statement of Policy about the enforcement powers given to it under Sections 31, 32, 35, 41, and 45 of the Act. In addition, the Act requires the LSB to make rules about the exercise of certain enforcement powers. Making the Statement of Policy and associated rules will enable the LSB to carry out enforcement activities to ensure compliance by the Approved Regulators that it oversees with the Regulatory Objectives in the Act. A separate impact assessment has been published for the LSB's powers to impose financial penalties.

What are the policy objectives and the intended effects?

3. The policy objectives and intended effects are that improved regulatory performance will in turn lead to better access and outcomes so that:

- consumers are more confident in accessing the legal services market and can make better informed decisions about purchases;

- cultures and systems of quality assurance are embedded throughout the legal services sector to give consumers confidence in the services they purchase.

What policy options have been considered? Please justify any preferred option

4. Do nothing - this is not an option – the LSB must publish this Statement of Policy and make these rules before it acquires its full powers. It is anticipated that this will be on 1 January 2010.

5. Statement of Policy and rules as drafted. The Act gives the LSB its enforcement powers. The LSB considers it reasonable, and the Act requires

the LSB, to make a Statement of Policy as to how it will use these powers if it has to.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?

6. In future we may review our compliance and enforcement strategy in the light of our other developing policies and our experience of applying it. This policy may also be the subject of review as part of the LSB's plans to review the performance of the Approved Regulators. However, this will be subject to further consultation in due course. The LSB intends to publish information about both its informal and formal enforcement action. Over time, this should enable a better assessment of the costs and benefits of the policy.

Annual costs

7. One-off (transition): £ negligible.

8. Average annual cost (excluding one-off): £ negligible.

Annual benefits

9. One-off: £ negligible.

10. Average annual benefit: £ negligible.

What is the geographic coverage of the policy/option?

11. England and Wales.

On what date will the policy be implemented?

12. It is anticipated that this will be 1 January 2010 when the LSB takes on its full powers under the Act.

Which organisation will enforce the policy?

13. The LSB.

Does enforcement comply with Hampton principles?

14. Yes.

Will implementation go beyond minimum EU requirements?

15. Yes. EU requirements do not require the regulatory framework set out in the Act.

What is the value of the proposed offsetting measure per year?

16. Nil.

What is the value of changes in greenhouse gas emissions?

17. Nil.

Will the proposal have a significant impact on competition?

18. No.

Annual cost (£-£) per organisation (excluding on-off)

19. The costs of this policy are not expected to add to the overall cost of compliance by Approved Regulators. If a penalty is imposed this may be passed through to those that the Approved Regulator regulates.

20. Micro: n/a Small: n/a Medium: n/a Large: n/a

Are any of these organisations exempt?

21. n/a.

Impact on Admin Burdens Baseline (2005 Prices)

22. Increase of £: approximately nil.

23. Decrease of £: approximately nil (although potential for small decrease).

24. Net Impact £: approximately nil.

Evidence Base

25. We consider that the cost of these changes is significantly below the generally accepted threshold of £5 million costs, below which an impact assessment is not necessary. However, we believe that in setting out how we have considered the various elements of the impact assessment will help us assess their impact on an ongoing basis.

26. Note that the LSB is an oversight regulator. Its enforcement policy is directed at the Approved Regulators that it regulates, not at those (such as solicitors or barristers) that they regulate.

Competition

27. We expect our enforcement strategy and processes to have a positive effect on competition. Compliant Approved Regulators should lead to a regulatory framework which enables providers of legal services to innovate and develop services that better reflect the needs of consumers.

Small Firms Impact Test

28. The LSB will take a proportionate approach to regulating smaller Approved Regulators to ensure the cost of compliance is not too burdensome.

Legal Aid

29. The enforcement policy will support and enhance the delivery of the Regulatory Objectives and as such will support the legal aid market through effective competition; better focus on consumers and proportionate regulation.

Race/Disability/Gender equalities

30. Because the LSB is an oversight regulator there is no direct impact on individuals. However, if the LSB achieves its intended outcomes, there will be a general improvement in the standard of regulation and the approach taken to it which we would expect to have a positive impact generally on the provision of legal services to all consumers, and to provide increased opportunities for all groups of those being regulated.

Human Rights

31. There are specific requirements on the LSB to make rules concerning oral and written representations that can be made about proposed enforcement action. The LSB must consider the representations made. In addition, in some instances, the Act provides for an appeal to the High Court against decisions taken by the LSB.

Rural Proofing

32. The LSB's enforcement policy is not expected to have a specific impact on rural areas.

Sustainability, carbon emissions, environment and health

32. There is no impact expected on sustainability, carbon emissions, environment and health.

Annex 9 – Impact Assessment: Maximum Financial Penalty

Summary: Intervention & Options

Agency:	Title:	
Legal Services Board ("LSB")	**Impact Assessment of the statutory instrument (to be made under Section 37(4) of the Legal Services Act) prescribing the maximum amount of a financial penalty that can be imposed on an Approved Regulator**	
Stage: Decision	**Version:** Final	**Date :** December 2009

Related Publications:

- Section 37 of the Legal Services Act 2007 (the "LSA")
- Consultation Paper – "Compliance and Enforcement – Statement of Policy. Consultation paper on compliance and enforcement strategy (including maximum financial penalty), draft statutory instrument and rules"
- Responses to Consultation Paper

Available to view or download at: http://www.legalservicesboard.org.uk

Contact for enquiries: Lesley Davies **Telephone: 020 7271 0071**

What is the problem under consideration? Why is government intervention necessary?

The LSA gives the LSB the power to impose financial penalties on Approved Regulators in certain circumstances. Section 37(4) of the LSA requires the LSB to make rules prescribing the maximum amount of a penalty that can be imposed. This Impact Assessment considers what the maximum penalty should be.

A financial penalty can be imposed where an Approved Regulator has failed to comply with any requirement imposed on an Approved Regulator by: (i) the LSB's internal governance rules (the separation of the regulatory and representative functions) made under Section 30 of the LSA; (ii) directions given by the Board under Section 32 of the LSA (for example for a failure to comply with any requirement of the LSA); and (iii) Section 51 of the LSA (requirements in relation to practising fees) or by any rules that the LSB may make under that section. Each of these requirements is designed to ensure that the legal services market operates in a way which gives consumers confidence in the way that legal services are regulated.

What are the policy objectives and the intended effects?

The policy objective is to comply with the requirements of the LSA and make rules prescribing the maximum amount of a penalty that can be imposed. The intended effects are that improved regulatory performance will encourage compliance by Approved Regulators with legislative and policy requirements which will in turn lead to better outcomes so that:

- consumers are more confident in accessing the legal services market and can make better informed decisions about purchases; and
- cultures and systems of quality assurance are embedded throughout the legal services sector to give consumers confidence in the services they purchase.

To meet these objectives, any maximum amount must provide sufficient deterrent value while remaining proportionate.

What policy options have been considered? Please justify any preferred option.

The LSB focussed on two options. The base case of 'do nothing' is not a viable option in this case because the LSA requires the LSB to make rules prescribing the maximum amount of a penalty. However, the options presented are compared to a hypothetical base case of 'do nothing'.

This Impact Assessment examines two options: (1) the preferred option set out in a previous consultation; and (2) the LSB's preferred option. In short this involves setting the maximum penalty as an amount equal to 5 per cent. of all income generated by an Approved Regulator from the exercise of its "regulatory functions" (as defined in Section 27 of the LSA). This option is preferred because it is considered to set a maximum with significant deterrent value but which remains proportionate.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?

This is a new power granted to the LSB. We will review the maximum amount of the penalty in the light of our developing policies on enforcement and compliance and our experience of using the financial penalty as an enforcement tool. Any revisions undertaken will be subject to the full consultation requirements of the LSA and best practice.

Ministerial Sign-off For Final Stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs.

Signed by the responsible Minister:

Not applicable

.....Date:

Summary: Analysis & Evidence

Policy Option: 1	Description: Set the maximum penalty as the greatest of: (i) an amount equal to £250 per individual that the Approved Regulator regulates; (ii) an amount equal to £5,000 per entity that the Approved Regulator regulates; or (iii) £10 million.

COSTS

ANNUAL COSTS

One-off (Transition) **Yrs**

£ Negligible

Average Annual Cost (excluding one-off)

£ Negligible

Description and scale of **key monetised costs** by 'main affected groups'

The maximum penalty under this option could result in a maximum penalty of around £28 million for the Law Society and £10 million for the Bar Council. Fines would also potentially involve significant reputational damage for Approved Regulators.

This is a relatively complicated penalty structure which would impose costs on Approved Regulators, who would be required to provide information on the number of entities and individuals they regulate, in addition to their turnover. The LSB would also face costs monitoring and enforcing this penalty structure.

Total Cost (PV) **£ Negligible**

Other **key non-monetised costs** by 'main affected groups'

There will be some cost of compliance for Approved Regulators, given the possibility of a fine increases the risk in which they operate. Given this option in effect provides a lower bound (of £10 million) for the maximum fine, such costs could be significant for, and may impact disproportionately on, smaller Approved Regulators. If regulators chose to pass on penalties in the form of increases in the costs of practicing certificates, the regulated bodies would ultimately bear these costs.

Any subsequent appeals of fines would generate costs for all parties and HMCS given appeals would be heard at court. Due to the expected low volume of cases, such costs are not expected to be significant.

BENEFITS

ANNUAL BENEFITS

One-off **Yrs**

£ Negligible

Average Annual Benefit (excluding one-off)

£ Negligible

Description and scale of **key monetised benefits** by 'main affected groups'

There is no financial incentive for the LSB to impose high penalties: fine income will be paid into the consolidated fund.

Total Benefit (PV) **£ Negligible**

Other **key non-monetised benefits** by 'main affected groups'

The maximum financial penalty proposed will provide a significant incentive for improved regulatory performance by the Approved Regulators which in turn will give consumers confidence in the services provided. Given the deterrence effect provided, the efficiency of the regulatory system should be improved.

Key Assumptions/Sensitivities/Risks

Assumptions are:

- the proposed maximum financial penalty will act as a deterrent;
- the circumstances in which the maximum will be used will be exceptional; and
- the level of any financial penalty imposed will always be proportionate to any breach

Price Base Year N/A	Time Period Years N/A	**Net Benefit Range** (NPV) **£ Negligible**	**NET BENEFIT** (NPV Best estimate) **£ Negligible**

What is the geographic coverage of the policy/option?			England & Wales	
On what date will the policy be implemented?			January 2010	
Which organisation(s) will enforce the policy?			The LSB	
What is the total annual cost of enforcement for these organisations?			£ NIL	
Does enforcement comply with Hampton principles?			Yes	
Will implementation go beyond minimum EU requirements?			Yes.	
What is the value of the proposed offsetting measure per year?			£ NIL	
What is the value of changes in greenhouse gas emissions?			£ NIL	
Will the proposal have a significant impact on competition?			No	
Annual cost (£-£) per organisation (excluding one-off)	Micro	Small	Medium	Large
Are any of these organisations exempt?	N/A	N/A	N/A	N/A

Impact on Admin Burdens Baseline (2005 Prices)				(Increase - Decrease)
Increase	£ Negligible	Decrease	£ Negligible	**Net** **£** Negligible

Key: **Annual costs and benefits: Constant Prices** **(Net) Present Value**

Summary: Analysis & Evidence

Policy Option: 2	Description: The setting of the maximum amount of penalty as an amount equal to 5 per cent. of all income generated by an Approved Regulator from the exercise of its "regulatory functions" (as defined in Section 27 of the Act)

COSTS

ANNUAL COSTS	
One-off (Transition) **Yrs**	Description and scale of **key monetised costs** by 'main affected groups'
£ Negligible	Approved Regulators would face a financial penalty of up to 5% of turnover derived from "regulatory functions" when fined. Fines would also potentially involve significant reputational damage for Approved Regulators.
Average Annual Cost (excluding one-off)	If fined, Approved Regulators will be required to provide information relating to their turnover.
£ Negligible	**Total Cost** (PV) **£ Negligible**

Other **key non-monetised costs** by 'main affected groups'

There will be some cost of compliance for Approved Regulators, given the possibility of a fine increases the risk in which they operate. Approved Regulators all face the same relative costs under this option (based on a potential fine of 5% of their turnover derived from "regulatory functions"). If regulators chose to pass on penalties in the form of increases in the costs of practicing certificates, the regulated bodies would ultimately bear these costs.

Any subsequent appeals of fines would generate costs for all parties including HMCS given appeals would be heard at court. Due to the expected low volume of cases, such costs are not expected to be significant.

BENEFITS

ANNUAL BENEFITS	
One-off **Yrs**	Description and scale of **key monetised benefits** by 'main affected groups'
£ Negligible	There is no financial incentive for the LSB to impose high penalties: fine income will be paid into the consolidated fund.
Average Annual Benefit (excluding one-off)	
£ Negligible	**Total Benefit** (PV) **£ Negligible**

Other **key non-monetised benefits** by 'main affected groups'

The maximum financial penalty proposed will provide an incentive for improved regulatory performance by the Approved Regulators which in turn will give consumers confidence in the services provided. Given the deterrence effect provided, the efficiency of the regulatory system should be improved.

Key Assumptions/Sensitivities/Risks

Assumptions are:

- the proposed maximum financial penalty will act as a deterrent;
- the circumstances in which the maximum will be used will be exceptional; and
- the level of any financial penalty imposed will always be proportionate to any breach

Price Base Year N/A	Time Period Years N/A	Net Benefit Range (NPV) £ Negligible	NET BENEFIT (NPV Best estimate) £ Negligible

What is the geographic coverage of the policy/option?	England & Wales

On what date will the policy be implemented?			January 2010	
Which organisation(s) will enforce the policy?			The LSB	
What is the total annual cost of enforcement for these organisations?			£ NIL	
Does enforcement comply with Hampton principles?			Yes	
Will implementation go beyond minimum EU requirements?			Yes.	
What is the value of the proposed offsetting measure per year?			£ NIL	
What is the value of changes in greenhouse gas emissions?			£ NIL	
Will the proposal have a significant impact on competition?			No	
Annual cost (£-£) per organisation (excluding one-off)	Micro	Small	Medium	Large
Are any of these organisations exempt?	N/A	N/A	N/A	N/A

Impact on Admin Burdens Baseline (2005 Prices)					(Increase - Decrease)
Increase of	£ Negligible	Decrease	£ Negligible	**Net**	**£** Negligible

Key: **Annual costs and benefits: Constant Prices** **(Net) Present Value**

Evidence Base (for summary sheets)

Introduction and Background

1. The LSB is the organisation created by the LSA and is responsible for overseeing legal regulators, (referred to as the Approved Regulators in the LSA) in England and Wales. The LSB's mandate is to ensure that regulation in the legal services sector is carried out in the public interest; and that the interests of consumers are placed at the heart of the system. The LSA gives the LSB and the Approved Regulators the same Regulatory Objectives[1] and a requirement to have regard to the Better Regulation Principles[2]. Compliance by the LSB and the Approved Regulators with the Regulatory Objectives, other requirements in the LSA and other statutes will help to ensure that this mandate is achieved.
2. The LSA gives the LSB a range of enforcement powers to exercise over Approved Regulators where their acts or omissions threaten the Regulatory Objectives. Its powers include the ability to impose a financial penalty upon Approved Regulators. This was considered to be an important part of a regulator's toolkit and necessary in the interests of the LSB having the greatest possible flexibility to use the most appropriate sanction at any given time. This was debated during the passage of the Legal Services Bill and therefore the merits of this power itself are not considered in this Impact Assessment.
3. Section 37(4) of the LSA requires the LSB to make rules prescribing the maximum amount of a penalty which may be imposed under Section 37. A financial penalty can be imposed where an Approved Regulator has failed to comply with any requirement imposed on an Approved Regulator by: (i) the LSB's internal governance rules (the separation of the regulatory and representative functions) made under Section 30 of the LSA; (ii) directions given by the Board under Section 32 of the LSA (for example for a failure to comply with any requirement of the LSA); and (iii) Section 51 of the LSA (requirements in relation to practising fees) or by any rules that the LSB may make under that section. Each of these requirements in the LSA is designed to ensure that the legal services market operates in a way which gives consumers confidence in the way that legal services are regulated.
4. In summary, the financial penalty will help prevent Approved Regulators from: (i) acting in a way so that their regulatory functions are prejudiced by their representative functions; (ii) using practising certificate fees in an inappropriate manner; and (iii) acting in a way that that is inconsistent with the LSA and in particular the Regulatory Objectives.
5. The rules that the LSB is required to make under Section 37(4) prescribe the maximum amount of a penalty. This is therefore the amount of a penalty that the LSB can impose in a worst case scenario. The LSB is under an overarching duty to act proportionately and this duty will be met each time the LSB seeks to impose a financial penalty. As an

[1] The Regulatory Objectives are
(a) protecting and promoting the public interest;
(b) supporting the constitutional principle of the rule of law;
(c) improving access to justice;
(d) protecting and promoting the interests of consumers;
(e) promoting competition in the provision of services such as are provided by authorised persons;
(f) encouraging an independent, strong, diverse and effective legal profession;
(g) increasing public understanding of the citizen's legal rights and duties;
(h) promoting and maintaining adherence to the professional principles.

[2] The five principles of good regulation are proportionality, accountability, consistency, transparency and targeting as set out in Section 3(3) of the LSA

additional safeguard, the LSA also sets out the grounds on which an Approved Regulator is able to appeal to the High Court against the decision of the LSB to impose a financial penalty.

Scope of the Impact Assessment

6. The scope of this Impact Assessment is limited to the amount of the maximum financial penalty. The decision to give the LSB the power to impose a penalty on the Approved Regulators has previously been discussed in consultation documents, independent reviews, White Papers and parliamentary debates. The LSA requires the LSB to make rule about what the maximum amount of such penalty should be. This Impact Assessment deals solely with what this maximum amount should be.

Scope of the proposals

7. In summary, the proposal is that the maximum amount should be an amount equal to 5 per cent. of all income which the Approved Regulator has derived from the exercise of its "regulatory functions" (as defined in Section 27 of the LSA) in respect of its most recent accounting period.

Stakeholder groups and Organisations in the scope of the proposal

8. The 10 current Approved Regulators and any new Approved Regulators will be subject to the financial penalty provisions. The current Approved Regulators are the Law Society, the Bar Council, the Council for Licensed Conveyancers, the Institute of Legal Executives, the Chartered Institute of Patent Attorneys, the Institute of Trade Mark Attorneys, the Faculty Office, the Association of Law Costs Draftsmen, the Association of Chartered Certified Accountants ("ACCA") and the Institute of Chartered Accountants of Scotland ("ICAS").

9. The LSB recognises that it may be possible for an Approved Regulator to choose to pass on the cost of any financial penalty to those it regulates by way of an increase in the cost of a practising certificate. This in turn may result in this cost being passed on to consumers. The extent to which passthrough at both levels occurs will depend on competitive pressures within the relevant markets.

10. The ability for the Approved Regulator to pass on the cost of the financial penalty (irrespective of what the level of the penalty is) is inherent in the structure of the LSA and is not something that the LSB has control over. Ultimately, whether an Approved Regulator will pass on the cost to its regulated community will depend on the nature of the regulated community.

11. Ultimately, the LSB believes that the use of a financial penalty is likely to be a rare event but that if the cost of any financial penalty is passed on in this way, any cost to the consumer is likely to be very small. Table 1 at paragraph 35 below sets out the likely cost to those regulated by an Approved Regulator in the event of the **maximum** penalty being set in accordance with Option 2, the preferred option.

Policy Rationale for Proposals

12. The LSA requires the LSB to make rules prescribing the maximum amount of a penalty which may be imposed under Section 37. The circumstances in which such a penalty can be imposed are set out above.

13. The LSB is mindful that it should set an appropriate maximum that is not too low, (as this may not have sufficient deterrent value) but not too high (as this may impose disproportionate costs on smaller Approved Regulators). The preferred option is one that is considered to provide an appropriate balance between these two concerns, and is considered by the LSB to be the most proportionate given its role as an oversight regulator and the requirements of the LSA.

Economic Rationale

14. The conventional economic approach to Government intervention is based on efficiency or equity arguments. Government intervenes if there is a perceived failure in the way a market operates ("market failures") or if it would like to correct existing institutional distortions ("government failures"). Government also intervenes for equity (fairness) reasons. In this case, intervention would be justified primarily on efficiency grounds.

15. Intervention by the LSB in the event of non compliance by imposing a financial penalty of sufficient deterrent value is likely to incentivise the Approved Regulator to improve compliance and therefore their overall efficiency and performance. This should improve welfare overall, assuming the compliance costs incurred by the Approved Regulators are outweighed by the value of efficiency gains made to the regulatory system.

Cost Benefit Analysis

16. The Consultation Paper considered a number of options for setting the amount of the maximum financial penalty. One option discussed was whether the maximum amount should be set at an amount equal to 10 per cent. of an Approved Regulator's income. This formulation is one that is commonly used by economic regulators, especially in the utilities sector. This option was largely discounted in the Consultation Paper (and subsequently by respondents) because it was recognised that the LSB's relationship with the Approved Regulators is very different to that of an economic regulator. The preferred option that was put forward in the Consultation Paper was Option 1 outlined below.

17. Response to the Consultation Paper suggested that the LSB look at the maximum fining powers given to the Legal Services Complaints Commissioner (the "LSCC"). This power effectively limits the LSCC maximum fine to £1 million by using a formula that states the maximum amount is the lesser of: (i) £1 million; and (ii) 1 per cent. of the bodies total income from all sources[3]. After consideration, this option was not perused.

18. However, in light of consultation responses, and after further consideration, the LSB has developed a further option, set out as Option 2 below. For the reasons explained in this Impact Assessment, Option 2 is now the preferred option, which will be implemented.

BASE CASE / OPTION 0 ("Do Nothing")

19. The options that the LSB has focussed on deal with how the LSB will set the maximum amount of a penalty. The LSA requires the LSB to make rules prescribing the maximum amount. Therefore, the do nothing base case is presented as hypothetical only. The two options presented below are compared to this hypothetical base case. There are no costs or benefits associated with the base case.

OPTION 1

Description

20. As set out above, this option was the one proposed in our original Consultation Paper. This proposed setting a maximum penalty of the greatest of:

- an amount equal to £250 per individual that the Approved Regulator regulates;
- an amount equal to £5,000 per entity that the Approved Regulator regulates; or
- £10 million.

[3] Legal Complaints Commissioner (Maximum Penalty) Order 2004 (SI 2004/ 2758)

Costs

Financial costs

21. The maximum penalty under this option could result in a maximum penalty of around £28 million[4] for the Law Society and £10 million[5] for the Bar Council. This option was not widely supported in our consultation. Respondents believed that the maximum amount was too large and that in some circumstances could potentially bankrupt some of the smaller Approved Regulators.

22. In instances where an Approved Regulator was fined, in addition to the financial costs they would also face reputational damage. This reinforces the financial incentives provided by the penalty itself.

Administrative costs

23. The LSB would incur some ongoing costs in instances when it would have to impose the penalty. These could be significant given the relative complexity of the penalty structure (compared to Option 2). Similarly, if fined Approved Regulators would face costs given they would be required to provide information relating the number of individuals and entities they regulate, in addition to their turnover.

24. An argument could be made that the imposition of a relatively large penalty (such as this option would allow) might lead to a greater number of appeals by Approved Regulators which in turn could lead to greater costs for the judicial system. There is no evidence that such impacts would generate significant costs for HMCS, particularly given it is not envisaged that financial penalties will be used on a regular basis and the LSB does not think that its selection of the appropriate level for the maximum penalty should affected by this consideration.

Compliance costs

25. Approved Regulators are likely to incur compliance costs to reduce the risk of receiving a penalty; the potential penalty proposed under this option would have significant deterrent value.

Distributional costs

26. Given this option in effect provides a lower bound (of £10 million) for the maximum fine, in relative terms (compared for example to their turnover) the potential fine a small Approved Regulators may face is higher than the fine a large Approved Regulators may face. Any compliance costs borne by Approved Regulators as a result of the penalty could be significant for, and may impact disproportionately on, smaller Approved Regulators.

27. As mentioned above, it is possible that an Approved Regulator may choose to pass on the cost of any financial penalty to those it regulates by way of an increase in the cost of the practising certificate. This in turn may result in this cost being passed on to consumers. This may generate distributional impacts, although the effect of such impacts is uncertain.

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[4] The consolidated report and financial statements for The Law Society as at 31 December 2008 state (at page 5) that there were 112,246 solicitors holding practising certificates as at March 2009. If you multiply this figure by £250 you reach approximately £28 million.

[5] The number of individuals that the Bar Council currently regulates is approximately 15,000. 15,000 multiplied by £250 equals £3.75 million. This means that the £10 million threshold would apply.

28. If the Approved Regulator chose to pass on the amount of the financial penalty to their regulated community, this in itself would incentivise members of the profession to put pressure on their Approved Regulator to improve their compliance. If a number of financial penalties were passed through by an Approved Regulator this may in itself incentivise members of the professions to switch to an alternative regulator (if one was available). All these factors should ultimately help drive regulatory compliance.

Benefits

Financial benefits

29. Any financial penalty imposed on an Approved Regulator by the LSB is paid into the Consolidate Fund. There is therefore no incentive on the LSB to impose a large penalty other than the penalty should be an incentive to change behaviour.

Efficiency benefits

30. The benefit of this option is that it sets a maximum penalty with significant deterrent value. This should provide benefits for firms and consumers within the regulatory framework covered, given the effectiveness of the regulatory system should be improved. The methodology also allows for the maximum penalty to increase as the Approved Regulators scope of regulatory functions increase.

Net Impact

31. It has not been possible to quantify the costs and benefits set out above, in line with the uncertainties present. However, it is considered that this option would result in a maximum penalty which could ultimately be too large for the smallest Approved Regulators. This conclusion is supported by consultation responses: all but one respondent had serious reservations about this proposal. This option would also impose extra administrative costs on all Approved Regulators, and on the LSB, compared to Option 2. For these reasons, this option is no longer the preferred option.

OPTION 2

Description

32. This option is to frame the maximum penalty as an amount equal to 5 per cent. of all income which the Approved Regulator has derived from the exercise of its “regulatory functions” (as defined in Section 27 of the LSA) in respect of its most recent accounting period.

33. This option will lead to a smaller maximum amount than that proposed under Option 1, particularly for the smallest Approved Regulators. Both options provide a maximum amount that the LSB can impose, but it is noted that in deciding what penalty to impose the LSB would always be under a duty to act proportionately, taking into account the particular circumstances of each case.

Costs

Financial costs

34. From the Approved Regulators’ perspective, this option doesn’t give them a certainty of capping the maximum penalty at a specific amount; rather the potential fee depends on turnover. Any fines would represent a cost to Approved Regulators.

35. An illustration of the cost of this proposal to those Approved Regulators who have publicly available accounts for the year ended 31.12.08 is set out in Table 1 below. This table also sets out the per capita cost to each member of the profession if the Approved Regulator chose to pass the penalty through as an increase in the practising certificate fee.

Table 1: Possible financial implications of Option 2 fee structure

Approved Regulator	Approximate income from "regulatory functions" derived from audited accounts FYE 31.12.08	Proposed maximum on basis of 5% formula	Number of Authorised Persons[6]	Per capita cost if full penalty passed through
The Law Society	£108 million	£5,400,000	108,407	£50.00
The General Council of the Bar	£6,100,000	£305,000	15,030	£20.00
Institute of Legal Executives	£6,500,000	£321,000	7,488	£43.00
Council for Licensed Conveyancers	£1,223,000	£61,000	1,034	£59.00
Institute of Trade Mark Attorneys	£582,000	£ 29,000	844	£35.00

Note: Accounting information for the Master of Faculties, the Chartered Institute of Patent Attorneys and the Association of Law Costs Draftsmen not publicly available. ACCA and ICAS are also excluded because they were not undertaking regulatory functions during the year ending 31.12.08.

36. In instances where an Approved Regulator was fined, in addition to the financial costs they would also face reputational damage. This reinforces the financial incentives provided by the penalty itself.

Administrative costs

37. The LSB would incur some minor ongoing costs in instances when it would have to impose the penalty. Given the proposed structure is simpler than under Option 1, these costs would be lower. Similarly, Approved Regulators would face costs if fined as they would be required to provide turnover information. These costs would also be lower than under Option 1.

38. As with Option 1, an argument could be made that the imposition of a relatively large penalty (such as this option would allow) might lead to a greater number of appeals by Approved Regulators which in turn could lead to greater costs for the judicial system.

[6] See page 6 of the LSB Business Plan 2009/10
http://www.legalservicesboard.org.uk/news_publications/publications/pdf/business_plan_2009_10.pdf

There is no evidence that such impacts would generate significant costs for HMCS, particularly given it is not envisaged that financial penalties will be used on a regular basis and the LSB does not think that its selection of the appropriate level for the maximum penalty should be affected by this consideration.

Compliance costs

39. A potentially large penalty such as proposed under this option would have significant deterrent value. One result of this may be that Approved Regulators face increased compliance costs to ensure that a financial penalty is not imposed against them. Unlike Option 1, there is no lower bound on the maximum fine: the maximum is proportional to turnover. This means that all Approved Regulators face the same relative risks, and would expected to bear the same relative costs, regardless of their size.

Distributional costs

40. It is possible that an Approved Regulator may choose to pass on the cost of any financial penalty to those it regulates by way of an increase in the costs of the practising certificate. This in turn may result in this cost being passed on to consumers. The final column of Table 1 illustrates the per capita cost to each member of the profession if the Approved Regulator chose to pass the penalty through as an increase in the practising certificate fee. This would generate distributional impacts on the regulated bodies and their customers, although the effect of such impacts is uncertain.

41. If the Approved Regulator chose to pass on the amount of the financial penalty to their regulated community, this in itself would incentivise members of the profession to put pressure on their Approved Regulator to improve their compliance. If a number of financial penalties were passed through by an Approved Regulator this may in itself incentivise members of the professions to switch to an alternative regulator (if one was available). All these factors should ultimately help drive regulatory compliance.

Benefits

Financial benefits

42. Any financial penalty imposed on an Approved Regulator by the LSB is paid into the Consolidate Fund. There is therefore no financial incentive on the LSB to impose a large penalty, other than the penalty should be an incentive to change behaviour.

Efficiency benefits

43. This option sets a maximum penalty with a significant deterrent value. This should provide benefits for firms and consumers within the regulatory framework covered, given the effectiveness of the regulatory system should be improved. The methodology also allows for the maximum penalty to increase as the Approved Regulators scope of regulatory functions increase.

44. The use of a figure based on a percentage of regulatory income follows the model that is already in use by the LSCC and allows for a maximum which is proportionate to the relative size of the different Approved Regulators.

45. However, the figure of 5 per cent. (rather than the 1 per cent. that the LSCC can impose) is considered appropriate because the roles of the LSB and the LSCC are very different. The LSCC regulates just one sub-section of activities (complaints). It is the LSB's responsibility to oversee the regulation of all regulatory activities of the Approved Regulators and to ensure that sufficient sanctions and deterrents are in place to deter major systemic regulatory failure, and to ensure its rapid correction if and when it occurs. This is an important consideration with the introduction of Alternative Business Structures.

46. The option also recognises that the 10 per cent figure often used by economic regulators is not appropriate for dealing with the scale of activities of the Approved Regulators.

However, the option does recognises that not limiting the penalty to an absolute maximum (as the LSCC does with is absolute maximum of £1 million) gives the flexibility for the level of the penalty to increase in line with the increase in an Approved Regulators "regulatory functions".

Net Impact

47. As with Option 1, it has not been possible to quantify the costs and benefits set out above, in line with the uncertainties present. However, it is considered that this option would result in a maximum penalty that would be appropriate for all Approved Regulators, regardless of their size. This option would also minimise the administrative costs on all Approved Regulators, and on the LSB. For these reasons, this option is the preferred option.

SUMMARY OF OPTIONS

48. The LSB prefers Option 2. The reasons for this are as follows:

- the use of a figure based on a percentage of regulatory income follows the model that is already in use by the LSCC and allows for a maximum which is proportionate to the relative size of the different Approved Regulators;
- the figure of 5 per cent. (rather than the 1 per cent. that the LSCC can impose) is considered appropriate because the LSB is dealing with a broader range of activity than the LSCC and would provide sufficient deterrent value;
- not limiting the penalty to an absolute maximum (as the LSCC does with is absolute maximum of £1 million) or minimum (such as £10 million in Option 1) gives the flexibility for the level of the maximum penalty to be clearly linked to the scope of an Approved Regulators "regulatory functions". The LSB believes that this flexibility is important as the regulatory regime for Alternative Business Structures develops;
- the methodology gives a maximum amount which, by sitting between the maximum that can be imposed by the LSCC and the maximum that can be imposed by most economic regulators, recognises the unique oversight relationship between the LSB and the Approved Regulators;
- the proposed structure is simple, which will minimise the administrative costs that both the LSB and Approved regulators would bear in any instances when a fine is imposed.

49. It should be remembered that this policy only sets a maximum amount. The LSA requires the LSB to act proportionally and as a result the actual penalty imposed will be considered on a case by case basis.

Enforcement and Implementation

50. The policy adopted will be implemented by a statutory instrument which can only be made with the consent of the Lord Chancellor.

51. The LSB will be the body who enforces the policy.

Specific Impact Tests

52. Extensive Impact Assessments were carried out in the process of the Legal Services Bill's progress through Parliament[7]. The LSA requires the LSB to makes rules prescribing the maximum amount a financial penalty.

Rural proofing

53. The LSB's policy on financial penalties and the amount of the maximum amount of any penalty is not expected to have a specific impact on rural areas.

Environmental tests

54. There is no impact expected on the environment.

Competition Assessment

55. We would expect our enforcement strategy and processes to have a positive effect on competition. Compliant Approved Regulators should lead to a regulatory framework which enables providers of legal services to innovate and develop services that better reflect the needs of consumers.

Sustainable Development

56. There is no impact expected on sustainable development.

Small Firms Impact Test

57. The maximum financial penalty rules will not apply to small businesses. However, as noted elsewhere in this Impact Assessment, it is possible that an Approved Regulator may choose to pass on the cost of any financial penalty to those it regulates by way of an increase in the cost of a practising certificate. If this occurred on a regular basis it could have a disproportionate impact on smaller law firm businesses. In mitigation, the LSB believes that the use of a financial penalty is likely to be a rare event and if it is used, the maximum it proposes (which is the maximum and is therefore not indicative of the likely average level of a penalty) when coupled with the LSB's overarching duty to act proportionately, is not large enough to cause a significant disproportionate impact on small firms.

Legal Aid and Justice Impact Test

58. The LSB's policy is not expected to have a specific impact on legal aid and justice.

Human Rights

59. There are specific requirements on the LSB to make rules concerning the making of oral and written representations in relation to the exercise of certain of the LSB's enforcement functions. Although there is no specific requirement for the LSB to make such rules in relation to the imposition of financial penalties, the LSB has decided that the same rules should apply as those that apply to its other enforcement functions.

60. Section 39 of the LSA provides a mechanism for Approved Regulators to appeal to the High Court against aspects of a decision to impose a financial penalty.

Freedom of Expression Audit

61. The LSB's policy is not expected to have a specific impact on Freedom of Expression.

Privacy Impact Test

62. The LSB's policy is not expected to have a specific impact on privacy.

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[7] http://www.official-documents.gov.uk/document/cm68/6839/6839.pdf

EIA

63. Because the LSB is an oversight regulator there is no direct impact on individuals. However, if the LSB achieves its intended outcomes, there will be a general improvement in the standard of regulation and the approach taken to it which we would expect to have a positive impact generally on the provision of legal services to all consumers, and to provide increased opportunities for all groups of those being regulated.

64. It is possible that an Approved Regulator may pass on the cost of any financial penalty to those it regulates by way of an increase in the cost of a practicing certificate. If this occurred on a regular basis it could have a disproportionate impact on solicitors, barristers and any other approved persons on relatively moderate incomes. This may have some impact on diversity given that a high proportion of these approved persons are likely to be Black or Minority Ethnic. However it will be for the Approved Regulator to determine how it passes on the cost of the financial penalty to those it regulates. The LSB believes that the use of a financial penalty is likely to be a rare event and that if it is used, the maximum it proposes, when coupled with the LSB's overarching duty to act proportionately, is not significant enough to cause such an impact.

Specific Impact Tests: Checklist

Type of testing undertaken	*Results in Evidence Base?*	*Results annexed?*
Competition Assessment	Yes	No
Small Firms Impact Test	Yes	No
Legal Aid	Yes	No
Sustainable Development	Yes	No
Carbon Assessment	Yes	No
Other Environment	Yes	No
Health Impact Assessment	Yes	No
Race Equality	Yes	No
Disability Equality	Yes	No
Gender Equality	Yes	No
Human Rights	Yes	No
Rural Proofing	Yes	No

Annexes

None

Bar Council Investigation Report

Formal investigation into the Bar Council's involvement in the BSB application to the LSB for approval of changes to the Code of Conduct in relation to the "Cab Rank Rule"

October 2013

Contents

1. Introduction to the investigation

1.1. This document sets out the results of the Legal Services Board's (" **the LSB**") investigation into the Bar Council's involvement in the Bar Standards Board's (" **the BSB**") application to the LSB for approval of changes to the Code of Conduct in relation to the "Cab Rank Rule".

Structure of this report

1.2. The main body of this report sets out the LSB's consideration of the evidence it analysed during its investigation and the conclusions it reached. Because of the volume of information involved, we have included as Annexes to this report the "facts and matters" that we took into account in our analysis; they are cross-referenced in the main body of the report.

1.3. Details of representatives of the Bar Council and the BSB are included in this report in order to show the sequence of actions within these organisations in relation to this matter. There is no evidence that individuals acted other than on behalf of their respective organisations. As such, our intention is not to focus on any particular individual. To facilitate redaction, a reference number has been assigned to each individual and has been used throughout this document, although the titles of some more senior roles may indicate the individual concerned. The names of these individuals have been redacted from Annex 1 for the purposes of publication.

1.4. Annexes 2 and 3 set out the relevant facts and matters before and after the LSB's Internal Governance Rules (" **the IGR**") (Annex 4) came into force. Annex 5 contains the text of the formal requests for information that we sent before and during the investigation.

Outcome of the investigation

1.5. Enforcement action has been informally resolved. Relevant correspondence has been published at the same time as this report and Board papers that considered this issue will be published in line with our publication policy.

Background

1.6. The Legal Services Act 2007 ("**the LSA**") created the LSB as a regulator with responsibility for overseeing the regulation of legal services in England and Wales. The regulatory framework of the LSA commenced on 1 January 2010.

1.7. Our focus is to deliver the eight regulatory objectives, set out in section 1 of the LSA. These are:

- protecting and promoting the public interest;
- supporting the constitutional principle of the rule of law;
- improving access to justice;
- protecting and promoting the interests of consumers;

- promoting competition in the provision of services in the legal sector;

- encouraging an independent, strong, diverse and effective legal profession;

- increasing public understanding of the citizen's legal rights and duties;

- promoting and maintaining adherence to the professional principles of independence and integrity; maintaining proper standards of work; observing the best interests of the client and the duty to the court; and maintaining client confidentiality.

1.8. The LSB oversees 10 separate approved regulators, which themselves regulate individuals and entities practising law. Our approach to this role is set out on our website.[1]

LSA section 28, section 30 and the IGR

1.9. Section 30 of the LSA requires the LSB to make rules setting out the requirements to be met by approved regulators to ensure that the exercise of an approved regulator's regulatory functions is not prejudiced by its representative functions and that decisions relating to its regulatory functions are, so far as reasonably practicable, taken independently from decisions relating to its representative functions. The LSB consulted on its proposed rules on 25 March 2009 and again on 16 September 2009. The LSB's decision document and the rules it made were published on 9 December 2009. These rules – the IGR[2] – are set out at Annex 4.

1.10. The IGR take a principles-based approach, imposing a general duty to have in place arrangements that observe and respect, and to act at all times in a way which is compatible with, the principle of regulatory independence. Furthermore, approved regulators must act in the way that they consider most appropriate for the purpose of meeting the principle of regulatory independence. The IGR include a schedule of specific requirements that apply to approved regulators with representative functions (known as applicable approved regulators – or **AAR**s). This schedule addresses issues such as governance, appointments to the regulatory board, regulatory strategy and the provision of resources and oversight. The requirements in the schedule are split into principles, rules and guidance.

1.11. One of the requirements of the IGR schedule is to delegate the responsibility for performing all regulatory functions to a body without any representative functions. Section 27 of the LSA defines regulatory functions as any functions the approved regulator has in relation to its regulatory arrangements or in connection with the making or the alteration of those arrangements. The

[1] LSB (June 2013), *Overseeing regulation: The LSB's approach to its role,* <http://www.legalservicesboard.org.uk/news_publications/latest_news/pdf/20130610_overseeing_regulation_final.pdf>
[2] LSB (December 2009), *Internal Governance Rules 2009,* <http://www.legalservicesboard.org.uk/Projects/pdf/internal_governance_rules%202009_final_km.pdf>

representative functions are defined as any functions the approved regulator has in connection with the representation, or promotion, of the interests of people regulated by it.

1.12. The General Council of the Bar ("**the Bar Council")** is the approved regulator for barristers and is an AAR. To comply with the requirement in the schedule it has delegated its regulatory functions to the BSB. Both organisations are required to self-certify that they comply with the requirements of the IGR schedule in a manner prescribed by the LSB from time to time.

1.13. Section 28 of the LSA places a duty on approved regulators to act in a way that is compatible with the regulatory objectives (so far as is reasonably practicable and in a manner they consider most appropriate). They must also have regard to the principles of best regulatory practice. A similar obligation is placed on the LSB by section 3 of the LSA. We have set out what we consider these regulatory objectives to mean in practice.[3] In relation to the requirement for the LSB and approved regulators to protect and promote the public interest the LSB considers, amongst other things, that:

> *The principle of separation of regulation and representation within the approved regulators is key to this objective. Technical compliance with the rules is an important foundation but nothing less than achieving and being able to demonstrate outcomes from them will increase public confidence and satisfy the public interest as secured by this objective.*[4]

1.14. The Legal Services Act 2007 (Commencement No. 6, Transitory, Transitional and Saving Provisions) Order 2009[5] commenced part 4 of the LSA. This included section 28 (approved regulator's duty to promote the regulatory objectives etc) and section 30 (rules relating to the exercise of regulatory functions). The order meant that these provisions, to the extent that they were not already in force, came into force on 1 January 2010. Therefore, approved regulators were under a legal requirement to act in a way compatible with the regulatory objectives, so far as is reasonably practicable, and to adhere to the IGR from that point.

The contractual terms and the rule change application

1.15. The BSB's Code of Conduct included two Annexes related to standard contractual terms before the LSB's IGR came into force. The Annexes were G1 and G2 of the BSB's Code of Conduct: the "Terms of Work on which Barristers Offer their Services to Solicitors and the Withdrawal of Credit scheme 1988" and "Services to solicitors, contractual terms".[6]

1.16. On 26 October 2011 we received an application from the BSB for LSB approval, under schedule 4, part 3 to the LSA, of an alteration to the BSB's regulatory arrangements.[7] The alteration concerned the operation of the "Cab Rank Rule," the introduction of new contractual terms, the introduction of a List of Defaulting Solicitors and the removal of Annexes G1 and G2 (as referred to

[3] LSB (July 2010), *The Regulatory Objectives,* <http://www.legalservicesboard.org.uk/news_publications/publications/pdf/regulatory_objectives.pdf>
[4] Paragraph 8
[5] The Legal Services Act 2007 (Commencement No. 6, Transitory, Transitional and Saving Provisions) Order 2009 <http://www.legislation.gov.uk/uksi/2009/3250/article/2/made>
[6] Annex 3, paragraph A3.4 and A3.5
[7] As defined in section 21 of the LSA

above) from the BSB's Code of Conduct. The drafting of new contractual terms had been the subject of discussions between the Bar Council and the Law Society for a number of years, pre-dating the establishment of the BSB. Further contextual background information on these discussions is set out in Annex 2.

1.17. The introduction of the new contractual terms and associated changes to the regulatory arrangements of the BSB was approved by the LSB on 27 July 2012,[8] and implemented on 31 January 2013.

1.18. The Cab Rank Rule was amended to state that a barrister is obliged to accept work offered under the new contractual terms or under any standard terms of work published by that barrister. However, if the instructions are from individuals that are named on the List of Defaulting Solicitors (and other persons authorised by the SRA), the Cab Rank Rule does not apply.

1.19. Solicitors (or other persons authorised by the SRA) that have contracted with a barrister on the new contractual terms or any other terms published by the barrister and who fail to pay the barrister's fees that the Voluntary Joint Tribunal on Barristers' Fees has adjudged to be due can be the subject of a complaint to the Bar Council (as well as under a number of other circumstances). If the complaint is successful then the solicitor (or other person authorised by the SRA) may be placed on the List of Defaulting Solicitors (and other authorised persons regulated by the SRA). If a person appears on this list barristers can turn down their instructions. This list is administered by the Bar Council's Fees Collection Office and the ability to complain about outstanding fees is only available to barristers who pay the voluntary Member Services Fee to the Bar Council.[9]

1.20. On 7 March 2013 the Bar Council issued a statement to the effect that it had designed the new contractual terms to provide "*appropriate protection to barristers*". It also stated that the Bar Council would be undertaking further work in relation to those terms with the Law Society, to promote "*our professional interest*".[10]

LSB's decision to investigate

1.21. Following the statement released by the Bar Council, on 27 March 2013 the LSB issued a notice under section 55 of the LSA seeking information from the Bar Council on its involvement in the drafting of the new contractual terms, the rule change application to the LSB and activity in relation to the statement issued by the Bar Council on 27 March 2013. Our analysis of the information received prompted us to issue a second notice on 9 May 2013.

1.22. Having considered analysis of information received from the Bar Council in response to these notices, the LSB decided at its meeting on 23 May 2013 to

[8] All relevant LSB papers for the rule change can be found here: http://www.legalservicesboard.org.uk/what_we_do/regulation/applications.htm#2011

[9] The Bar Council website states: *" If you have fees outstanding, and have paid your Member Services Fee, you can make complaints to the Fees Collection Office*" see http://www.barcouncil.org.uk/for-the-bar/introduction-to-member-services/fees-collection/

[10] The Bar Council (7 March 2013), *New Contractual Terms: Joint statement by the Chairman of the Bar and the President of the Law Society,* <http://www.barcouncil.org.uk/media-centre/news-and-press-releases/2013/march/new-contractual-terms-joint-statement-by-the-chairman-of-the-bar-and-the-president-of-the-law-society/>

commence a formal investigation of the Bar Council's conduct in relation to an alteration to the BSB's regulatory arrangements.[11]

Scope of investigation

1.23. Five heads of investigation were set out by the LSB. These are (in the order considered in this Report):

- has the Bar Council failed to comply with a requirement imposed on it by the IGR, namely the requirement at all times to act in a way which is compatible with the principle of regulatory independence and which it considers most appropriate for the purpose of meeting that principle (Rule 6(b));
- has the Bar Council failed to comply with a requirement imposed on it by the IGR, namely the requirement to ensure the exercise of regulatory functions is, so far as reasonably practicable, independent of any representative functions (Rule 7(c));
- have acts, or a series of acts had, or likely to have, an adverse impact on protecting and promoting the public interest by undermining the principle of independent regulation;
- have acts, or a series of acts had, or likely to have, an adverse impact on supporting the constitutional principle of the rule of law to the extent that the Bar Council has breached a requirement within the IGR;
- are there any other actions by the Bar Council that emerge from the investigation that are relevant to the issue of regulatory independence.

1.24. We also identified the following themes to assist in the categorisation and consideration of the evidence provided by the Bar Council. The themes were:

- whether the BSB simply "contracted out" a complex administrative task to an organisation with greater and more expert resources and, if so, how it considered whether this was consistent with the IGR;
- whether, and if so how, the Bar Council, in carrying out the work, considered whether this was consistent with the IGR;
- what would have been "reasonably practicable" in terms of separation of representative and regulatory functions in this case;
- whether there is evidence that the Bar Council was the "controlling mind" and determined the content of the application as well as

[11] LSB (May 2013), *Minutes of a meeting of the Legal Services Board (LSB) on 23 May 2013,* <http://www.legalservicesboard.org.uk/about_us/board_meetings/pdf/2013_05_23_minutes_of_meeting_final.pdf>

processing its preparation. In particular, whose view prevailed in the event of disagreement over drafting or approach;

- whether there was an attempt to deceive the LSB about the source of the rule change application, given our specific query about whether standard terms were a representative matter.

1.25. These themes have been used as a tool to analyse the mass of evidence that we have acquired during the course of the investigation. The outputs from this analysis informed our consideration of whether there is sufficient evidence to show that the Bar Council was in breach of any of the questions defined in the five heads of investigation.

1.26. We initially identified a theme about whether the Bar Council placed significant legal risk on the BSB's decision by acting as the author of a proposal on which it was one of a number of consultees. However, our analysis showed that the issues raised by this theme were more appropriately considered as aspects of some of the other themes.

Approach to the investigation

1.27. The following sections first analyse the facts and matters that are relevant to the five heads of investigation. Then they assess that information and consider what findings the LSB draws from that analysis.

1.28. Some information, set out in Annex 2, predating the introduction of the IGR has been considered with a view to understanding past events and the approach taken by the Bar Council to the introduction of the IGR. Annex 3 sets out the relevant facts and matters (including omissions) for events after the IGR were in force. The facts and matters in Annexes 2 and 3 show that the same Bar Council individuals were involved with the issue before and after the IGR were introduced.

1.29. Information for our conclusions has been drawn from, among other things, information received from the Law Society in response to a request for information on 26 June 2013, and from the Bar Council in response to requests under section 55 of the LSA issued on the following dates:

- 27 March 2013;
- 9 May 2013;
- 21 June 2013 (as amended on 24 June 2013);
- 16 August 2013.

The questions from the all of the section 55 notices related to this investigation can be found at Annex 5.

1.30. A version of facts and matters, including omissions, was shared with the Bar Council on 22 July 2013, giving it the opportunity to correct any factual inaccuracies in the document. We have taken account of the Bar Council's

comments provided on 29 July 2013 in the version of facts and matters contained in this document at Annex 3. The LSB considered the response of the Bar Council and where appropriate made amendments or included additional information. However, the facts and matters in Annex 3 are not themselves an agreed document.

1.31. A version of the report was also shared with the Bar Council and BSB on 13 September 2013. The BSB provided comments on this version of the report on 4 October 2013. The LSB considered the content of the BSB's response and where appropriate made amendments.

2. Analysis and findings: the principle of regulatory independence and the IGR

2.1. This section considers the two heads of investigation:

- has the Bar Council failed to comply with a requirement imposed on it by the IGR, namely the requirement at all times to act in a way which is compatible with the principle of regulatory independence and which it considers most appropriate for the purpose of meeting that principle (Rule 6(b))?

- has the Bar Council failed to comply with a requirement imposed on it by the IGR, namely the requirement to ensure the exercise of regulatory functions is, as far as reasonably practicable, independent of any representative functions (Rule 7(c))?

2.2. The IGR define the principle of regulatory independence as the principle that:

> *structures or persons with representative functions must not exert, or be permitted to exert, undue influence or control over the performance of regulatory functions, or any persons(s) discharging those functions.*[12]

Our analysis includes consideration of whether the Bar Council's actions were at all times compatible with this principle as well as whether it considered what was the most appropriate way to meet that principle.

2.3. We have considered:

- the nature and extent of the Bar Council's involvement;

- whether it was it the Bar Council or the BSB that was in control;

- what it might have been "reasonably practicable" for the Bar Council to do to ensure that the exercise of regulatory functions by the BSB in this case was independent of the Bar Council's representative functions;

- whether the Bar Council implemented any of these – or any other – reasonably practicable measures.

2.4. Part of our analysis considers whether the BSB simply "contracted out" a complex administrative task to an organisation with greater and more expert resources and, if so, how it considered whether this was consistent with the IGR. We have also considered whether, and if so how, the Bar Council, in carrying out the work, considered whether this was consistent with the IGR. In addition, we have considered what (if any) impact the Bar Council's involvement in the rule change application process could be said to have had on compliance with these requirements of the IGR.

[12] The Internal Governance Rules 2009 paragraph 1

Discussion

The nature and extent of the Bar Council's involvement

2.5. Annex 2 shows the approach taken by the Bar Council and the BSB on the issue of new contractual terms prior to the introduction of the IGR. In this case, the issue was long-running. Standard (non-contractual) terms and the Withdrawal of Credit Scheme had been included in the Bar Council's Code of Conduct since 1988 and contractual terms since 2001(as Annexes G1 and G2). In addition, the BSB had been involved in discussing with the Bar Council its progress in developing new contractual terms for a number of years prior to the introduction of the IGR. Work on the new contractual terms was not included in the BSB's corporate publications from 2008 to 2011 (even though those publications were detailed in nature). However, they did appear in Bar Council documents such as the Bar Council's 2008 Annual Report and its 2011-13 Strategic Plan.[13] In this case, there was no perceptible change in practice once the IGR came into force: Bar Council staff and members who had been involved in drafting the new contractual terms and BSB papers continued to do so after the IGR were introduced.

2.6. It is unclear how, when and by whom it was decided that the BSB would make use of Bar Council expertise and background knowledge, and how and when this was communicated to the Bar Council. However, the Bar Council told the LSB that *"[...] it was obvious that the BC could (and should) assist the BSB if and when called upon to do so. It is not now possible to identify the first occasion on which a representative of the BSB decided to request such assistance, but it must have been shortly after the BSB was set up".*[14] The Bar Council also told the LSB that because Bar Council staff had worked for many years on this issue *"[...] it was therefore considered obvious, as well as logical and sensible, that the BSB should use that experience where it was likely to prove beneficial. This was particularly appropriate in the first few years of the existence of the BSB, which was taking up matters initially started by the Bar Council".* [15] The Bar Council also told the LSB that *"[a]t all times, the BSB was in full control of the process"*.[16]

2.7. A decision to draw on external expertise is a reasonable approach by an approved regulator. In this case, it would have been reasonable for the BSB to take into account the Bar Council's previous experience in developing the contractual terms. However, the Bar Council was not necessarily the only source of expertise – an individual barrister may have been able to assist the BSB just as ably and without raising the same independence issues.

2.8. Once the IGR were in force, in considering whether it would be appropriate for the Bar Council to remain involved in drafting the new contractual terms and papers for the BSB, we would have expected to see consideration (by both the Bar Council and the BSB) of the following issues:

- the comparative levels of expertise in the Bar Council and the BSB;

[13] See Bar Council documents here: <http://www.barcouncil.org.uk/media/18179/annreportaccs2008.pdf> and <http://www.barcouncil.org.uk/media/106044/bar_council_strategic_plan_2011-2013.pdf>
[14] Annex 3, paragraph A3.102
[15] Annex 3, paragraph A3.105
[16] Annex 3, paragraph A3.42

- whether the involvement of the Bar Council raised any IGR issues;

- whether anyone else had appropriate expertise;

- how the BSB would supervise the Bar Council staff and members to ensure that the work produced was consistent with the regulatory objectives and other requirements of the LSA.

2.9. It is worth noting that ahead of separation of regulatory matters from the Bar Council to the BSB, all regulatory matters, and therefore all experience and expertise, lay in the Bar Council. Other regulatory matters have been successfully delivered in compliance with sections 28 and 30 of the LSA, and the IGR.

2.10. Even though production of Board and Committee papers did not formally fall within BSB/Bar Council shared services, once it became obvious that the Bar Council's involvement was continuing over a number of years after the IGR were introduced, we would have expected to see consideration of the creation of a similar agreement to those already in place for shared services[17] or the implementation of other governance arrangements to enable the BSB to manage the input of the Bar Council.

2.11. Even if consideration of whether the working arrangements in place should continue was not undertaken at the introduction of the IGR, in the LSB's judgement, there were a number of occasions where the Bar Council's continued involvement could reasonably have been reconsidered:

- representatives of the Bar Council were present at the 21 October 2010 BSB Board meeting when the issue of whether this was a regulatory or representative matter was discussed. One press report indicates that the matter was referred to as a "*union-based activity*" and that the Bar Council Chair was present and commented that there was "*[...] no attempt to cross the governance boundaries*".[18] Assuming this discussion did occur, it would have been reasonable for the Bar Council and/or the BSB to re-consider the Bar Council's involvement and, if it was nevertheless appropriate for it to remain involved, to put in place properly structured arrangements with the BSB;

- the Law Society's response to the April 2010 Bar Council consultation was reported to the October 2010 BSB Board meeting. This had the effect of highlighting that the consultation about a regulatory change was being considered by the Bar Council's representative arm (rather than the BSB). The BSB Board (whether in response to the Law Society's comment or for some other reason) decided that the matter was a regulatory one.[19] There is no evidence, however, that it considered whether the continued

[17] Since 10 August 2010 the Bar Council and BSB have had a service level agreement in relation to Equality and Diversity Issues. This agreement has been reviewed by the LSB and complies with the IGR requirements in relation to shared services
[18] Annex 3, paragraph A3.24
[19] Annex 3, paragraph A3.23

involvement of the Bar Council in a regulatory matter was appropriate as a matter of principle and, even if it was, whether the level of involvement was appropriate. The Bar Council could also have reviewed its continuing involvement either when it saw the Law Society's response or after the BSB's Board meeting;

- at the point of drafting the rule change application to the LSB, it became clear that the Bar Council member of staff was unfamiliar with the full requirements of the LSB's rule change process.[20] Although the BSB did give some advice to the Bar Council about how to consider the requirements of the LSA, it would have been reasonable at that point for the Bar Council and the BSB to consider whether drafting an application to the LSB to change regulatory arrangements was an appropriate function for a representative body.

2.12. Given that the rule change incorporating new contractual terms was not specifically included in the BSB's corporate documents,[21] we would also expect to have seen some consideration of whether it was appropriate for the BSB's resources to continue to be used on this issue and what allocation of resources was appropriate given the other work in its business plan. It was discussed at no fewer than 10 BSB meetings between 2010 and 2012 and even though the Bar Council was doing a considerable amount of the work, production of relevant papers for Board and Committee members and servicing those meetings would have used BSB resources.

2.13. Some of the evidence could indicate that the BSB was indeed directing the Bar Council. For example, on 17 March 2010 a BSB officer (BSB 10) explained the process and content for applications to the LSB to a member of the Bar Council (BC 11);[22] this lends some support to the Bar Council's statement that it was the BSB that controlled the process. However, this contrasts with the fact that at one point during 2010 the BSB did not seem to know what the Bar Council was doing or who was able to submit a rule change application. For example, on 15 October a BSB officer asked a Bar Council officer if "*[...] your application"* [23] to the LSB had been submitted. This calls into question the Bar Council's statement that it was the BSB that controlled the process. However, the reason for the question (that a BSB member (BSB 2) was querying whether it should be first considered by the BSB Board) does indicate that at least someone in the BSB knew that it did have to consider the application before submission to the LSB.

2.14. The Bar Council's statement to the LSB that *"[t]he Bar Council's involvement in the 2010 consultation was undertaken at the request of the BSB and with the benefit of guidance provided by the BSB*"[24] is not borne out by the evidence we have examined. The LSB has not been provided with any documents in which the BSB requests the Bar Council to produce and conduct a consultation

[20] Annex 3, paragraph A3.56
[21] Annex 3, paragraph A3.55 and Table 1
[22] Annex 3, paragraph A3.14
[23] Annex 3, paragraph A3.20
[24] Annex 3, paragraph A3.100

exercise on the new contractual terms. A BSB member of staff (BSB 18) did provide a list of names and addresses of consultees to a Bar Council member of staff (BC 11).[25] There is also evidence of a discussion between a Bar Council member of staff (BC 11) and a BSB member of staff (BSB 11) on making a rule change applications to the LSB. However, the note of that meeting makes no reference to the consultation, nor does it suggest that the BSB requested a consultation or that the BSB provided guidance on consultation to the Bar Council.[26] There was also no evidence that content was reviewed or approved by the BSB before publication.

2.15. Some of the emails between the Bar Council and the BSB in March and April 2010 indicate that the Bar Council enjoyed a substantial degree of autonomy over the drafting of the proposed changes. For example, on 23 March 2010 a Bar Council member of staff (BC 11) told a BSB member of staff (BSB 10) that "*[t]he Consultation paper is 99% approved – but, as it is in the name of the Bar Council AND the BSB, would you mind casting your eye over it and let me know if you are happy with it*".[27] At that point the BSB did query why the consultation was going to be a joint one since there was no record of a BSB decision that it should be. Senior individuals in the BSB then made the decision that there should not be a joint consultation.[28] But we do not consider that this can be interpreted as a BSB request to the Bar Council to undertake the consultation.

2.16. At that time, the Bar Council still assumed that there would be a joint application to the LSB. A Bar Council member of staff (BC 11) told a BSB member of staff (BSB 11) that it intended to submit the application in November 2010.[29]

2.17. Although the Bar Council drafted the report on the consultation for the BSB Board meeting in October 2010[30], this was perhaps not surprising as it had carried out the consultation. However, despite the BSB Board's decision at that meeting that this was a regulatory matter and should be led by its Standards Committee, joint actions were then allocated to Bar Council and BSB representatives.[31] In practice, despite statements by the Bar Council during this investigation, many subsequent papers were prepared and presented by the Bar Council, with limited direction and/or approval by the BSB (beyond submission to its secretariat) in advance of its meetings.[32]

2.18. In April 2011, a senior BSB member questioned whether the BSB was "*[...]over-reaching its remit as [a regulator]*", questioning the appropriateness of a regulator setting out standard contractual terms and having them as the baseline for the operation of the Cab Rank Rule.[33] The comments were sent by the BSB to the Bar Council - which rejected them because the suggestion had

[25] Annex 3, paragraph A3.16
[26] Annex 3, paragraph A3.14
[27] Annex 3, paragraph A3.15
[28] Annex 3, paragraph A3.17
[29] Annex 3, paragraph A3.19
[30] Annex 3, paragraph A3.21
[31] Annex 3, paragraph A3.23
[32] Annex 3, Table 2: Summary of BSB meetings when the new contractual terms formed part of the formal agenda
[33] Annex 3, paragraph A3.48

been considered previously and rejected as impractical.[34] The Bar Council's approach was later supported by the 19 May 2011 BSB Board meeting.[35]

2.19. The application to the LSB was drafted by the Bar Council, with some assistance from the BSB. In October 2011 the BSB queried why its comments had not been taken into account by the Bar Council in the draft application to the LSB.[36] This appears to have been an oversight by the Bar Council member of staff who then incorporated most of the proposed changes. The Bar Council told the LSB that, although there is no evidence, it is the firm recollection of the Bar Council member of staff that the proposed amendments were discussed with a member of staff at the BSB and the conclusion was that not all the proposed changes should be included.[37]

2.20. Once the application was nearing completion, the BSB changed references to "*the Bar Council*" to "*the BSB*" and altered the font to the BSB's (as the organisations have different mandatory house styles).[38] The reason for the changes was that "*[w]e need to make sure that this is seen as a recommendation by the BSB in the light of our regulatory objectives – not something that is being proposed by the Bar Council in the interests of barristers (the LSB has already criticised us on this point recently)"*.[39] There is nothing to suggest that the BSB at this point fully considered whether this "cut and paste" approach was appropriate. Whilst the LSB was considering the application in June 2012, the BSB refused the Bar Council's request to attend a meeting with the LSB saying: "*[w]e need to maintain the separation between the BSB/BC when it comes to regulatory independence. The LSB already think we're a little too close for comfort and a joint meeting on proposed regulatory changes won't help this impression*".[40]

2.21. The LSB asked the Bar Council in its 21 June 2013 section 55 notice (as amended on 24 June) how it ensured compliance with the IGR from their introduction, and thereafter, in relation to the contractual terms and associated alteration to BSB regulatory arrangements and to provide documents to support its explanation. The Bar Council's response said that it had already established the BSB by the time the IGR came into force and had amended its standing orders and made a new constitution for the BSB. It said that "*[t]he Bar Standards Board was an independent body whose members were individuals of integrity and independence. That remained the case after, as well as before, the commencement of the Internal Governance Regulations [...]. Any attempt to exercise undue influence or control over the Bar Standards Board would have been rejected by the Bar Standards Board and would have been raised by the Bar Standards Board with the Bar Council and/or the Legal Services Board in the manner considered appropriate by the Bar Standards Board".*[41]

2.22. Even after the application to the LSB was submitted by the BSB, it does not appear that the BSB had proper control of the process – it did not understand the reasons for further changes that the Bar Council had proposed and had to

[34] Annex 3, paragraph A3.48
[35] Annex 3, paragraph A3.54
[36] Annex 3, paragraph A3.65
[37] Annex 3, paragraph A3.65
[38] Annex 3, paragraph A3.64 and A3.67
[39] Annex 3, paragraph A3.66
[40] Annex 3, paragraph A3.82
[41] Annex 3, paragraph A3.106

revert to it for advice.[42] Once LSB approval was given for the application, control over implementation was mostly handled by the Bar Council.[43] However, after the Bar Council submitted a formal request to the BSB for a delay to implementation, the BSB did reject pressure from the Bar Council on the timing of the announcement (although the Bar Council applied pressure by indicating that it would leak out as a result of discussion at a Bar Council (GMC) meeting).[44]

Was it the Bar Council or the BSB that was in control?

2.23. The Bar Council told the LSB that the BSB was in full control of the application to alter the BSB's regulatory arrangements. It stated that the BSB made its decisions as it saw fit and sometimes contrary to what the Bar Council representatives sought.[45] The Bar Council has suggested that the BSB simply used the Bar Council's expertise in the area and effectively "contracted out" a number of tasks related to the alteration of the BSB's regulatory arrangements.[46]

2.24. This section therefore considers the extent to which the Bar Council, through its representatives and its employees, acted as the controlling mind in relation to the application to alter the BSB's regulatory arrangements on the new contractual terms. The concept of "controlling mind" in this paper refers to a state of affairs where one party is either directly or indirectly controlling the activities in relation to or the actions of another party. In this respect the LSB has considered whether the representative arm of the Bar Council corporately or through its representatives controlled the actions or activities of the BSB. The LSB has considered this concept to assess whether there is evidence of 'undue influence' which is defined in the IGR as:

> *pressure exercised otherwise than in due proportion to the surrounding circumstances, including the relative strength and position of the parties involved, which has or is likely to have a material effect on the discharge of a regulatory function or functions.*[47]

2.25. This section also considers the extent to which the Bar Council controlled the rule change application process and the content of that application.

2.26. Following the introduction of the IGR the most relevant events for this section are:

- the April 2010 consultation by the Bar Council and consideration of the consultation responses;
- the governance process for drafting and considering the proposed amendments to the BSB's regulatory arrangements;

[42] Annex 3, paragraph A3.84
[43] Annex 3, paragraph A3.93
[44] Annex 3, paragraph A3.98
[45] Annex 3, paragraph A3.42
[46] Annex 3, paragraphs A3.102, A3.105 and A3.108
[47] Page 2, LSB (December 2009), I*nternal Governance Rules 2009,*
<http://www.legalservicesboard.org.uk/Projects/pdf/internal_governance_rules%202009_final_km.pdf>

- the production and submission of the application to the LSB to alter the BSB's regulatory arrangements;

- the decision period for the application, including the response to the warning notice issued by the LSB[48] and the final alterations to the BSB's regulatory arrangements.

2.27. The discussion in paragraphs 2.14 and 2.15 shows that we have no evidence that the BSB initiated or commissioned the April 2010 consultation. The absence of any input into the content of the consultation or approval of the consultation suggests that the Bar Council was the controlling mind in relation to the content of consultation document and the proposed alterations to regulatory arrangements in that document.

2.28. Following the closure of the consultation, Bar Council representatives considered the responses and came to the conclusion that the proposed alterations to the regulatory arrangements should be brought forward, subject to some minor changes to the new contractual terms. There is no evidence that the BSB was involved in reaching this conclusion. The Bar Council, at this point, was working on an application to be submitted to the LSB to alter the BSB's regulatory arrangements.[49] The BSB did not have control of this and did not appear to know if the application to alter the BSB's regulatory arrangements had been made.

2.29. The Bar Council tabled papers to the BSB Board meeting on 21 October 2010 for discussion and noting. This included the statement that:

> *"[t]he [Bar Council's] Implementation Committee is currently working on the revision of the contractual terms and Rules. It is also drafting the application to the Legal Services Board for the necessary approval to the Code amendment with a view to submitting the application in November."*[50]

2.30. When a version of the agenda for the BSB Board meeting on 21 October 2010 stated that the item on standard contractual terms was for "*discussion and decision*" a Bar Council member of staff (BC 11) told a BSB member of staff (BSB 15) that the matter should be for "*discussion and noting",* not for decision. The final agenda sheet states that the item was for "*discussion and noting".* This could suggest that the Bar Council was not seeking approval for the conclusions it had reached in relation to the consultation responses or the fact that it was going to submit an application to the LSB to alter the BSB's regulatory arrangements. However, the Bar Council told the LSB that the minutes of the BSB Board meeting are more important as they show that the BSB Board concluded "*that the proposed rule changes should be considered further by the [BSB's] Standards Committee and reported back to the [BSB] Board".*[51]

[48] http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/bsb_changes_to_operation_of_cab_rank_rule_lsb_warning_letter.pdf
[49] Annex 3, paragraph A3.19
[50] Annex 3, paragraph A3.21
[51] Annex 3, paragraph A3.23

2.31. Even if the BSB subsequently decided that further consideration was required, we consider that it is clear from the cover paper that it was Bar Council's original intention that the matter was to be noted and that the rule change application was to be submitted in November 2010. The fact that the matter was referred to the BSB's Standards Committee suggests that (at this point) the BSB exercised a degree of control over the proposed changes to its regulatory arrangements. But before then, the evidence suggests that the work was being completed at the initiative of the Bar Council.

2.32. From November 2010 the BSB's Standards Committee considered a number of papers written by representatives of the Bar Council as well as papers drafted by members of the BSB's Standards Committee.[52] In its letter of 12 April 2013 to the LSB, the Bar Council stated:

> *"following the 2010 consultation the Bar Council continued to respond to the BSB's requests for assistance by providing draft papers and attending the meetings of the BSB's Standards Committee and of the BSB itself".*[53]

2.33. Evidence suggests a mix of requests from the BSB and provision of support by the Bar Council. However, the Bar Council drafted papers that were not reviewed and/or approved by the BSB, and the Bar Council was driving forward the overall process. In a number of instances, BSB representatives made suggestions on how the regulatory arrangements could or should be changed. These suggestions were often dismissed by Bar Council representatives and did not form part of the final application to the LSB. An example of this is when Bar Council representatives forcefully rejected suggestions from a BSB Board member.[54] It may, however, be the case that the BSB representatives were convinced by arguments put forward by the Bar Council in these instances, but there is no evidence that this was the case.

2.34. Further changes to the BSB's regulatory arrangements were proposed by the Bar Council to the BSB during June 2011, to ensure that barristers would not be in a worse position following any alterations to the regulatory arrangements. The BSB Standards Committee meeting minutes suggest that they did not understand the alterations being proposed by the Bar Council but nonetheless agreed to make them.[55] This issue was once again tabled to the BSB Board in a paper written with the assistance of Bar Council representatives. The BSB Board agreed with these alterations to the BSB's regulatory arrangements.[56]

2.35. The application to alter the BSB's regulatory arrangements was initially drafted by representatives of the Bar Council. The properties of the Microsoft Word documents submitted to the LSB support this. The original drafts were in Bar Council house style with the Bar Council as the main and only contact and there were multiple references throughout to the Bar Council. The Annexes which included the proposed alterations to the BSB's regulatory arrangements

[52] Annex 3, Table 2: Summary of BSB meetings when the new contractual terms formed part of the formal agenda
[53] Annex 3, paragraph A3.19
[54] Annex 3, paragraph A3.48
[55] Annex 3, paragraph A3.60
[56] Annex 3, paragraphs A3.61 and A3.62

were in the Bar Council house style and the authors in the document's properties were Bar Council representatives.[57]

2.36. The BSB asked the Bar Council to amend the draft application to improve the section on the regulatory objectives and to include something on the better regulation principles. The papers submitted to the LSB show little or no reference to the regulatory objectives or better regulation principles, up to this point. That could indicate that the policy was not seen as a regulatory matter, or that the requirements of the LSA to justify a change to regulatory arrangements were not understood. The BSB also made changes to remove references to the Bar Council. Documents show that the BSB was amending the application so it was *"[...] seen as a recommendation from the BSB in the light of our regulatory objectives – not something that is being proposed by the Bar Council in the interests of barristers".*[58] This does not indicate that the BSB was fully in control of all the issues concerning changes to its regulatory arrangements.

2.37. The BSB spent a limited time reviewing the final application to the LSB to alter its regulatory arrangements. The BSB received the final application and Annexes in PDF format from the Bar Council at 11:57 on 26 October 2011 and it was submitted to the LSB at 12:29 on the same day. As the documents were in PDF format it is unlikely that the BSB made any final amendments to the document.[59] We consider that the evidence provided does not support the Bar Council's statement that this was the BSB's application with Bar Council support: it appears to have been the other way around.

2.38. Once the application was received, the LSB issued a number of questions to the BSB (on 18 November 2011). A response was received from the BSB on 2 December 2011. We do not know who wrote this response. However we note that the footer of the document is in the same format as the footer that appears in the documents produced by the Bar Council for the application and its Annexes.

2.39. The LSB issued a warning notice on 20 January 2012. We sought views from consultees at this point. The Bar Council responded as a consultee. It was in favour of the BSB's proposals. The contact for the Bar Council response was the individual who had drafted the application to alter the BSB's regulatory arrangements.[60] The BSB was provided with all the consultation responses and was asked to respond to them. It did so on 11 May 2012. The draft of this letter was provided to the Bar Council for its comments on 5 May 2012.[61] The Bar Council provided comments on 8 May 2012. The Bar Council email, to which the comments were attached, also states "*[a]s regards to the draft letter to the LSB, the improvements are excellent*". A number of emails dated 11 May 2012 show that the Bar Council did not support some of the changes suggested by the BSB but the BSB was clear that the matter was a regulatory matter and one for it to determine.[62]

2.40. Although the BSB provided its draft response to the Bar Council before sending it to the LSB on 11 May 2012, the information provided by the Bar Council

[57] Annex 3, paragraph A3.67
[58] Annex 3, paragraph A3.66
[59] Annex 3, paragraph A3.67
[60] Annex 3, paragraph A3.71
[61] Annex 3, paragraph A3.74
[62] Annex 3, paragraph A3.76

about its involvement at this stage does not indicate that it was a controlling mind in relation to the BSB's response. However, we do consider that the fact that the BSB shared its response with the Bar Council could run the risk that it would try to unduly influence the BSB at this point.

2.41. On 19 June 2012 the Bar Council proposed to the BSB further amendments to the Code of Conduct and the new contractual terms. These proposals deleted the Annexes related to the Voluntary Joint Tribunal rules, the scheme for Publicly Funded matters and the rule relating to the List of Defaulting Solicitors. The Bar Council's proposals also removed a number of clauses in the new contractual terms that refer to the removed Annexes.[63] An earlier email from the Bar Council to the BSB referred to a request from the BSB's Chair to remove these Annexes from the rule change application.[64]

2.42. There is some evidence of the BSB trying to exert its independence around this time. For example, on 19 June 2012, a BSB member of staff (BSB 21) told a Bar Council member of staff (BC 11) that the Bar Council was not allowed to attend a meeting with the LSB. The BSB member of staff (BSB 19) stated:

> *"[w]e need to maintain the separation between the BSB/BC when it comes to regulatory independence. The LSB already think we're a little too close for comfort and a joint meeting on proposed regulatory changes won't help this impression".*[65]

2.43. However, in our judgement, the Bar Council's reaction shows its desire to retain influence and control because the Bar Council member of staff (BC 11) expressed surprise at this decision saying that: *"despite it being a BSB application, because it is the Bar Council who will be dealing with the fees collection issues and because the Bar Council, for historic reasons, has been instrumental in drawing up the new terms."*[66]

2.44. This is supported by an exchange of emails on 25 July 2012, just before the LSB was due to make its decision. A BSB member of staff (BSB 11) emailed a Bar Council member of staff (BC 11) stating:

> *"they [LSB] need to know asap what further changes we propose to make to the rules. Looking at your proposed amendment attached, I note that you have proposed deleting the definition of "list of defaulting solicitors" from the definitions section of the Code. The reasons for doing this were not explained in* [the Chair of the Bar Council Implementation Committee (BC 3's)] *memo and seems somewhat illogical to me, given that the term is still going to be used in the Code".*[67]

2.45. This indicates that the BSB still did not fully understand the reasons for proposed changes to its regulatory arrangements and was reliant on the Bar Council to explain them. However, the BSB's challenge was correct: the Bar Council member of staff (BC 11) replied to the BSB member of staff (BSB 11) and noted that the definition for the "List of Defaulting Solicitors" should be

[63] Annex 3, paragraph A3.85
[64] Annex 3, paragraph A3.85
[65] Annex 3, paragraph A3.82
[66] Annex 3, paragraph A3.83
[67] Annex 3, paragraph A3.84

retained *"we were so concentrated on fitting in with your chairman's desire to remove annexes T2, T3 and T4 from the Code of Conduct, that we got carried away!"*.[68]

2.46. We considered whether the reference to the Chair of the BSB (see paragraph 2.41) could be further evidence of the BSB exerting control over the changes. We therefore asked the Bar Council to provide emails or correspondence between the Chair of the BSB and the Bar Council in relation to the removal of Annexes T2 – T4. The Bar Council told us that: "*there were no emails or other correspondence with the Chair of the BSB".*[69]

2.47. The application was approved by the LSB on 27 July 2012. The final set of regulatory arrangements reflected those submitted to the BSB by a member of the Bar Council on 19 June 2012 albeit with the retention of the definition of the List of Defaulting Solicitors which had been accidentally omitted by the Bar Council.

2.48. While there is evidence that the BSB had some control over the application and the final set of arrangements that were submitted to the LSB, the Bar Council continued to make suggestions for changes to the BSB's regulatory arrangements and conducted the drafting of them. In our judgement, any control by the BSB was occasional and limited. The Bar Council retained the majority of control and influence over decisions. The onus under section 28 and 30 of the LSA, and the IGR, is on the Bar Council to respect and deliver compliance.

What might have been "reasonably practicable" for the Bar Council to do?

2.49. The BSB assumed responsibility for regulatory functions on 1 January 2006. The Bar Council then amended the BSB's constitution and its own standing orders during 2010 in light of the introduction of the IGR. The changes came into effect on 30 April 2010.[70]

2.50. Although distinct regulatory and representative organisations might facilitate independent regulation, the Bar Council/BSB form of separation ought to be capable of upholding the principle of regulatory independence. To make this work, arrangements are required that, amongst other things, include the regulatory body having the ability independently to define and implement a strategy for performance of its functions, having access to resources reasonably required to meet them, and having effective control over the management of those resources. The IGR give an indication of factors that the LSB will consider in assessing compliance with this, including service level agreements and dispute resolution mechanisms being in place.

2.51. As part of the process of gaining necessary assurances to provide annual dual self-certification of compliance with the IGR to the LSB, an AAR is expected to consider the structures that it has in place (e.g. governance arrangements) and specific issues that arise. Governance arrangements will obviously be tailored to a particular organisation and evolve over time. It is reasonable to expect, though, that they would deliver awareness and compliance at all levels within the organisation on an ongoing basis, and scrutiny to ensure that this is

[68] Annex 3, paragraph A3.85
[69] Appendix 3, paragraph A3.85
[70] Annex 3, paragraph A3.13

happening. In addition, we might reasonably expect to see review and evolution built into processes and procedures to achieve progressive enhancements to independence.

2.52. Therefore, having analysed what happened in practice in terms of the nature and extent of the Bar Council's involvement and whether the Bar Council or the BSB was in control, we now consider what actions it might have been reasonably practicable for the Bar Council to do to comply with the requirements of the IGR. This incorporates our assessment of the range of proportionate responses to the risks of non-compliance with the IGR that could have been identified.

2.53. While the use of external support from the associated representative body may be appropriate, in the context of the IGR it would be reasonably practicable to have arrangements in place to identify and communicate the need for external support, and to manage subsequent assistance. In our judgement, there are several actions that it would have been reasonably practicable to consider and implement in this case once the IGR were in force. These include some or all of the following:

- reasonably practicable separation of regulatory and representative functions might, in the first instance, have involved consideration of what input the BSB considered was needed from the Bar Council on workstreams that it had been involved with and how this would be controlled, with plans then put into effect and monitored. For example, BSB staff could have captured Bar Council knowledge and prepared papers for BSB meetings, confirming accuracy prior to submission. Equally, the Bar Council could have drafted the actual contractual terms (if it had relevant expertise), with BSB representatives drafting cover papers and presenting at meetings, reflecting the need for them to understand the regulatory issues raised. Alternatively (or as well as), the Bar Council could have agreed to bring BSB Board members and staff up to speed with the policy and drafting issues over time with a view to complete handover at some point, particularly once it had been decided that it was a regulatory issue and for the drafting and handling of the submission to the LSB to be fully under BSB control;

- it would have been reasonably practicable for actions arising from BSB meetings to be allocated to representatives of the Bar Council, so long as these were subject to BSB supervision. In all cases, it would have been reasonably practicable for there to have been a robust clearance process in place for submissions to BSB meetings, involving a sufficiently senior representative of the BSB who was given enough time to consider and clear papers for submission to Committee and Board meetings. In contrast, we consider it would be reasonably practicable for the preparation of applications to alter regulatory arrangements to sit with the regulatory body, with any assistance subject to BSB supervision;

- even if it was decided that it was appropriate for the Bar Council to continue to have substantial input, it would have been reasonably practicable to put in place arrangements that set out who would do what work, what was required in terms of content of Committee and Board documents (for example, the need to consider in full each of the regulatory objectives) and deadlines that allowed for sufficient BSB consideration and clearance;

- another example of what would have been reasonably practicable in terms of managing the use of the Bar Council's resources would have been for it to adopt a similar approach to that set out in the agreements for shared services.[71] Although work on the new contractual terms may not specifically be a shared service, the significant amount of time that the Bar Council must have spent on the issue means that it might have been reasonably practicable to include it in a similar type of agreement. While they are not in and of themselves a solution, such an agreement or arrangement could help to deliver awareness within an organisation and actions to achieve compliance with the IGR ;

- we also consider that it would have been reasonably practicable, when concerns were raised about whether the Bar Council's involvement (for example in the Law Society's response to the April 2010 Bar Council consultation[72]) for there to have been some reconsideration of whether that involvement was consistent with the IGR. In particular, whether it should, as a representative body, be drafting an application to the LSB to alter its regulatory arm's regulatory arrangements.

Did the Bar Council implement any of these – or any other – reasonably practicable measures?

2.54. The Bar Council initially told the LSB that the April 2010 consultation was undertaken at the request of the BSB and with the benefit of guidance provided by the BSB.[73] No written documents supported this position. It subsequently told the LSB that there was:

> *"no need for the Bar Council to be formally instructed to carry out the consultation"*[74]

and that considering the LSB's process for applications to alter regulatory arrangements and guidance from the LSB then:

> *"[...] it was only reasonable and sensible that the Bar Council's Implementation Committee and secretariat should use that experience*

[71] Since 10 August 2010 the Bar Council and BSB have had a service level agreement in relation to Equality and Diversity Issues. This agreement has been reviewed by the LSB and complies with the IGR requirements in relation to shared services
[72] Annex 3, paragraph A3.22
[73] Annex 3, paragraph A3.100
[74] Annex 3, paragraph A3.100

and take a lead on formulating and issuing the April 2010 consultation".[75]

2.55. A consultation on the alteration of an approved regulator's regulatory arrangements would generally be expected to be carried out by the regulatory arm itself. This is the case because section 27(1) (b) of the LSA defines the making and or alteration of regulatory arrangements as a regulatory function and section 30 of the LSA together with the IGR require AARs to delegate regulatory functions to an independent regulatory body. Consultation is considered to be a regulatory function because it is part of the process of proposing new, or alterations to existing, regulatory arrangements. It is reasonably likely that alterations to regulatory arrangements will occur following a consultation.

2.56. It is possible to envisage a situation where a regulatory body contracts with an organisation to carry out a consultation exercise for it. If it were to do so, we would expect the regulatory body to initiate the need for the consultation and to have a clear, most likely written, agreement with the organisation conducting the consultation. We would also expect that the regulatory body had input into the content and final approval of the consultation document and to any proposed alterations to the regulatory arrangements contained in it. We would also expect some consideration of the appropriateness of the organisation undertaking the consultation exercise for the regulatory body including, but not limited to, any assessment on the legitimacy with which the consultation is viewed and the ability of the organisation to consult with a broad cross section of those impacted or possibly impacted by the proposed changes. We would also expect the consultation to explain transparently why an organisation which is not the regulatory body is consulting on the proposed alterations to regulatory arrangements.

2.57. If the organisation conducting the consultation was the representative side of the AAR (and a formal contract between separate legal entities was not possible) then we would also expect both organisations to consider the IGR as it pertains to the use of shared services. For example, the Bar Council and BSB have had (since 10 August 2010) a service level agreement in relation to Equality and Diversity issues. The service level agreement provides that the Bar Council Equality and Diversity team will provide support and advice in ensuring that equality principles are taken into account in policy development of the BSB. This includes advice on impact assessment of policies.[76] This agreement has been reviewed by the LSB and complies with the IGR requirements in relation to shared services.

2.58. There is no evidence that any of these sorts of arrangements were in place. The documents we have been provided with show that the Bar Council initiated the drafting of the April 2010 consultation document with the expectation that the consultation would be jointly issued. It was provided to the BSB when it was "[...] *99% approved*".[77] The BSB did not comment on the consultation or the proposed alterations to its regulatory arrangements.

[75] Annex 3, paragraph A3.100
[76] Bar Council and BSB Service Level Agreement (2010), *Equality and diversity*, <http://www.legalservicesboard.org.uk/Projects/pdf/equality_and_diversity_sla_v0_4_final.pdf>
[77] Annex 3, paragraph 3.15

2.59. The Bar Council told the LSB that the BSB asked for its assistance and that *"[a]t all times the BSB was in full control of the process*".[78]

2.60. It would have been reasonably practicable for the BSB to have reached a view on whether expertise was needed and the possible sources of it, of which the Bar Council might have been one. However, whether the Bar Council held relevant expertise is not the subject of this investigation, and is no more relevant for the contractual terms than any other part of regulation. If the BSB did decide that it needed the Bar Council's assistance, it would also have been reasonably practicable for its continuing provision to have been subject to an analysis of compliance with sections 28 and 30 of the LSA (and therefore the IGR) and formal measures put in place and reviewed over time, to ensure continuing compliance.

2.61. There is no evidence that a decision was taken, or that formal arrangements covering the Bar Council's involvement in the new contractual terms was in place. Indeed, in commenting on a draft version of the facts and matters, the Bar Council has told us that "*[a]n instance of the informality and co-operation between the Bar Council and the BSB can be found in [...] now point A3.100 of the facts and matters at Annex 3]. There was no need for the Bar Council to be "formally" instructed to carry out the consultation. (BC 11) […] attended a meeting at the LSB with two members of the BSB staff on the 10 December 2009 at which the LSB made clear what its expectations were in respect of applications made to it. As a result of that meeting and subsequent guidance from the LSB, it was only reasonable and sensible that the Bar Council's Implementation Committee and secretariat should use that experience and take a lead on formulating and issuing the April 2010 consultation".*[79]

2.62. In practice, it appears that the Bar Council's involvement continued unchanged once the IGR were in force. For example, it intended to proceed with and prepare the consultation in April 2010. Bar Council staff confirmed to BSB staff (BSB 10) that the BSB had not seen the consultation (as would normally be the BSB's process) and that "*...we are now doing a consultation for the purposes of making a successful application to the LSB...".*[80]

2.63. On 15 October 2010 BSB staff (BSB 10) asked Bar Council staff (BC 11) if "*your application"* to the LSB had been submitted. However, the reason for the question (that a BSB member (BSB 2) was querying whether it should be first considered by the by BSB Board) does indicate recognition within the BSB that it should consider the application.[81] The BSB Board did, at its meeting on 21 October 2010, decide that "*[u]ntil now, this issue had been handled by the Bar Council as a representative matter [...]. However, since it involved amendments to the Code of Conduct, the Board considered that it was a regulatory matter and only the BSB could make the application to the LSB"*.[82]

2.64. This decision, however, did not translate into a change of approach. Many subsequent papers were prepared and presented by the Bar Council with limited direction and/or approval by the BSB (beyond submission to its secretariat) in advance of meetings. For example on 22 October 2010, Bar

[78] Annex 3, paragraph A3.42
[79] Annex 3, paragraph A3.100
[80] Annex 3, paragraph 3.16
[81] Annex 3, paragraph A3.20
[82] Annex 3, paragraph A3.23

Council staff (BC 11) requested that the new contractual terms be placed on the BSB Standards Committee meeting agenda for 24 November 2010, and stated that they would give the BSB the report and all relevant papers.[83] These papers included a summary of the consultation responses. The text includes several references to the "*Bar Council and the BSB"*[84] in relation to agreeing or disagreeing with views expressed in responses.

2.65. The LSB's analysis has shown that there were only minor or very brief references to the regulatory objectives in the papers drafted by the Bar Council.[85] The Bar Council told the LSB that members of the BSB "*were well aware of the regulatory objectives*".[86] However, we do not consider that statements about individuals' awareness of their statutory responsibilities are a reasonably practicable way to ensure compliance with them on this or any other issue. In addition, having asked in September 2009 for information about the regulatory objectives, the BSB did not query why the subsequent paper made such brief reference to them.[87] Nor did it query why consideration of the regulatory objectives was not included in detail in papers after section 28 and the IGR were in force. We do not consider that this shows that the BSB members were well aware of the regulatory objectives.

2.66. Despite statements to the contrary by the Bar Council, an updated version of the February 2011 paper to the BSB Standards Committee appears to have been prepared for the March 2011 BSB Standards Committee by a Bar Council Implementation Committee member (BC 5).[88] This largely adopted the Bar Council's proposal, except that the new contractual terms were not given default status. This is cited by the Bar Council as one example of control of this issue by the BSB. However, the paper also included the following sentence "*[...] while the Bar Council would prefer a "deeming" provision to be included in the Code of Conduct it recognised the fact that this was a matter of judgement on which there may well be differences of opinion, and was not in any event overwhelmingly important".*[89] We do not consider that the rejection of a matter that was not considered particularly important is a good example of the BSB being in control.

2.67. In May 2011 a member of BSB staff (BSB 15) asked for assistance from a Bar Council member (BC 5) on the arguments in drafting the paper, as the Bar Council member was more familiar with the new contractual terms.[90] While this could amount to a form of direction by the BSB, it also suggests that it would not be in a position to adequately supervise the Bar Council's input. It also shows that even though some time had passed since the BSB decided this issue was a regulatory matter, there appears to have been no attempt by the Bar Council to train BSB members or staff and get them up to speed with the issue, with a view to them being able to take it forward in future. That is further borne out by events surrounding – and after the submission of – the rule change application to the LSB.

[83] Annex 3, paragraph A3.25
[84] Annex 3, paragraph 3.27
[85] Annex 3, Table 2: Summary of BSB meetings when the new contractual terms formed part of the formal agenda
[86] Annex 3, paragraph A3.107
[87] Annex 2, paragraphs A2.20 and A2.21
[88] Annex 3, paragraph A3.40
[89] Annex 3, paragraph A3.41
[90] Annex 3, paragraph A3.49

2.68. For example, in June 2011 a Bar Council member of staff (BC 11) emailed a BSB member (BSB 3) about a proposed change to the amendments to the BSB Code of Conduct that had been agreed by the BSB Board in May 2011.[91] The Bar Council member of staff suggested alternative drafting to meet the concerns of the Bar (in general). These were presented to the June 2011 BSB Standards Committee by a member of the Bar Council Implementation Committee (BC 4). The minutes recorded that the Committee did not find it entirely easy to understand the point but nevertheless agreed to the amendment.[92] A paper prepared by Bar Council staff (BC 11) (which was sent to, but does not appear to have been approved by the Chair of the BSB Standards Committee (BSB 3))[93] was agreed at the September BSB Board meeting.[94]

2.69. The application itself was drafted by the Bar Council, with assistance from the BSB, for example with BSB staff (BSB 11) explaining the process and content for applications to the LSB to Bar Council staff (BC 11) on 17 March 2010.[95] The LSB considers that it should have been reasonably practicable by this time for BSB staff and members to be able to draft the rule change application (albeit that it would include the standard terms drafted by the Bar Council). Instead, the BSB's policy input appears to have been limited and the changes made to the application by BSB staff were to amend references to the Bar Council to the BSB, and to alter the font to BSB house style (reflecting that the organisations have different mandatory house styles). BSB staff (BSB 12) highlighted to Bar Council staff (BC 11) "*[w]e need to make sure that this is seen as a recommendation by the BSB in the light of our regulatory objectives – not something that is being proposed by the Bar Council in the interests of barristers (the LSB has already criticised us on this point recently). I therefore think it needs to go from the Professional Practice Team (with one of us as the contact) but happy to discuss".*[96]

2.70. Once the application was sent to the LSB in October 2011, further changes were proposed. Comments by the BSB staff (BSB 12) to the Bar Council (BC 11) are not indicative of ownership or control by the BSB "*they [the LSB] need to know asap what further changes we propose to make to the rules. Looking at your proposed amendment attached[...]. The reasons for doing this were not explained in [the Chair of the Bar Council Implementation Committee (BC 3's)] memo [...]".*[97] In our judgement, it would have been reasonably practicable after the rule change application had been submitted to have expected BSB staff to be able to understand the nature of the proposed amendments and why they were being made.

2.71. We acknowledge that the BSB did refuse a Bar Council request to attend a meeting with the LSB on the application in June 2012, indicating "*[w]e need to maintain the separation between the BSB/BC when it comes to regulatory independence. The LSB already think we're a little too close for comfort and a*

[91] Annex 3, paragraph A3.58
[92] Annex 3, paragraph A3.60
[93] Annex 3, paragraph A3.61
[94] Annex 3, paragraph A3.62
[95] Annex 3, paragraph A3.14
[96] Annex 3, paragraph A3.66 and A3.67
[97] Annex 3, paragraph A3.84

joint meeting on proposed regulatory changes won't help this impression".[98] The Bar Council expressed surprise at this, noting that the Bar Council and BSB representatives had supported each other's position at a previous meeting.

2.72. Once LSB approval is given to a rule change, we consider that it is reasonably practicable for the regulatory body to implement its own regulatory arrangements. We consider that it is reasonably practicable for a regulator to understand how a rule change will be implemented and the timescale for doing so. Although there can be good reasons for implementation having to be delayed, decisions should always be made by the regulator. In this case, control over implementation was mostly given over to the Bar Council. On chasing for an implementation date, BSB staff (BSB 11) indicated to a Bar Council officer (BC 11) that any delay would need to be justified to the LSB "*[...] otherwise they may have general concern about our governance and the effectiveness of our regulatory arrangements*".[99]

2.73. We recognise that in October 2012 the Bar Council did submit a formal request to the BSB to delay implementation.[100] BSB staff (BSB 7) noted that the Bar Council said "*[...] they had wanted to be seen to be separating themselves from us"*. However, it was also noted that "*[w]e should of course agree to it. I did point out to [Bar Council members of staff] (BC 8) and (BC 9) that they had invented a bureaucracy for themselves in "applying" to us – notwithstanding that the supporting evidence of their plans etc is helpful and necessary[...] could have been done with less paper and process"*.[101]

2.74. On announcing a final implementation date for the changes, the BSB did reject pressure from the Bar Council on the timing of the announcement. However, in response, the Bar Council indicated that one of its members would be asked about the matter at a Bar Council meeting, and that the information would leak out after that. We do not consider that this shows that the BSB was in control of implementing its own regulatory arrangements.[102]

2.75. Beyond this, its response to our question on how it ensured compliance with the IGR from their introduction, and thereafter, in relation to the new contractual terms was that "*[t]he Bar Standards Board was an independent body whose members were individuals of integrity and independence. That remained the case after, as well as before, the commencement of the Internal Governance Regulations [...]. Any attempt to exercise undue influence or control over the Bar Standards Board would have been rejected by the Bar Standards Board and would have been raised by the Bar Standards Board with the Bar Council and/or the Legal Services Board in the manner considered appropriate by the Bar Standards Board"*.[103]

Assessment

2.76. It is clear from the context before the IGR were implemented that the Bar Council did indeed have substantial experience in the new contractual terms as it had been developing them since 2001. It is also the case that the Bar Council

[98] Annex 3, paragraph A3.82
[99] Annex 3, paragraph A3.94
[100] Annex 3, paragraph A3.95
[101] Annex 3, paragraph A3.97
[102] Annex 3, paragraph A3.98
[103] Annex 3, paragraph A3.106

established the BSB and devolved its regulatory responsibilities to it to give effect to structural independence.

2.77. In developing the new contractual terms, both the Bar Council and BSB clearly appreciated that this involved a regulatory function, in terms of the change to regulatory arrangements. Although consideration of amending the contractual terms predated the IGR, there is no evidence of consideration of, or compliance with the IGR on this issue, once they came into effect. Instead, the evidence suggests that development of the new contractual terms continued after the IGR came into force without any active review of whether they were in fact a regulatory arrangement until a discussion at the October 2010 BSB Board meeting.

2.78. Consideration of these issues was necessary to ensure that a regulatory discretion has been exercised: proceeding on an assumption that it was "*obvious*", "*logical*" and "*sensible*"[104] for the Bar Council to remain involved to the extent it did – even if true – cannot be used to retrospectively fulfil its obligations under the IGR.

2.79. The Bar Council's approach appears to have diverted attention from the fact that this was an exercise of the BSB's regulatory functions. The evidence suggests relatively close and informal working practices between the Bar Council and BSB. Despite there being "flags" along the way that should have prompted consideration of whether the approach being taken was appropriate in the light of the IGR (for example, the Law Society's response to the April 2010 consultation[105] and later the paper to the BSB Standards Committee on 15 December 2010 in which it was questioned whether the issue was a regulatory one)[106], beyond occasional temporary reflection, these did not translate into amended working practices and separation of functions. Rather, the evidence showed the Bar Council having overall control of this matter, even if it did not fully dictate the path taken (in terms of the meetings with the LSB at which the contractual terms were discussed).

2.80. Instead, its approach throughout was one that showed that, in fact, it considered that the issue was the Bar Council's to take forward rather than the BSB's. For example, it drafted BSB Board and Committee papers for more than 2 years. In March 2011 it sent papers to the BSB for its meetings several days late.[107] It even drafted the rule change application to the LSB as though it was the Bar Council's own application – the BSB's Standards Committee paper in February 2011 referred to the *"Bar Council's proposals"* and talks about the Bar Council (not the BSB) amending *"its own"* Code of Conduct.[108] That approach continued after the rule change had been submitted: when it was formally asked for its comments on the LSB's warning notice it failed to inform the LSB of the extent of its role in the whole process and responded as though it were commenting on the BSB's proposals.[109]

2.81. In our judgement, the Bar Council should have carried out some analysis in the context of the requirements placed on it by the IGR to assure itself that it was

[104] Annex 3, paragraph A3.105
[105] Annex 3, paragraph A3.22
[106] Annex 3, paragraph A3.29
[107] Annex 3, paragraph A3.38 and A3.40
[108] Annex 3, paragraph A3.36
[109] Annex 3, paragraph A3.71

acting in a way that was consistent with them. We do not consider that the fact that the BSB had been established and the reliance on the personal qualities of members of the BSB are sufficient to demonstrate compliance with the IGR. The IGR require the Bar Council to *"at all times act in a way which is compatible with the principle of regulatory independence and which it considers most appropriate for the purpose of meeting that principle*". This required active consideration – at all times – of whether the Bar Council's actions in drafting BSB papers, presenting them at meetings and drafting an application to alter the BSB's regulatory arrangements were compatible with regulatory independence. We recognise that governance arrangements will be tailored to a particular organisation and will evolve over time. It is reasonable to expect, though, that the Bar Council and BSB would deliver awareness and compliance at all levels of the organisation on an ongoing basis, and scrutiny to ensure that this is happening. In addition, we would expect to see review and the potential for evolution built into processes and procedures to ensure continuing compliance. Its explanation now – that BSB members are individuals of integrity and independence – is insufficient to demonstrate compliance with the IGR.

2.82. We have found no evidence that the BSB asked the Bar Council for its support or that the Bar Council considered whether its continued involvement was appropriate given the requirements of the IGR or whether it would be better if the BSB used alternative sources of support.

2.83. Despite the Bar Council's statement that "*[a]ny input in drafting by Bar Council officers or members was entirely under the supervision and direction of the BSB's officers"* and that *"[a]t all times the BSB was in full control of the process*",[110] for the most part evidence does not support this and suggests the issue was driven forward by the Bar Council, with the BSB's role being predominantly a reactive one. Although there were occasions where the BSB sought to take control of the process being applied to the contractual terms, on balance, the behaviours suggest that the Bar Council exerted undue control, and that the IGR were not considered or observed.

2.84. The responsibility for compliance with the IGR rests on the approved regulator. In this case, it would have been reasonably practicable to put one or more arrangements in place to assess and ensure that the working arrangements between the Bar Council and the BSB were consistent with the IGR. Formal arrangements need not have been overly burdensome. As it is, there is no evidence of them.

2.85. The Bar Council appears to suggest that consistency with the IGR was maintained through the BSB making ultimate decisions on the content of the contractual terms and submission of an application to the LSB. Having considered the evidence carefully it is our view that this approach falls short of a reasonably practicable approach to the separation of regulatory and representative functions. In reaching that conclusion we have had regard to the fact that the evidence we have seen suggests that the Bar Council was in control of most of the process leading up to those decisions and there was little time for the BSB to consider the Bar Council's papers prior to them being tabled.

[110] Annex 3, paragraph A3.42

2.86. The Bar Council says that it was appropriate for the BSB to use the expertise of Bar Council because the BSB did not have suitable expertise. It is not inevitably a breach of the IGR, nor does it necessarily have an adverse impact on the regulatory objectives, for a regulator to ask its representative arm for advice and support, particularly if there is obvious expertise or experience that it would be difficult for the regulator to acquire quickly at reasonable cost. However, the regulator needs to be in control of the process for producing any papers and must ensure that it assures itself that the rationale behind any proposals is consistent with the requirements placed on it by the LSA.

2.87. Once the BSB had recognised that the issue was a regulatory matter and that it ought to be considered by the appropriate BSB Committee, all the proposed alterations were approved by the BSB Board. Despite consideration by relevant BSB Board meetings and Committees, our analysis has also shown that the Bar Council acted as a "controlling mind" in the development of the contractual terms. There is no evidence that any project or contract type management was applied (such as the definition of scope of the task and how progress would be monitored and reported) over a provider of services that could have indicated that the BSB was in control of the process. The Bar Council was the initiator and author of the April 2010 consultation and evaluated the responses to the consultation. It also wrote BSB Board and Committee papers (with little reference to the regulatory objectives), presented them at the BSB's meetings and developed them subsequently under minimal supervision from the BSB. Documents were often provided to BSB representatives without review or with minimal review and there is evidence that the Bar Council felt able to reject or ignore suggestions from the BSB. During this time it was also the Bar Council representatives who were writing and amending the proposed alterations to the BSB's regulatory arrangements.

2.88. There was no attempt to transfer knowledge of this regulatory arrangement to the BSB even though the matter was discussed over a number of years after the IGR were in force. Generally, the Bar Council acted in manner that showed little regard for the IGR and/or the risks to the regulatory objectives from its actions; it felt free to propose alterations to the BSB's regulatory arrangements, reject suggestions from the BSB and attend and speak at BSB meetings. The Bar Council was left to produce the application to alter the BSB's regulatory arrangements and while advice and amendments were provided by the BSB, many of these were to mask the author the work.[111]

2.89. However, we recognise that it was BSB Committees and the BSB Board that made the decisions in relation to the rule changes and approval to submit an application to the LSB. Nevertheless, although there were occasions where the BSB sought to take control of the process being applied to the new contractual terms, for example, by referring the matter to its Standards Committee, on balance, the behaviours suggest that the Bar Council exerted undue influence or control, and that the IGR were not considered or observed.

2.90. We also take the view that an important aspect of regulatory independence is transparency and clarity of decision making between the representative and regulatory functions. Such transparency is consistent with good governance and ensures appropriate accountability. For the reasons we have set out

[111] Annex 3, paragraphs A3.64 and A3.65

above we have concluded that there was a lack of clarity and transparency between the Bar Council and BSB in the way the application for the rule change was pursued.

2.91. We also take the view that in considering this issue it is relevant to consider not just what the Bar Council has done, but also what it has not done. In other words its omissions as well as its acts. In that respect we consider relevant:

- the failure by the Bar Council to realise that, even after a period of several years, many BSB staff did not really understand the policy and background to the issue of the new contractual terms and continued to rely on Bar Council input;

- the failure to reveal to the LSB the extent of its involvement in the rule change application process when it responded to a formal request for advice on the LSB's warning notice;

- there is no evidence that the Bar Council considered whether its continued involvement in the issue of the new contractual terms was consistent with the IGR. In particular, because it had been discussing the matter with the Law Society in both organisations' representative capacity for a number of years prior to the IGR coming into force, it should have actively considered whether its actions in relation to this representative function or interest could undermine the principle of independent regulation.

Findings

2.92. We have given examples above of several reasonably practicable actions that in our view could have been taken to minimise the risk of undue influence on the BSB's independence whilst making use of any Bar Council experience or expertise. The LSB is not stating that the Bar Council should have taken all of these steps discussed above in order to meet its obligations to ensure it acted compatibly with the principle of regulatory independence. However, the examples show that there were a range of proportionate steps which it might have been reasonably practicable to have taken to meet the principle. There may, of course, be other actions that could have been taken. These need not have been overly burdensome but would have shown that the principle of regulatory independence had been properly recognised and respected. We have not, from the evidence available, been able to identify any steps of this nature which the Bar Council took to secure the principle of regulatory independence. Indeed, we have seen no evidence that there was any process at all that was designed to achieve it.

2.93. It may well have been the case that the Bar Council had more experience or expertise in contractual drafting than the BSB because it was involved with the policy before the BSB was established. But the question whether the Bar Council had experience or expertise is not the subject of this investigation. The question is whether the Bar Council ensured that the way in which the exercise of a regulatory function (namely development of, and application for, the regulatory rule change) was as far as reasonably practicable, carried out

independently of any representative functions. In our view, having considered the evidence, it was not. Furthermore, we have seen no evidence that a decision was taken following implementation of the LSA (and therefore the IGR) as to the appropriateness of the Bar Council's continued involvement in the application for rule change, or that formal arrangements covering that ongoing involvement were put in place. There is no evidence that either the Bar Council or the BSB ever considered in any systematic way the most appropriate measures that should be put in place to ensure the independent exercise of regulatory functions.

2.94. On the contrary, matters proceeded very much as they had before the IGR came into force. Many of the subsequent papers were prepared and presented by the Bar Council with limited direction and/or approval by the BSB and the rule change application itself was drafted by a Bar Council member of staff. In June 2011 the Bar Council proposed changes based on barristers' needs rather than the requirements of the LSA. Although on some occasions papers were produced with a degree of collaboration between Bar Council representatives and BSB representatives in our judgement, the Bar Council was the controlling mind for the majority of the time and so exercised undue influence or control over the BSB.

2.95. We do not consider that it is good practice to allow members or employees of the representative body to regularly present papers to regulatory Boards or Committees. There are a number of obvious risks to the regulatory objectives and compliance with the IGR from doing so. The legitimacy of the process and decision reached can be called into question. Representatives are likely to argue for alterations that are of benefit to those they represent. They may not consider, with equal weight, the interests of other parties or the wider regulatory objectives. They will receive privileged access and influence above and beyond those that are also impacted upon by any proposed changes. There is no evidence that the Bar Council or the BSB considered these risks.

2.96. In our judgement, although the Bar Council had established the BSB and devolved its regulatory functions to it, its actions were inconsistent with the requirements of the IGR to at all times act in a way which is compatible with the principle of regulatory independence and which it considers most appropriate for the purpose of meeting that principle. In response to our enquiries on this issue the Bar Council has placed reliance upon the integrity of members of the BSB. In our view this response is insufficient to address the issues at stake. On the contrary the responsibility in the IGR is on the Bar Council "*at all times to act*" – so the responsibility is on the Bar Council itself, rather than on the BSB.

2.97. For all these reasons we find that the Bar Council's acts and omissions did not comply with principle of independent regulation contained in the IGR and that it:

- did not at all times act in a way which is compatible with the principle of regulatory independence and which it considered most appropriate for the purpose of meeting that principle;

- failed to comply with a requirement imposed on it by the IGR, namely the requirement to ensure the exercise of regulatory

functions is, as far as reasonably practicable, independent of any representative functions.

3. Analysis and findings: the public interest

3.1. This section considers whether acts, or a series of acts, had, or are likely to have, an adverse impact on protecting and promoting the public interest by undermining the principle of independent regulation.

3.2. In coming to a view on this part of the investigation, we have considered whether:

(a) there is evidence that independent regulation is essential to the public interest, given the requirements in the LSA and the IGR;

(b) if so, whether findings that the Bar Council breached requirements of the IGR mean there was (or was likely to be) an adverse impact on the public interest.

Is there evidence that independent regulation is essential to the public interest?

3.3. It is a fundamental principle of the LSA that:

- the exercise of a regulator's regulatory functions is not prejudiced by its representative functions;

- the decisions a regulator makes about exercising its regulatory functions are so far as reasonably practicable taken independently from decisions relating to its representative functions.

3.4. This principle reflects Parliament's consistent belief (which extends from the 2005 White Paper[112] through the Legal Services Bill to the IGR themselves) that the public interest is served by independent regulation.

3.5. The LSB document[113] (which explains how we will interpret and apply the LSA's regulatory objectives) says of the objective to protect and promote the public interest:

> *"The principle of separation of regulation and representation within the approved regulators is key to this objective. Technical compliance with the rules is an important foundation but nothing less than achieving and being able to demonstrate outcomes from them will increase public confidence and satisfy the public interest as secured by this objective."*

Did the Bar Council breach one or more of requirements of the IGR?

3.6. Paragraphs 2.92-2.97 sets out why, in our judgement, we consider that the evidence shows that the Bar Council did breach the IGR. The LSA states that the IGR are "*requirements to be met by approved regulators*".[114] However, our

[112] Department for Constitutional Affairs (October 2005), *The Future of Legal Services: Putting Consumers First,* <http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/legalsys/folwp.pdf>
[113] LSB (July 2010), *The Regulatory Objectives,* <http://www.legalservicesboard.org.uk/news_publications/publications/pdf/regulatory_objectives.pdf>
[114] Section 30(1) Legal Services Act 2007.

analysis has revealed that the Bar Council's involvement in the production of BSB Board and Committee papers on this topic was inconsistent with the IGR in its controlling nature and its extent across a number of years. We have also shown that although there were several reasonably practicable actions that could have been taken to ensure that the Bar Council's regulatory functions were independent of its regulatory functions, from the evidence available, we have been unable to identify any steps of this nature which the Bar Council took to secure the principle of regulatory independence; establishing the BSB in and of itself was insufficient in this case. Indeed, we have seen no evidence that there was any process at all that was designed to achieve it.

Assessment

3.7. We consider that in this case, the undue influence or control that the Bar Council had over the development of the new contractual terms and the rule change application process were likely to result in preferential treatment for its points of view and desired outcomes. We do not consider that this is compatible with increasing public confidence and satisfying the public interest. In our judgement, the following are examples of acts, or series of acts that had, or are likely to have, an adverse impact on protecting and promoting the public interest by undermining the principle of independent regulation:

- the extent of the drafting and development of the underlying policy carried out by the Bar Council and on:
- the April 2010 consultation document;
- the BSB's Committee and Board papers between 21 October 2010 and 15 September 2011;
- the presentation by Bar Council staff and member of those papers at the BSB's meetings;
- the drafting of the application to change the BSB's regulatory arrangements.

Findings

3.8. Given the fundamental importance of this principle and the fact that we have concluded that acts or omissions of the Bar Council mean that it did not comply with the principle of regulatory independence, we find that this failure had an adverse impact on protecting and promoting the public interest.

4. Analysis and findings: the constitutional principle of the rule of law

4.1. This section considers whether acts, or a series of acts, had, or were likely to have, an adverse impact on supporting the constitutional principle of the rule of law to the extent that the Bar Council has breached a requirement within the IGR.

4.2. In coming to a view on this part of the investigation, we have considered whether there is evidence:

(a) that the Bar Council breached one or more of requirements of the IGR;

(b) of an adverse (or likely adverse) impact on supporting the constitutional principle of the rule of law by showing that complying with the IGR (i.e. the Bar Council's own statutory framework) is essential to supporting the constitutional principle of the rule of law.

4.3. We have also considered whether there was an attempt by the BSB and/or the Bar Council to deceive the LSB about the source of the application to alter the BSB's regulatory arrangements, given our specific query about whether standard contractual terms were a representative matter. If there was an attempt to, this could have an impact on supporting the constitutional rule of law.

Did the Bar Council breach one or more of requirements of the IGR?

4.4. The discussion in paragraphs 2.92 – 2.97 sets out why, in our judgement, we consider that the evidence shows that the Bar Council did breach the IGR. The Act states that the IGR are "*requirements to be met by approved regulators*".[115]

Is complying with the IGR essential to supporting the constitutional principle of the rule of law?

4.5. The LSB document[116] explains how we will interpret and apply the LSA's regulatory objectives and emphasises the importance of the LSB and regulators not doing anything to undermine the rule of law. The document places particular emphasis on the importance of regulators and lawyers being independent of government but it does not consider explicitly the role of regulatory independence in upholding the rule of law. So although it is of great concern that the Bar Council breached its obligations under the IGR, we conclude that the very specific nature of the issue that we have been investigating does not, in our judgement, lead us to consider that those actions had, or are likely to have, an adverse impact on support for the wider constitutional principle of the rule of law.

[115] Section 30(1) Legal Services Act 2007.
[116] LSB (July 2010), *The Regulatory Objectives,* <http://www.legalservicesboard.org.uk/news_publications/publications/pdf/regulatory_objectives.pdf>

4.6. We therefore find that these acts or omissions did not, and were not likely to have, an adverse impact on supporting the constitutional principle of the rule of law.

5. Analysis and assessment: Was there an attempt to deceive the LSB?

5.1. In order to determine whether there was an attempt by the BSB and/or the Bar Council to deceive the LSB about the source of the application to alter the BSB's regulatory arrangements we have considered:

- whether the application in question was indeed one relating to regulatory arrangements and if so:
- what was the source of the application;
- to what extent was the LSB aware of that source;
- whether the BSB and/or the Bar Council did anything that could be considered an attempt to deceive or intentionally mislead the LSB about the source of the application.

Was the application in question one relating to regulatory arrangements?

5.2. In relation to our first specific query about whether the standard contractual terms were a representative or regulatory matter we first need to consider:

- the extent to which the matter is a representative or regulatory matter;
- if and when the Bar Council and/or BSB determined that the matter was a representative or regulatory matter.

5.3. Prior to this application being approved by the LSB, the BSB's Code of Conduct included two Annexes concerning standard contractual terms for barristers. The first Annex (G1) dealt with the operation of the Withdrawal of Credit Scheme and the second (G2) included contractual terms. The first Annex was authorised by the General Council of the Bar in 1988 and has been amended a number of times since then. The second was authorised by the General Council of the Bar in 2001. Paragraphs 403.2 (a) (iii), 603(g) and 604(g) of the Code of Conduct referred to these Annexes.

5.4. As the standard terms were referred to in the Code of Conduct and annexed to the Code of Conduct and the new contractual terms were to be included in the Code of Conduct in a similar manner, they are part of the BSB's regulatory arrangements. Any activity in connection with the making or alteration of regulatory arrangements is a regulatory function. The LSB challenged the appropriateness of the issue being a regulatory matter and the BSB argued forcefully in its response to the LSB's warning notice that the matter was a regulatory matter and needed to remain a regulatory matter. But was it always considered as such by the Bar Council?

5.5. The BSB was established on 1 January 2006 to carry out the Bar Council's regulatory functions. However, in the period 2001 to February 2009 the Bar Council was negotiating with the Law Society regarding a potential new set of contractual terms. The Law Society considered these negotiations to be a wholly representative function and the SRA's regulatory arrangements make no reference to the standard contractual terms, so this interpretation is correct in relation to solicitors.

5.6. At its meeting in October 2009, the BSB Board decided that the matter was a regulatory one and, therefore, the responsibility of the BSB.[117] Yet the Bar Council continued to conduct a significant amount of the work on this matter, including the consultation proposing changes to the BSB's regulatory arrangements. In response to the consultation, the Law Society questioned the appropriateness of the Bar Council consulting on a regulatory matter.[118] In October 2010, the BSB Board reiterated that this issue was a regulatory matter and so should be considered by the BSB's Committees and Board.[119]

5.7. Based on this, we consider that the Bar Council should have realised on three separate occasions that the matter was regulatory in nature and so should be the responsibility of the BSB. Therefore we conclude that the Bar Council knew, or ought reasonably to have known, that the consideration of the introduction of the new contractual terms and the related alterations to the BSB Code of Conduct was a regulatory function as it concerned the alteration of regulatory arrangements.

What was the source of the application?

5.8. As to the source of the application, we highlight in section 2 (particularly paragraphs 2.12 to 2.20, 2.28 to 2.38 and 2.62 to 2.69) the chain of events which led to the application. Our analysis also highlights the evidence we have seen as to the source of drafting and consideration of the documentation which was generated during that process. From the evidence we have seen we believe it is reasonable to conclude that the Bar Council was the source of key elements of the documentation relating to the application. For instance:

- the documents we have been provided with show that the Bar Council initiated the drafting of the consultation document (albeit with the expectation that the consultation would be jointly issued);[120]

- both the initial draft of the rule change application (May 2011) and the amended draft application (October 2011) were prepared by a Bar Council member of staff;[121]

[117] Annex 2, paragraph A2.24
[118] Annex 3, paragraph A3.22
[119] Annex 3, paragraph A3.23
[120] Annex 3, paragraph A3.15
[121] Annex 3, paragraphs A3.56 and A3.62 to 3.63

- the initial draft application was written in the Bar Council house style font and included a Bar Council member of staff (BC 11) as the contact for the application.[122]

To what extent was the LSB aware of that source?

5.9. We turn now to the question of the extent to which the LSB was aware that the Bar Council was involved in this work. The LSB met with representatives of the BSB and Bar Council on 10 December 2009.[123] A potential application to alter the BSB's regulatory arrangements in relation to the new contractual terms was discussed at this meeting. On 18 February 2010 a Bar Council representative asked the LSB to review a proposed consultees list.[124] The LSB responded advising that the accountancy approved regulators (ACCA and ICAS) should be included alongside the other organisations proposed by the Bar Council. The consultation was published in April 2010 by the Bar Council. Therefore the LSB was aware of Bar Council involvement in the publication of the consultation and the distribution of it to potential consultees. The consultation document is silent on the reason why the Bar Council was carrying out the consultation instead of the BSB. So the LSB was not aware why the consultation was being conducted by the Bar Council when it was published.

5.10. The facts and matters Annexes shows the Bar Council was responsible for the production of the draft of the application to alter the BSB's regulatory arrangements. The BSB provided a number of comments on this draft. This included a comment that it would:

> *"be useful if we could explain why this [the April 2010 Consultation] was being led by the Bar Council rather than the BSB".*[125]

5.11. The Bar Council added the following sentence to the final version of the application

> *"The Bar Council handles complaints of non-payment of counsel's [sic] fees by solicitors and had started work on this issue before the BSB came into existence, it was therefore decided that the Bar Council should undertake the consultation and present its recommendations to the BSB for approval."*

5.12. We have concluded from the evidence we have seen that the LSB's understanding of why the Bar Council carried out the work is limited to the above sentence. In the LSB's view, this is an inadequate explanation as to whether the decision was made by the Bar Council or the BSB, and the basis for it.

[122] Annex 3, paragraph A3.67
[123] Annex 3, paragraph A3.69
[124] Annex 3, paragraph A3.69
[125] Annex 3, paragraph A3.65

Did the BSB and/or the Bar Council do anything that could be considered an attempt to deceive or intentionally mislead the LSB about the source of the application?

5.13. Finally, we consider the question of whether the BSB and/or the Bar Council did anything that could be considered to be an attempt to deceive or intentionally mislead the LSB about the source of the application.

5.14. The BSB made a number of amendments to the draft application to the LSB. This included amendments to delete 18 references to the Bar Council and the insertion of references to the BSB. The BSB also changed the point of contact on the application from the Bar Council to the BSB.[126] The Bar Council, on instructions from the BSB, changed the font of the application so it matched the house style of the BSB.[127] This could be interpreted as an effort to mask the origin of the application; as the BSB noted at the time:

> *"[w]e need to make sure that this is seen as a recommendation from the BSB in the light of our regulatory objectives – not something the that is being proposed by the Bar Council in the interests of barristers".*[128]

5.15. An example of one of the drafting changes is shown below:[129]

> ***Bar Council draft**: A total of 75 responses were received and having studied each response the Bar Council's comments are as follows.*
>
> ***BSB amendments**: A total of 75 responses were received and, having studied each response, the Bar Standards Board considered the Bar Council's analysis as follows.*
>
> ***BSB final application:** A total of 75 responses were received. Each response has been studied and the Bar Standards Board's comments are as follows.*

5.16. The change in relation to who studied the responses is very subtle. It is not untrue; all the responses had been studied. But the evidence provided to the LSB during this investigation shows that the BSB Board was provided with a 23 page summary of the consultation responses which was produced by the Bar Council, the BSB's Standards Committee were provided with a more detailed document produced by the Bar Council and a member of the BSB's Standard's Committee (BSB 4) reviewed the SRA and Law Society submissions.[130] So while the drafting changes may be consistent with the facts of what happened, the document should have made clear what the actual process had been in terms of who considered the responses to the consultation.

5.17. Other changes also have a similar effect. For instance:[131]

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[126] Annex 3, paragraph A3.67
[127] Annex 3, paragraph A3.67
[128] Annex 3, paragraph A3.66
[129] Annex 3, paragraph A3.64
[130] Annex 3, Table 2:Summary of BSB meetings when the new standard contractual terms formed part of the formal agenda (from 2010 to the approval of the changes)
[131] Annex 3, paragraph A3.64

Bar Council version: *"the Bar Council concluded it would not be feasible to draw up one set of standard terms that would suit both privately funded matters and such publicly funded matters as well"*

Final Version*: "the BSB concluded it would not be feasible to draw up one set of standard terms that would suit both privately funded matters and such publicly funded matters as well."*

5.18. The application was sent from the BSB and the LSB was not aware that it had been produced by the Bar Council. One of the Annexes to the application included an equalities impact assessment. This document stated that it was completed by a member of staff of the Bar Council (BC 11). However, the fact that the individual worked for the Bar Council was not declared. Even if the LSB had been aware that the individual worked for the Bar Council, it is not clear that the LSB would automatically have assumed that the Bar Council was involved in the production of the application itself. This is because the BSB and the Bar Council have had (since 10 August 2010) a service level agreement in relation to Equality and Diversity issues. The service level agreement provides that the Bar Council Equality and Diversity team will provide support and advice in ensuring that equality principles are taken into account in policy development of the BSB. This includes advice on impact assessment of policies.[132] This agreement has been reviewed by the LSB and complies with the IGR requirements in relation to shared services.

5.19. During the decision period the BSB refused to allow the Bar Council to attend a meeting with the LSB. The reason for this refusal was because:

> *"[w]e need to maintain the separation between the BSB/BC when it comes to regulatory independence. The LSB already think we're a little too close for comfort and a joint meeting on proposed regulatory changes won't help this impression".*[133]

5.20. This suggests that the BSB refusal to let the Bar Council attend meetings was motivated by a wish to generate a positive impression of the BSB's independence from the Bar Council rather than any evaluation as to whether it was appropriate for the Bar Council to attend such meetings. This is supported by the fact that the BSB and Bar Council continued to liaise on the issue. For instance the Bar Council had sight of drafts of the BSB's response to the LSB's warning notice and commented on at least one those drafts (albeit in a limited way). In its response to the LSB's warning notice, the Bar Council did not make clear the extent of its involvement with the rule change application.

Assessment

5.21. Any attempt to deliberately mislead one's regulator is extremely serious. Within the framework of this investigation, it could be considered as an aspect of the heads of investigation that consider the public interest and the constitutional principle of the rule of law.

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[132] Bar Council and BSB Service Level Agreement (2010), *Equality and diversity,* <http://www.legalservicesboard.org.uk/Projects/pdf/equality_and_diversity_sla_v0_4_final.pdf>

[133] Annex 3, paragraph A3.82

5.22. The BSB and Bar Council altered the rule change application to suggest that it had been produced by the BSB. By that late stage, it may well have been the case that the BSB and Bar Council's views were exactly the same and the interchange of names was a technical matter. However, the subtle changes to the drafting indicate that both the BSB and the Bar Council recognised the need to obscure the true extent of the Bar Council's involvement. Although we have seen no evidence that the objective of these actions was to mislead the LSB, in our judgement both the Bar Council and the BSB should have realised that this could have been the likely effect of the changes.

5.23. We have also considered whether the Bar Council's omission in not revealing to the LSB the extent of its involvement in the rule change application when asked for advice in response to the warning notice about the application was done with the intent of deceiving the LSB. Although we have seen no evidence that the objective of the omission was to deceive the LSB, in our judgement the Bar Council should have been transparent about the extent of its involvement.

5.24. Despite these acts and omissions although it is extremely regrettable that the Bar Council and BSB behaved in this way, we have seen no evidence that it deliberately attempted to deceive the LSB.

6. Are there any other actions by the Bar Council that emerge from the investigation that are relevant to the issue of regulatory independence?

The operation of the List of Defaulting Solicitors

6.1. During the course of this investigation, we have looked in detail at the way in which the Bar Council operates the List of Defaulting Solicitors. If a solicitor (or other person authorised by the SRA) is placed on this list, then a barrister is not obliged by the Cab Rank Rule to accept instructions from them. If a solicitor is not on the list and proposes instructions on the standard contractual terms (or other terms published by the barrister) then the Cab Rank Rule applies to the barrister. This change was included in the rule change application that brought the new contractual terms into the BSB's Code of Conduct.

6.2. Our starting position is that we do not consider that the rules made by the Bar Council about the operation of the List of Defaulting Solicitors and other Authorised Persons can legitimately be considered to have been made for the purposes of representing or promoting the interests of barristers.[134] On the contrary, the rules have been made to give effect to the regulatory arrangements of the BSB which state:

> *Annex T – accessed 31 July 2013*[135]
>
> *19. GOVERNING LAW, JURISDICTION AND DISPUTE RESOLUTION*
>
> *19.1 The Agreement and these Conditions shall be governed by and construed in accordance with the law of England and Wales.*
>
> *19.2 Unless any alternative dispute resolution procedure is agreed between the parties, the parties agree to submit to the exclusive jurisdiction of the Courts of England and Wales in respect of any dispute which arises out of or under this Agreement.†*
>
> *19.3 Without prejudice to Clause 19.2, the parties may agree to alternative methods of dispute resolution, including submission of any dispute regarding fees to the Voluntary Joint Tribunal on Barristers' Fees where the Authorised Person is a solicitor.†*
>
> *† The parties are reminded that if a judgement or a Voluntary Joint Tribunal's award is not fully paid within 30 days, the Barrister may request the Chairman of the General Council of the Bar to include the solicitor on the List of Defaulting Solicitors.*

6.3. Both the current scheme and the previous one (the Withdrawal of Credit Scheme) required a barrister to pay a Members' Services Fee to the Bar Council before the barrister can make a complaint about non-payment of fees

[134] Bar Council (March 2012), *Rules relating to the list of defaulting solicitors and other authorised persons 2012,* <http://www.barcouncil.org.uk/media/190651/12_10_20_rules_list_defaulting_sols__authorised_persons_2012_amended.pdf>
[135] BSB, *Annex 4 – The (new) Standard Contractual Terms,* <https://www.barstandardsboard.org.uk/regulatory-requirements/the-code-of-conduct/annexes-to-the-code/annexe-t-the-(new)-standard-contractual-terms-for-the-supply-of-legal-services-by-barristers-to-authorised-persons-2012/>

by a solicitor.[136] This means that, unless the representative body's membership fee is paid (or unless another barrister who has paid the fee makes a complaint about the same solicitor), the Cab Rank Rule will apply and the barrister will remain obliged to accept instructions from a non-paying solicitor.

6.4. The LSB asked the Bar Council for an explanation as to why the Bar Council currently considers it appropriate to charge a Members' Services Fee to enable a barrister to make a request to the Chairman of the General Council of the Bar to include the solicitor on the List of Defaulting Solicitors.[137] The Bar Council responded:

> *"The question wrongly assumes that the Bar Council charges the Member's Services Fee to enable barrister to request the inclusion of solicitor in the List of Defaulting Solicitors. In fact, the Bar Council has charged the Member's Services Fee (formerly known as the Voluntary Subscription) for many years, long before the Rules were introduced. Certain services are provided by the Bar Council are only provided to barristers who have paid the Member's Services Fee. Following the introduction of the Rules, that has included the administration of the procedure for handling requests for including solicitors and other Authorised Persons in the list of Defaulting Solicitors and other Authorised Persons. No other fee is charged for this service".*[138]

6.5. The Bar Council's website[139] describes the Members' Services Fee (MSF) as:

> *"The MSF is a voluntary payment that is used entirely in your interests in order to continue the work that cannot be funded through the [Practising Certificate Fee]. By paying the tax deductible MSF, you contribute to the Bar Council's efforts to preserve and promote the Bar, and enable us to continue to support you in your practice."*

Member benefits include offers and discounts on things such as hotels, cars, shirts, private medical insurance and gym membership. It also includes an arbitration and mediation service. Information about the List of Defaulting Solicitors and other Authorised Persons is included in the section called "fees collection".

6.6. The page on the Bar Council's website about "Fees Collection" states:[140]

> *"If you have fees outstanding, and have paid your Member Services Fee, you can make complaints to the Fees Collection Office in the following circumstances."*[141]

6.7. It is clear from this that in order to make a complaint about a solicitor that has not paid a barrister's fees, a barrister has to have paid the Member's Services Fee. However, this is not the only service the barrister can obtain by paying this fee. The Bar Council's reports and accounts for 2011/2012 suggests that in relation to the Member Services Fee "*circa 80% of the self employed Bar and*

[136] Annex 3, paragraph A3.8
[137] Annex 4: Section 55 notice to Bar Council dated 16 August 2013
[138] Bar Council letter to LSB (Chris Kenny) dated 22 August 2013, LSB item reference 5 22.
[139] Accessed 12 August 2013
[140] Annex 3, paragraph A3.9
[141] See http://www.barcouncil.org.uk/for-the-bar/introduction-to-member-services/fees-collection/ [accessed 29 August 2013]

50% of the employed Bar do pay the fee"[142] The level of the Members Services Fee for the year to 31 March 2013 was £150 for a QC, £100 for those from 3 years call and £50 for those 1 to 2 years call. It was expected to raise £1.13million in income for the Bar Council.

6.8. The figures from 2011/12 (if still broadly similar) suggest that 20% of self employed barristers cannot complain to the Bar Council about unpaid fees and so must continue to accept instructions from defaulting solicitors because the Cab Rank Rule would continue to apply.

6.9. This appears to us to be contrary to the key arguments that the BSB put forward in making its written representations to the LSB's warning notice when it said that its rule change was part of a package that is consistent with better regulation. It said that the contractual terms are "a reasonable corollary" of the Cab Rank Rule and has also highlighted the importance to diversity of barristers getting paid.

6.10. Those representations, while not mentioning the Tribunal or List of Defaulting Solicitors, specifically argued that:

> *"[…] it is not reasonable to expect barristers in independent practice to be obliged to act with no contractual right to be paid for their services or definition of when they are entitled to be paid. As it is, non-payment of fees ranks high amongst the reasons given for leaving the self-employed Bar and we know that disproportionate numbers of those who do leave are women."*
>
> *"[…] the cab rank rule is to be reformed, by attaching the obligations it imposes to a modern contract, which barristers can enforce"*
>
> *"The proposed changes are a package, each aspect of which is related to the other. [The rule change is] consistent with, and very much supports, the aim of better regulation."*

6.11. The requirement to pay a fee is also not reflected in the BSB's actual regulatory arrangements: paragraph 19 of Annex T makes no mention of the requirement to pay a fee in order to request that a solicitor is included on the defaulters' list. There was no mention of the requirement to pay a fee in the Bar Council's April 2010 consultation on this issue.

6.12. For all these reasons we have concluded that the process by which a *"[b]arrister may request the Chairman of the General Council of the Bar to include the solicitor on the list of defaulting solicitors"* is a regulatory arrangement for which a Members' Services Fee cannot be charged. The arrangements currently in place constitute a breach of that principle.

6.13. We consider that it may be appropriate for the Bar Council to give effect to the BSB's regulatory arrangements on this topic, given its experience of operating the previous scheme. However, as with the other topics considered in this report, it must do so within the context of the IGR. To restrict access to the List of Defaulting Solicitors to only those barristers who opt to pay a fee means, in our judgement, that the Bar Council is operating a regulatory matter as a

[142] Bar Council, The Bar Council: Annual Report & Accounts 2011/12 http://www.barcouncil.org.uk/media/167056/bar_council_annual_report_and_accounts_2011___2012.pdf

representative one, with no justification or legal basis for doing so. We consider that, in doing so, the Bar Council has failed to ensure that the exercise of its regulatory functions is not prejudiced by any representative functions or interests.

Bar Council attendance at private sessions of BSB meetings

6.14. It has come to our attention that, as a matter of routine, the BSB invites the Bar Council to attend the part of its Board meetings that it holds in private, although it does sometimes exclude the Bar Council representatives from specific discussions.

6.15. The requirement, as far as reasonably practicable, to separate regulatory and representative functions and the IGR are designed to build public confidence that regulation operates in the consumer and public interest, not in the interest of barristers and other lawyers. Preferential treatment of the Bar Council, by virtue of its attendance where consumer and other lobbies are excluded, has the potential to undermine that confidence. Furthermore, we consider that the presence of the Bar Council is likely to inhibit free and frank discussion and tactical management of the representative body, as well all of the other things that a regulator needs to think about in creating the right incentives and disincentives for the regulated community to behave in the right way.

7. Consideration of unreasonableness

7.1. The LSB's Statement of Policy[143] on compliance and enforcement states:

> *"In deciding whether it is appropriate to exercise its formal enforcement powers, the LSB must have regard to the principle that it should only use them if the act or omission of the Approved Regulator (or the [Solicitors Disciplinary] Tribunal) was unreasonable. In most circumstances it is unlikely that the LSB would consider an act or omission to be unreasonable merely because we would have acted differently or that the act or omission has had or is likely to have an adverse impact on one or more of the Regulatory Objectives. We will, where appropriate, consider the rationale for the act and omission by the Approved Regulator (or the [Solicitors Disciplinary] Tribunal) and encourage a review of the situation if we consider, for example, that all options have not been fully explored or the views of consultees were not properly weighed. That, however, is not the same thing as substituting one view for another."*

7.2. We have therefore considered whether the acts or omissions of the Bar Council in this case were unreasonable. The independence of regulation from the professional interest is a fundamental aspect of the LSA. The LSA required the LSB to make rules to ensure that the exercise of regulatory functions is not prejudiced by a regulator's representative functions and that decisions relating to the exercise of regulatory functions are so far as reasonably practicable taken independently of representative functions. The investigation has shown that the Bar Council's behaviour did not change following the change in the law and the coming into force of the LSB's rules. The Bar Council did not at all times act in a way which was compatible with the principle of regulatory independence and which it considered most appropriate for the purpose of meeting that principle. Nor did it comply with the requirement to ensure the exercise of regulatory functions is, as far as reasonably practicable, independent of any representative functions. We consider that it would have been reasonable for the Bar Council to have done some or all of the actions set out in section 2 of this report. It would have been reasonable for the Bar Council to have done some or all of these things at the introduction of the IGR. But it could also have done some or all of them at any time during its involvement, particularly when the BSB decided (in October 2010) that the contractual terms were a regulatory matter and at various points subsequently. We consider that the fact that it did not do so means that it acted unreasonably.

7.3. For the reasons set out in this report, we consider that the Bar Council went beyond the provision of assistance to the BSB. Its actions show a representative body driving forward work over a long period of time that was recognised as benefitting professional interests and subsequently advertised as such once the rule change application had been approved. The Bar Council ought reasonably to have been alive to the fact that it could exert undue influence and control over the BSB and taken steps to ensure that it did not do

[143] LSB (November 2010), *Statement of Policy on Compliance and Enforcement,* <http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/pdf/statement_of_policy_compliance_and_enforcement_v2_november10.pdf>

so. But it went beyond simple provision of advice and expertise and instead had significant control of the process for making alterations to the regulatory arrangements and the application to the LSB to make changes those arrangements. It acted as a "controlling mind" in the development of matters related to the contractual terms and had undue influence and control over the design of the regulatory arrangements and the application made to the LSB to alter the BSB's regulatory arrangements. The final position was supported by those that the Bar Council represents and did not reflect the interests of other parties that had been involved such as the Law Society. In our judgement the Bar Council acted unreasonably by taking the lead and masterminding a regulatory function which the IGR required it to have delegated to the BSB.

7.4. We have set out in section 2 what, in our judgement, would have been reasonably practicable things for the Bar Council to have done to ensure that its continued involvement did not breach the IGR. It could have done some or all of these things – or indeed other things that it considered were more appropriate. But we have no evidence that it did anything. The Bar Council says that members of the BSB are people of integrity and independence[144] and that this was sufficient to ensure compliance with the IGR. In our judgement, this is not sufficient; active consideration of IGR compliance was particularly important on this issue because it had been such a long-running issue and it was not clear that it was definitely a regulatory arrangement. Those two facts alone should have prompted proper reflection by both the BSB and Bar Council. We consider that the fact that this was not done was unreasonable.

7.5. As it was, it appears that the BSB was, to a significant extent, captured by its representative arm on this issue over a number of years. There is little evidence that the BSB really controlled any of the processes and, even after the rule change had been submitted, its staff did not really understand how it was going to work in practice or the timetable for its implementation.

7.6. We have seen no evidence that the Bar Council and/or the BSB deliberately set out to deceive the LSB about the Bar Council's involvement in the rule change application process. The LSB's concerns in the warning notice were about the content of the proposed rule change rather than the process by which it had been developed. Nevertheless, if the BSB had been in control of the process, it would have been reasonable for it to have made clear to the LSB the extent of the Bar Council's involvement rather than to change drafting and fonts in a way which gave the impression that the BSB had drafted the rule change application and fully considered all the consultation responses. In addition, it would have been reasonable for the Bar Council, in responding to the LSB's warning notice, to have made clear the extent of its involvement in the rule change application and the development of the underlying policy. We consider the fact that it did not do so to be unreasonable.

7.7. We do not consider that the involvement of the Bar Council in the BSB's response to representations on the warning notice was unreasonable. From the evidence we have seen, its involvement was limited and appropriate.

7.8. We consider that the way in which the Bar Council has given effect to the BSB's regulatory arrangements for a barrister to request the Chairman of the

[144] Annex 3, paragraph A3.106

Bar Council to include a solicitor on the List of Defaulting Solicitors is unreasonable. Currently, a barrister is unable to make such a request unless s/he has paid a Members Services Fee. The BSB's regulatory arrangements make no mention of any fee and, for the reasons set out in section 6, we do not consider that the rules made by the Bar Council can legitimately be considered to have been made for the purposes of representing or promoting the interests of barristers.

Annex 1: Bar Council and BSB representatives and their roles – section redacted for publication

Annex 2: Context before the IGR were in force

The Contractual Terms

A2.1. This section sets out the historical context of contractual terms before the IGR were in force. The LSB considers that this information is relevant to the investigation since it shows the way in which the Bar Council had been involved in this issue prior to the introduction of the IGR.

A2.2. Contractual terms had been part of the Bar's Code since 2001 (as Annex G2). These existed alongside the "Terms of Work on which Barristers Offer their Services to Solicitors and the Withdrawal of Credit Scheme 1988" (as Annex G1). Annex G1 included, in addition to provisions related to the Withdrawal of Credit Scheme, non-contractual terms of work for barristers. These were "passported" into the regulatory arrangements of the BSB and (along with everything else in the Code) deemed to meet the requirements of the LSA. The BSB was established on 1 January 2006. The new contractual terms appear to have first been considered by the BSB's Rules Committee (a predecessor to its Standards Committee) in early 2006.[145] The new contractual terms appear to have been first considered by the BSB Board on 20 July 2006.[146]

A2.3. Once the new contractual terms were being considered by the BSB, a number of papers for BSB meetings were prepared and presented by the Bar Council. There is limited evidence of direction or approval by the BSB (apart from submission to its secretariat). The minutes of one[147] noted that "*[n]egotiations over the terms with the Law Society had apparently been difficult and concern was expressed by the Bar Council representatives that nothing should be done which would risk affecting the remaining negotiations*".

The negotiations with the Law Society

A2.4. The Law Society and the Bar Council had been negotiating since 2001 on a new set of arrangements to replace the "Terms of work on which Barristers Offer their Services to Solicitors and the Withdrawal of Credit Scheme 1988."[148] The Bar Council's Implementation Committee believed that new contractual terms had been agreed with the Law Society in 2008[149] and, in December 2008, an application was made to the Ministry of Justice ("**the MoJ**") in the name of the BSB to make changes to the BSB's Code of Conduct.[150] However, in February 2009 the Law Society stated that it was not willing to endorse these terms.[151] The application to the MoJ to change the BSB's Code of Conduct was suspended.[152]

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[145] Bar Council letter (BC 7) to LSB (Chris Kenny) on 5 July 2013
[146] Bar Council letter (BC 7) to LSB (Chris Kenny) on 5 July 2013, Annex 2A
[147] BSB Standards Committee minutes 29 October 2008, LSB item 124
[148] See paragraph 4, BSB, *Application for Approval of amendment to the Bar Code of Conduct: the Cab Rank Rule,* 16 December 2008. LSB item reference 120
[149] Paper drafted by Bar Council staff member (BC 11) and Bar Council Implementation Committee Member (BC 2) entitled Annex B Standard Contractual Terms for Barristers, BSB Standards Committee meeting, 30 September 2009. LSB item 124. For drafting evidence see LSB item 126 and 127.
[150] BSB, *Application for Approval of amendment to the Bar Code of Conduct: the Cab Rank Rule*, 16 December 2008. LSB item reference 120
[151] Item 3, Paragraph 2, Minutes of the BSB's Standards Committee dated 30 September 2009. LSB item reference 125.
[152] BC 7, letter to Chris Kenny dated 28 June 2013*, Annex: Further information and materials supplied pursuant to request for further information made on the 21 June 2013*. LSB item reference 118

A2.5. The Law Society considered that at all times these negotiations were a representative matter and has told the LSB that the SRA was never involved in any of the negotiations.[153]

A2.6. Following the decision of the Law Society not to endorse the terms, the General Management Committee of the Bar Council ("GMC") instructed the Bar Council's Implementation Committee to draw up new and simplified contractual terms together with the appropriate amendments to the BSB's Code of Conduct and to proceed with or without the support of the Law Society.[154] The minutes of the BSB's Standards Committee on 30 September 2009 record that the GMC had suggested that *"the Bar Council would now 'go it alone.'"*[155]

A2.7. The Bar Council's GMC consists of the main officers of the Bar Council, the Chairs of a number of Bar Council Committees, a number of other barrister representatives and the Bar Council Chief Executive. The BSB Chair or a representative is allowed to attend meetings of the GMC but not vote.[156] The Bar Council's Implementation Committee was established in 2007 to deal with the implementation and practicalities of operating new contractual terms on which barristers offer their services to solicitors.[157] It is a wholly representative Committee and, like all of the Bar Council's representative Committees, is overseen by the Bar Council's GMC.

The first rule change application (December 2008, pre-LSA IGR)

A2.8. A rule change application was submitted to the MoJ by the BSB on 16 December 2008.[158] Prior to that, a member of the Bar Council's Implementation Committee (BC 6) presented the proposed changes to the Code of Conduct to the BSB Board on 6 November 2008.[159] The Bar Council member of staff (BC 11) reported to the Chair of the Bar Council's Implementation Committee (BC 3) and a member of the Bar Council's Implementation Committee (BC 5):

> *"I am pleased to advise that [a member of the Bar Council's Implementation Committee] (BC 6) persuaded the [BSB] Board to agree to the Code Amendments. Next step: Ministry of Justice. I will be asking my colleagues in BSB how to do this".*[160]

A2.9. On 10 November 2008 the Bar Council member of staff (BC 11) emailed the Chair of the Bar Council's Implementation Committee (BC 3) stating:

> *"A report needs to be written explaining what the changes are and why they are needed. I have been given a couple of examples by the BSB*

[153] Law Society letter to LSB (Chris Kenny) dated 26 June 2013. LSB item reference 195
[154] Paper drafted by Bar Council staff member (BC 11) and Bar Council Implementation Committee Member (BC 2) entitled *Annex B Standard Contractual Terms for Barristers, BSB Standards Committee meeting*, *30 September 2009.* LSB item 124. For drafting evidence see LSB item 126 and 127.
[155] Item 3, Paragraph 2, *Minutes of the BSB's Standards Committee dated 30 September 2009*. LSB item reference 125.
[156] Paragraph 16, Hobart (March 2010), *Standing Orders for Committee and Sub-Committee of the Bar Council,* <http://www.legalservicesboard.org.uk/Projects/pdf/2_bar_council_standing_orders_asreceived_30april2010.pdf>
[157] See Bar Council website: http://www.barcouncil.org.uk/about-us/constitution-and-structure/committees/implementation-committee/ [Accessed 4 July 2013]
[158] BSB Letter and enclosures to Ministry of Justice 16 December 2008*, Application for Approval of amendments to the Bar Code of Conduct: the "Cab Rank Rule,"* see LSB item reference 120.
[159] Page 3, Minutes of the Bar Standards Board meeting 4:00pm on Thursday 6 November 2008*, Item 8 – implementation of the standard contractual terms for barristers*, see LSB item reference 119.
[160] Bar Council member of staff (BC 11) reported to the Chair of the Bar Council's Implementation Committee (BC 2) and a member of the Bar Council's Implementation Committee (BC 5) at 16:56 on 6/11/2008, see LSB item reference 121

and they have offered to check &/or comment on the report if needed before it goes off to the MoJ".[161]

A2.10. The proposed changes included the alteration of provisions related to the Cab Rank Rule, the introduction of new Annexes to the BSB's Code of Conduct to include the new contractual terms, the scheme for complaining to the Bar Council and the defaulting solicitors' scheme rules and the deletion of Annexes G1 and G2.[162]

A2.11. The new contractual terms had been discussed at the BSB's Standards Committee meeting on 17 September 2008 and 29 October 2008. At the meeting on 29 October 2008 the minutes report that:

> *"Negotiations over the terms with the Law Society had apparently been difficult and concern was expressed by the Bar Council representatives that nothing should be done which would risk affecting the remaining negotiations".*[163]

A2.12. On both occasions representatives from the Bar Council's Implementation Committee (BC 3 and BC 5) and a Bar Council member of staff (BC 11) attended. The minutes state that one of the representatives from the Bar Council's Implementation Committee (BC 3) provided an overview to the BSB's Standards Committee meeting on 17 September 2008 and a Bar Council member of staff (BC 11) explained the issue to the Committee. It is not clear from the minutes of the BSB's Standards Committee meeting on 29 October 2008 who presented the paper written by the Bar Council to that meeting. [164]

A2.13. The application to the MoJ was initially drafted by a Bar Council member of staff (BC 11). The draft was reviewed by a BSB member of staff (BSB 11). The BSB member of staff (BSB 11) made no comments on the draft.[165] The draft was then sent to the Chair of the Bar Council's Implementation Committee (BC 3) who made amendments and sent the application to a Bar Council member of staff (BC 11) at 14:57 on 15 December 2008.[166] The final version of the application was submitted to the MoJ by a BSB member of staff (BSB 11) on 16 December 2008. The reference and contact for the application was a Bar Council member of staff (BC 11).[167]

A2.14. This application was suspended in February 2009 after the Law Society stated that it was not willing to endorse the proposed contractual terms.[168]

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[161] Bar Council member of staff (BC 11) reported to the Chair of the Bar Council's Implementation Committee (BC 2) at 10:22 on 10/11/2008, see LSB item reference 121
[162] BSB Letter and enclosures to Ministry of Justice 16 December 2008, ibid
[163] Page 4, BSB Standards Committee meeting papers 30 September 2009, *Annex B: Standard Contractual Terms for Barristers*, see LSB item reference 124.
[164] Pages 3 and 4, BSB Standards Committee meeting papers 30 September 2009, *Annex B: Standard Contractual Terms for Barristers*, see LSB item reference 124.
[165] See emails between a member of Bar Council staff (BC 11) and a member of BSB staff (BSB 11) timed 17:16 11 November 2008, 10:04 12 November 2008 and 10:54 13 November 2008, see LSB item reference 122
[166] See emails between a Bar Council member of staff (BC 11) and the Chair of the Bar Council's Implementation Committee (BC 2) timed 14:57 15 December 2008 and 15:07 15 December 2008, see LSB item reference 123
[167] BSB Letter and enclosures to Ministry of Justice 16 December 2008*, Application for Approval of amendments to the Bar Code of Conduct: the "Cab Rank Rule"*, see LSB item reference 120.
[168] Paragraph 2d i(d), Bar Council letter and annex to LSB 28 June 2013, *Annex: Further information and materials supplied pursuant to request for further information made on the 21 June 2013,* see LSB item reference 118

The second rule change application (October 2009, pre-LSA IGR)

A2.15. The second application was based on the first application but it was amended by the Chair of the Bar Council's Implementation Committee (BC 3), members of that Committee (BC 5, BC 4 and BC 6) and a Bar Council member of staff (BC 11).[169] The application was submitted to the MoJ on 23 October 2009.[170] Prior to that, the issue of new contractual terms was considered at the Bar Council's GMC meeting on 24 September 2009,[171] the BSB's Standards Committee meeting on 30 September 2009[172] and the BSB Board meeting on 22 October 2009.[173] However, the draft application that was submitted to the MoJ on 23 October 2009 did not form part of the papers for the BSB's Standards Committee meeting or the BSB Board meeting.[174]

A2.16. The minutes from the 22 September 2009 meeting of the Bar Council's Implementation Committee note a discussion of the Bar Council working group on the resubmission of the second rule change application, with a view to sending it back to the MoJ immediately after the BSB meeting (assuming that the BSB Board was in agreement).[175] The minutes stated *"(BC 11) explained that the MoJ advised that the longer we leave going back to them [with a revised application on the contractual terms], the less time the Ministry will have to query anything and therefore the greater the risk of passing it to the Legal Services Board*".

A2.17. The paper for the BSB's Standards Committee meeting on 30 September 2009 was drafted by a Bar Council member of staff (BC 11) and amended by the Chair of the Bar Council's Implementation Committee (BC 3).[176] It was presented to the Committee by the Chair of the Bar Council's Implementation Committee (BC 3).[177] The paper explained that the Law Society had pulled out of negotiations that spring: "*[t]he GMC therefore instructed the Implementation Committee to draw up new and simplified Contractual Terms (together with schemes for making complaints to the Bar Council) together with the appropriate amendments to the Code of Conduct and proceed with or without the support of the Law Society. The revised Contractual Terms before the Committee, together with revised schemes for making complaints to the Bar Council, procedure for Joint Tribunals and proposed Code amendments have been drawn up by the*

[169] Paragraph 2h i, Bar Council letter and annex to LSB 28 June 2013, *Annex: Further information and materials supplied pursuant to request for further information made on the 21 June 2013,* see LSB item reference 118. Also see emails between a member of Bar Council staff (BC 11), the Chair of the Bar Council's Implementation Committee (BC 2) and members of the Bar Council's Implementation Committee (BC 4, BC 6 and BC 5) timed 12:27, 13:02, 14:13, 14:35, 14:40, 14:42, 14:49 and 16:52 on 16 October 2009, see LSB item reference 136 to 143

[170] BSB Letter and enclosures to Ministry of Justice 23 October 2009*, Application for Approval of amendments to the Bar Code of Conduct: the "Cab Rank Rule," re Contractual Terms of Work for the supply of legal services by barristers to solicitors,* see LSB item reference 134.

[171] BSB Standards Committee 30 September 2009, *Annex B: Standard Contractual Terms for Barristers*, see LSB item reference 124

[172] Minutes of the BSB Standards Committee 30 September 2009, *Item 3: Approval of the new standard contractual terms*, LSB item reference 125

[173] Minutes of the BSB Board 22 October 2009*, Item 6 – Standard contractual terms for barristers*, see LSB item reference 131

[174] BSB Standards Committee 30 September 2009, Annex B: Standard Contractual Terms for Barristers, see LSB item reference 124 and BSB Board 22 October 2009, BSB Paper 92(09) – Standard Contractual Terms for Barristers, see LSB item reference 129

[175] Bar Council letter (BC 7) to LSB (Chris Kenny) on 28 June, Annex 2H: Bar Council 22 September 2009 Minutes

[176] See emails between a member of the Bar Council staff (BC 11) and the Chairman of the Bar Council's Implementation Committee (BC 2) timed 11:18 on 15 September 2009 and timed 10:04 on 18 September 2009. Also see email between a member of Bar Council staff (BC 11) and a member of BSB staff (BSB 22) timed 12:36 on 21 September 2009. See LSB item references 126, 127 and 128.

[177] Minutes of the BSB Standards Committee 30 September 2009, *Item 3: Approval of the new standard contractual terms*, LSB item reference 125 for evidence of drafting please

Implementation Committee and considered by members of the Remuneration and Fees Collection Committee". The paper was presented for discussion and decision".[178]

A2.18. The minutes for this meeting state:

> *"(BC 3) explained that the original application to have terms approved by the Ministry of Justice was currently on hold. It was important to have the terms consider before the duty to approve them was transferred from the MoJ to the Legal Services Board.*
>
> *The view was expressed that the Ministry of Justice was unlikely to consider the terms in time. If the papers had to go to the LSB, there was a risk that the LSB might want the standard contract to be amended and couched in terms which showed how they met the regulatory objectives under the Legal Services Act 2007. It was noted that the Law Society had described the standard contract as anti-competitive, but that evidence had not been provided to support that view".*[179]

A2.19. No evidence has been provided to explain who in the BSB approved the paper for submission to the BSB's Standards Committee meeting.

A2.20. The minutes of the BSB's Standards Committee meeting on 30 September 2009 also state:

> *"The terms were due to be discussed by the [BSB] Board at its meeting on the 22 October. The Committee expressed a wish to see an assessment of how the terms met the regulatory objectives. [The Chair of the Bar Council's Implementation Committee] (BC 3) offered to write a response to the comments made by the committee and address that matter".*

A2.21. The assessment requested by the BSB Standards Committee was written and presented by the Bar Council at the BSB Board meeting on 22 October 2009. The paper was drafted by the Chair of the Bar Council's Implementation Committee (BC 3) with assistance from members of Bar Council's Implementation Committee and from a Bar Council member of staff (BC 11).[180] The papers included a document entitled "*Response to the queries raised by the [BSB] Standards Committee 30 September 2009"*. In practice this document did not include any detailed discussion of the regulatory objectives and only addressed questions such as whether the contractual terms were needed, more technical queries such as whether the wording of paragraph 4 of the contractual terms was clear enough and the impact of the new terms on the joint tribunal.

A2.22. A document entitled "*proposed new standard contractual terms"* contained the following brief references to the regulatory objectives:

> *"By having clear, standard, terms of work on which barristers offer their services to solicitors which apply in the absence of alternative terms*

[178] Bar Council letter (BC 7) to LSB (Chris Kenny) on 28 June 2013, Annex 2F
[179] Page 3, Minutes of the BSB Standards Committee 30 September 2009, *Item 3: Approval of the new standard contractual terms*, LSB item reference 125
[180] See emails between a member of BSB staff (BSB 17) and a member of Bar Council Staff (BC 11) timed 9:39 on 7 October 2009 and 12:05 On 8 October 2009, see LSB item references 132 and 133

having been agreed, the interests of consumers are protected and, enshrining the change in the Code of Conduct, maintains the adherence to the Bar's professional principles. The present system of non contractual terms, a basis which has been operating for centuries, has long been considered archaic and out of step with modern commerce. These contractual terms therefore encourage an independent, strong and effective legal profession."

A2.23. The minutes of the BSB Board meeting on 22 October 2009 make no reference to the regulatory objectives. The minutes refer to a barrister explaining the public interest in standard contractual terms. The explanation was that "*they enable the cab rank rule to be enforced, since a barrister could otherwise use uncertainty about terms to avoid cab rank rule obligations."*

A2.24. At the meeting a BSB member questioned the appropriateness of the procedural approach being taken (in terms of the Bar Council's role). The minutes state:

> *"Another barrister member queried why the BSB as a regulator was being required to warrant that the proposed business terms were acceptable, when the BSB's sole involvement concerned the Cab Rank Rule [...]. There were also concerns that a subcommittee of the Bar Council (Implementation Committee) was proposing changes to the BSB's Code of Conduct, when this was the responsibility of the Standards Committee. Matters such as this should be routed through Standards and then on to the Board".*

A reply was given

> *"[...] that the Standard Contractual Terms would be of benefit to a minority of solicitors and barristers (perhaps 30%) who would not consider formulating their own terms and would suffer if the present non contractual system, without default remedies, continued".* [181]

Actions as a result of the discussion were allocated to both the Bar Council and the BSB.

A2.25. The second application was submitted by a Bar Council member of staff (BC 11) to BSB members of staff (BSB 11 and BSB 22) at 15:54 on 23 October 2009.[182] It was then submitted by the BSB to the MoJ on BSB headed paper on 23 October 2009. The signatory was a Bar Council member of staff (BC 11) and the reference and contact for the second application was the same Bar Council member of staff (BC 11).[183] No evidence has been provided to suggest that the BSB made any changes or amendments to the application prior to it being submitted to the MoJ. A Bar Council member of staff (BC 11) thanked BSB members of staff (BSB 11 and BSB 22) for their advice in an email dated 23

[181] Page 5 Minutes of the BSB Board 22 October 2009*, Item 6 – Standard contractual terms for barristers*, see LSB item reference 131

[182] See email from a member of Bar Council staff (BC 11) to members of BSB staff (BSB 11 and BSB 22) timed 15:54 on 23 October 2009, see LSB item reference 178

[183] BSB Letter and enclosures to Ministry of Justice 23 October 2009*, Application for Approval of amendments to the Bar Code of Conduct: the "Cab Rank Rule," re Contractual Terms of Work for the supply of legal services by barristers to solicitors*, see LSB item reference 134.

October 2009;[184] however, no documentary evidence has been provided containing advice provided by the BSB to the Bar Council or confirming the BSB review or approval of the final application.

[184]See email from a member of Bar Council staff (BC 11) to members of BSB staff (BSB 11 and BSB 22) timed 15:54 on 23 October 2009, see LSB item reference 178

Annex 3: Facts and matters after the IGR were in force

A3.1. This section sets out key facts and matters that the LSB has taken into account during its investigation. Other facts and matters have been included in the discussion sections with relevant source footnotes. Facts and matters relating to the Bar Council and BSB's actions prior to the introduction of the IGR are included in Annex 2. This included consideration of the negotiations between the Bar Council and the Law Society and the first and second applications to amend the Code of Conduct.

A3.2. Information has been drawn from, among other things, that received from the Law Society in response to a request for information on 26 June 2013, and from the Bar Council in response to requests under section 55 of the LSA issued on the following dates:

- 27 March 2013;
- 9 May 2013;
- 21 June 2013, as amended on 24 June 2013;
- 16 August 2013.

A3.3. A version of facts and matters, plus omissions, was shared with the Bar Council on 22 July 2013, giving it the opportunity to correct any factual inaccuracies in the document. The Bar Council replied on 29 July 2013 and this version of the facts and matters takes into account that response.

A3.4. The BSB's Code of Conduct included two Annexes related to standard contractual terms before the LSB's Internal Governance Rules (2009) came into force. The Annexes were G1 and G2 of the BSB's Code of Conduct: the "Terms of Work on which Barristers Offer their Services to Solicitors and the Withdrawal of Credit scheme 1988" and "Services to solicitors, contractual terms". "The Terms of Work on which Barristers Offer their Services to Solicitors and the Withdrawal of Credit Scheme 1988" was authorised by the General Council of the Bar on 16 July 1988 and amended by authority of the General Council of the Bar on 10 November 1990, 17 July 1999, 24 March 2001 and 21 November 2001. Annex G1 was deleted from 31 January 2013 and Annex T (the (new) standard contractual terms) was added to the Code of Conduct.[185]

A3.5. Annex G2 - Services to solicitors, contractual terms was authorised by the General Council of the Bar on 24 March 2001 and amended by authority of the General Council of the Bar on 17 November 2001.[186] Annex G2 was deleted from

[185] BSB Code of Conduct, Annexe G1 – Services to solicitors withdrawal of credit, <https://www.barstandardsboard.org.uk/regulatory-requirements/the-code-of-conduct/annexes-to-the-code/annexe-g1-services-to-solicitors,-withdrawal-of-credit/>

[186] BSB Code of Conduct, Annexe G2 – Services to solicitors contractual terms, <https://www.barstandardsboard.org.uk/regulatory-requirements/the-code-of-conduct/annexes-to-the-code/annexe-g2-services-to-solicitors,-contractual-terms/>

31 January 2013 and Annex T (the (new) standard contractual terms) was added to the Code of Conduct.

A3.6. The introduction of the new contractual terms and associated changes to the regulatory arrangements of the BSB was approved by the LSB on 27 July 2012,[187] and implemented on 31 January 2013.[188] The application made on 26 October 2011 from the BSB in relation to the new contractual terms comprised: template contractual terms for use by barristers when providing their services to solicitors; rules about the operation of a joint tribunal (with the Law Society) to resolve fee disputes; and rules about the operation of a list of solicitors that have been adjudged to have not paid barristers' fees that they owed. When approved, the new contractual terms were annexed to the BSB's Code of Conduct (Annex T) but the other Annexes submitted to the LSB in October 2011 were not. The rule change also introduced changes to the Cab Rank Rule in the BSB's Code of Conduct.

A3.7. The changes to the Cab Rank Rule have the effect that a self-employed barrister is not obliged to accept instructions from a solicitor or a person authorised by the SRA if they are named on the List of Defaulting Solicitors and other Authorised Persons. The Rule was also amended to state that the barrister is obliged to accept work offered under the new contractual terms or under any standard terms of work published by the barrister.

A3.8. Solicitors (and persons authorised by the SRA) that have contracted with a barrister on the new contractual terms or any other terms published by the barrister, and who fail to pay the barrister's fees that the Joint Tribunal has adjudged to be due, can be the subject of a complaint to the Bar Council. There are also a number of other circumstances where a barrister may make a complaint about an individual regulated by the SRA who has failed to pay the barrister's fees. The Bar Council maintains a List of Defaulting Solicitors and other Authorised Persons regulated by the SRA who fail to pay fees following a successful complaint. This is administered by the Bar Council's Fees Collection Office and the ability to complain about outstanding fees is only available to barristers who pay the voluntary Member Services Fee to the Bar Council.[189] Authorised persons is defined in the Bar Council rules as: *"a person who is an authorised person for the purposes of s. 18(1)(a) of the Legal Services Act 2007 and whose approved regulator under that Act is the Law Society and/or the SRA, and all successors and assignees (a) of which the barrister's Instructing Solicitor is a director, partner, member, employee, consultant, associate or agent and (b) on whose behalf, and in such capacity, the Instructing Solicitor instructs the barrister."*

A3.9. The List of Defaulting Solicitors is made available to practising barristers, the Law Society, the Master of the Rolls and the SRA, but not to the general public, to solicitors, or those authorised by the SRA in general. More detail on the

[187] All relevant LSB papers for the rule change can be found here: http://www.legalservicesboard.org.uk/what_we_do/regulation/applications.htm#2011

[188] Bar Council (17 October 2012), *Implementation of New Terms of Engagement for barristers,* <http://www.barcouncil.org.uk/media-centre/news-and-press-releases/2012/october/implementation-of-new-terms-of-engagement-for-barristers/>

[189] The Bar Council website states: " If you have fees outstanding, and have paid your Member Services Fee, you can make complaints to the Fees Collection Office" http://www.barcouncil.org.uk/for-the-bar/introduction-to-member-services/fees-collection/

operation of the List of Defaulting Solicitors is considered in section 6 of the main document.

LSA section 28, section 30 and the IGR

A3.10. The LSB consulted on its proposed IGR to be made under section 30 of the LSA on 25 March 2009 and again on 16 September 2009. The LSB's decision document and the rules it made were published on 9 December 2009.

A3.11. The Legal Services Act 2007 (Commencement No. 6, Transitory, Transitional and Saving Provisions) Order 2009[190] commenced part 4 of the LSA. This included section 28 (Approved regulator's duty to promote the regulatory objectives etc) and section 30 (Rules relating to the exercise of regulatory functions). The Order meant that these provisions, to the extent that they were not already in force, came into force on 1 January 2010.

A3.12. Following the commencement of the above sections of the LSA, the LSB's IGR as published on 9 December 2009 came into force on 1 January 2010.

A3.13. The BSB was established on 1 January 2006 to carry out the regulatory functions of the Bar Council. The Bar Council's constitution and standing orders were amended at this point to reflect the delegation of regulatory functions to the BSB. The Bar Council further amended its constitution and its standing orders during 2010 to reflect the requirements of the LSB's IGR. The amended constitution and standing orders came into force on 30 April 2010.[191]

The third rule change application

The consultation period (March 2010 to October 2010)

A3.14. The LSB met with representatives of the BSB and Bar Council on 10 December 2009. A potential application to alter the BSB's regulatory arrangements in relation to the new contractual terms was discussed at this meeting. On 18 February 2010 a Bar Council representative asked the LSB to review a proposed consultees list. The LSB responded advising that the accountancy approved regulators (ACCA and ICAS) should be included alongside the other organisations proposed by the Bar Council.[192] The consultation was published in April 2010 by the Bar Council. On 17 March 2010 a member of Bar Council staff (BC 11) met with a BSB member of staff (BSB 11) to discuss the LSB's rule approval process.[193]

A3.15. On 23 March 2010 a Bar Council member of staff (BC 11) informed a BSB member of staff (BSB 10) that a consultation document on the new contractual terms was due to be published. A Bar Council member of staff (BC 11) stated that the consultation document would be published in the name of the Bar Council and the BSB. The Bar Council member of staff (BC 11) stated:

[190] The Legal Services Act 2007 (Commencement No. 6, Transitory, Transitional and Saving Provisions) Order 2009 <http://www.legislation.gov.uk/uksi/2009/3250/article/2/made>
[191] Bar Council BSB Regulatory Independence Certificate 2010, <http://www.legalservicesboard.org.uk/Projects/pdf/bc_and_bsb_regulatory_independence_certificate_final_300410.pdf>
[192] See emails between a Bar Council member of staff (BC 11) and a BSB member of staff (BSB 18) time 17:05 on 29 March 2010 and 08:54 on 30 March 2010. Subject line: Names and addresses for consultees. See LSB Item reference 41
[193] Meeting note dated 17 March 2010, meeting between Bar Council member of staff (BC 11) and a BSB member of staff (BSB 11), note drafted by BC 11, see LSB item reference 43

"The Consultation paper is 99% approved – but, as it is in the name of the Bar Council AND the BSB, would you mind casting your eye over it and let me know if you are happy with it."

A3.16. The BSB member of staff (BSB 10) asked the Bar Council member of staff "*who gave agreement/approval for it to be a joint consultation paper?"* The Bar Council member of staff (BC 11) replied:

"The [BSB] Board have not seen the consultation paper. The [BSB] Board did agree last autumn to the Code amendment and contractual terms proposed in the Consultation paper. As a consequence we (in the name of the BSB) made an application to the MoJ. The MoJ "sat" on it and ran out of time. So we now have to make a fresh application to the LSB. As the LSB are super-keen on processes and consultation, and as we had not specifically consulted on these new terms and Code amendments, we are now doing a consultation for the purposes of making a successful application to the LSB (though of course if the consultation throws up anything which makes us pause & rethink, then pause & rethink will happen."[194]

After this, at the request of a Bar Council member of staff (BC 11), a BSB member of staff (BSB 18) provided contact details for consultees.[195]

A3.17. On 16 April 2010 a BSB member of staff (BSB 10), after consultation with the Director of the BSB (BSB 8) and a BSB Board member (BSB 3), informed the Bar Council member of staff (BC 11) that:

"We [the BSB] think that the Bar Council should go ahead and issue the consultation in its own name. We can liaise again at the end of the consultation period and when the submission is made to the LSB."[196]

A3.18. The consultation was published on 29 April 2010 by the Bar Council alone.[197] The consultation stated that:

"Subject to the outcome of this consultation process, it is the intention of the Bar Council and the Bar Standards Board to apply to the Legal Services Board for approval under the Legal Services Act 2007 of the proposed changes to the Code."[198]

A3.19. When the consultation closed (31 July 2010), the Bar Council's Implementation Committee considered the responses and decided that the proposed amendments to the BSB's Code of Conduct should remain as proposed by the consultation paper, but that there should be some amendments

[194] See emails between a member of Bar Council staff (BC 11) and a member of BSB staff (BSB 10) timed 15:00 on 23 March 2010 and at 16:28, 16:37 and 16:48 (x2) on 29 March 2009 Subject line: Consultation on contractual terms (for instructions from solicitors to barristers) See LSB item reference 40

[195] See emails between a member of Bar Council (BC 11) and a BSB member of staff (BSB 18) on 29 and 30 March 2009. See LSB item reference 41

[196] See emails between a member of Bar Council staff (BC 11) and a member of BSB staff (BSB 10) timed 11:50, 11:53, 12:00 and 12:01 on 16 April 2010, subject line: Contractual terms consultation. See LSB item reference 42

[197] Bar Council (April 2010), Consultation: Contractual Terms of work for the supply of legal services by Barristers to Solicitors, <http://www.barcouncil.org.uk/media/145294/final_fees_consultation_paper_apr10.pdf>[accessed July 2013]

[198] Page 1, Bar Council (April 2010), Consultation: Contractual Terms of work for the supply of legal services by Barristers to Solicitors, <http://www.barcouncil.org.uk/media/145294/final_fees_consultation_paper_apr10.pdf>[accessed July 2013]

to the proposed new contractual terms.[199] The Bar Council Implementation Committee worked on these amendments and also on an application to the LSB.[200] A meeting note suggests that a Bar Council member of staff (BC 11) told a BSB member of staff (BSB 11) that it was intended to submit the application in November 2010.[201] The Bar Council has stated that *"following the 2010 consultation the Bar Council continued to respond to the BSB's requests for assistance by providing draft papers and attending the meetings of the BSB's Standards Committee and of the BSB itself".*[202]

A3.20. According to an email dated 15 October 2010, a BSB Board member (BSB 2) had questioned whether the BSB Board should consider the application before submission to the LSB. Therefore, a BSB member of staff (BSB 11) asked the Bar Council member of staff (BC 11): *"Has your application to the LSB gone?"* A Bar Council member of staff (BC 11) responded that *"it has not yet gone. It is being worked on."* The reply also stated that:

> *"The [Bar Council's] implementation [sic] Committee have already considered the results of the Consultation and, whilst there was some helpful drafting suggestions to the contract terms, there was nothing that made the Committee think the proposed Code amendment should be changed though the contract terms will be tweaked."* [203]

The BSB Board and BSB Standards Committee meetings

BSB Board meeting 21 October 2010

A3.21. The BSB Board considered a paper on the new contractual terms at its meeting on 21 October 2010.[204] This paper and its Annexes were produced by a Bar Council member of staff (BC 11)[205] and presented to the Board by a member of the Bar Council's Implementation Committee (BC 6).[206] The annexes included a summary of responses to the April 2010 consultation (with a list of respondents). It is not clear who requested the item to be on the agenda. Prior to the meeting a Bar Council member of staff (BC 11) told[207] a BSB member of staff (BSB 15) that the agenda item was for discussion and noting, not discussion and decision (although the Bar Council considers that the BSB decision recorded in the minutes of the meeting is more important).[208] The cover paper states that:

> *"The [Bar Council's] Implementation Committee has studied each of the responses and concluded that whilst there should be some amendment to the contractual terms and the Rules relating to the list of*

[199] See emails between a Bar Council member of staff (BC 11) and a BSB member of staff (BSB 11) timed 10:09, 10:20, 10:28, 10:33 and 10:35 on 15 October 2010. see LSB item reference 47
[200] BSB Board paper 89(10), Standard Contractual Terms for Barristers. LSB item reference 4.
[201] Teleconference note by a Bar Council member of staff (BC 11), t/c with [a BSB member of staff] (BSB 11) 28/9/10, LSB item reference 44.
[202] Bar Council letter to the LSB of 12 April 2013
[203] See emails between a Bar Council member of staff (BC 11) and a BSB member of staff (BSB 11) timed 10:09, 10:20, 10:28, 10:33 and 10:35 on 15 October 2010. see LSB item reference 47
[204] BSB Board meeting minutes, Thursday 21 October 2010, Item 10- standard contractual terms for barristers, see LSB item reference 2
[205] See emails between a Bar Council member of staff (BC 11) and a BSB member of staff (BSB 17) at 15:33 on 5/10/2010 and 14:51 on 12/10/2010, see LSB item references 45 and 46
[206] Page 6, BSB Board meeting minutes, Thursday 21 October 2010, Item 10- standard contractual terms for barristers, see LSB item reference 2
[207] BSB Board agenda sheet, Thursday 21 October 2010, Item 10 – standard contractual terms for barristers, see LSB item reference 145 and email on 12 October 2010 timed 14:51, see LSB item 46
[208] Bar Council letter to the LSB of 29 July 2013

Defaulting Solicitors there is no justification to revise the Code amendments submitted to the BSB in October 2009.

The [Bar Council's] Implementation Committee is currently working on the revision of the contractual terms and Rules. It is also drafting the application to the Legal Services Board for the necessary approval to the Code amendments with a view to submitting the application in November."[209]

A3.22. The cover paper makes no reference to the regulatory objectives of the LSA. The Annex document records references to the regulatory objectives made by respondents to the consultation. This includes a comment from 12 KBW that they do not agree with the consultation's statements that competition and access to justice will be improved by the proposal. They suggest that there is no access to justice issue in relation to the proposed changes.[210] The excerpts from the SRA's response included in the paper quoted directly from the original consultation document in relation to the regulatory objectives of protecting and promoting the public interest and that of consumers and the maintenance of professional standards. The SRA was also reported to have questioned whether the proposals were in keeping with the reformed legal services market arising from the LSA.[211] The Law Society observed that:

"It is puzzling that a consultation about a regulatory change is being undertaken by the representative arm of the Bar Council, rather than the Bar Standards Board."[212]

A3.23. The minutes of the BSB Board meeting on 21 October 2010 note that the BSB Board considered that the new contractual terms were a regulatory matter and that only the BSB could make the application to the LSB. The BSB Board agreed *"that the proposed rule change should be considered by the BSB's Standards Committee and reported back to the [BSB] Board"* . The responsibility to do so was allocated to the Chair of the BSB's Standards Committee (BSB 3), a BSB member of staff (BSB 13) and a Bar Council member of staff (BC 11).[213]

A3.24. Press reports of the BSB Board meeting on 21 October 2010 noted the following:

"While the Bar Council has been leading the work on the new scheme, the BSB is required to apply to the Legal Services Board (LSB) for approval of amendments to the bar's [sic] code of conduct. The Bar Council has been drafting the application, and at the BSB's full board [sic] meeting last week, the suggestion that this could go into the LSB without further review by the BSB's standards committee was firmly rejected.

[209] Paragraphs 6 and 7, BSB Board meeting 21 October 2010, BSB Paper 89(10) – standard contractual terms for barristers, see LSB item reference 4
[210] Page 8, Bar Council 2010, summary of responses to the Bar Council 2010 consultation on contractual terms of work for the supply of legal services by barristers to solicitors, BSB Paper 89(10) annex, see LSB item reference 5
[211] Page 6, Bar Council 2010, ibid
[212] Page 20, Bar Council 2010, ibid
[213] Page 6, BSB Board meeting minutes, Thursday 21 October 2010, Item 10- standard contractual terms for barristers, see LSB item reference 2

Barrister member [BSB 7] described the contractual terms as a 'union-based activity that we have inherited, bizarrely'. Bar Council Chairman Nick Green QC stressed that there was no attempt to cross the governance boundaries."[214]

BSB's Standards Committee meeting 24 November 2010

A3.25. On 22 October 2010, the day after the BSB Board meeting, a Bar Council member of staff (BC 11) emailed a BSB member of staff (BSB 15) to request that the issue of the new contractual terms be placed on the agenda of the BSB's Standards Committee on 24 November 2010. The Bar Council member of staff (BC 11) stated that he would give the BSB member of staff (BSB 15) the report and all relevant papers. The deadline for papers was 17:00 on 16 November 2010.[215] A Bar Council member of staff (BC 11) submitted the papers at 17:20 on 16 November 2010 in MS Word format and at 17:32 in PDF format.[216] BSB papers are usually distributed a week before the relevant meeting.[217] The 17 November 2010 was a week before the BSB's Standards Committee meeting on 24 November 2010. The Bar Council states that these papers were "*submitted [to the BSB] in mid-November so there was sufficient time to enable any changes required by the BSB secretariat to be implemented" .* The Bar Council acknowledged that no changes were made.[218]

A3.26. The papers for the BSB's Standards Committee meeting on 24 November 2010 were drafted by a Bar Council member of staff (BC 11) with assistance and comments from members of the Bar Council's Implementation Committee (BC 4 and BC 6).[219] The cover paper makes no reference to the regulatory objectives.[220] However, the draft application to make amendments to the Code of Conduct makes reference to the regulatory objectives included at attachment 7 of the meeting papers.

A3.27. The draft application included in the papers for the BSB's Standards Committee meeting on 24 November 2010 (prepared by the Bar Council member of staff (BC 11) was drafted in the name of the Bar Standards Board. When considering the consultation responses it states that: *"A total of 75 responses were received and, having studied each response the Bar Council's comments are as follows:"* However, the text in this section has nine references to *"the Bar Council and the Bar Standards Board"* in relation to whether both organisations agree or disagree with a particular consultation response or comment. For example the draft application states: *"The Bar Council and Bar*

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[214] Neil Rose (26 October 2010), "Standard contractual terms for solicitors instructing barristers delayed again," *Legal Futures,* http://www.legalfutures.co.uk/regulation/barristers/standard-contractual-terms-for-solicitors-instructing-barristers-delayed-again-after-regulatory-mix-up [accessed 16 July]

[215] See emails between a Bar Council member of staff (BC 11) and a BSB member of staff (BSB 15) at 10:32, 10:38, 10:42, 10:59 and 11:09 on 22 October 2010, see LSB item reference 48

[216] See emails between a Bar Council member of staff (BC 11) and a BSB member of staff (BSB 15) at 17:20 and 17:32 on 11 November 2010, see LSB item references 150 and 151

[217] See for example email from a BSB member of staff to the members of the BSB's Standards Committee for the meeting on 9 March 2011 at 17:20 on 2 March 2011

[218] Page 3, paragraph 2l(i)(b) annex to letter from Bar Council to Chris Kenny (LSB) dated 28 June 2013, *Requirement to provide information served on 24 June 2013: Notice served under Section 55 Legal Services Act 2007.* See LSB item reference 118

[219] See emails between a Bar Council member of staff (BC 11) and members of the Bar Council's Implementation Committee (BC 2, BC 4, BC 6 and BC 5) at 11:18 on 9/11/2010, 15:59 on 12/11/2010, 10:34, 10:56, 17:21, 21:10, 23:56 on 15/11/2010 and 13:25, 13:36, 13:38 and 15:05 on 16/11/2010, see LSB item references 148 and 149.

[220] BSB Standards Committee meeting 24 November 2010, *Annex B – Standard contractual terms for barristers,* see LSB item reference 7

Standards Board disagree with the Law Society's view ...".[221] However, we have no evidence that BSB members of staff or BSB Board or Committee members had reviewed the draft application or the consultation responses, such as the Law Society's, before the draft application was tabled to the BSB's Standards Committee at the meeting on 24 November 2010.

A3.28. A member of the Bar Council's Implementation Committee (BC 5) presented the papers to the BSB's Standards Committee on 24 November 2010. The meeting agreed that a further paper on the issue should be prepared by a member of the BSB's Standards Committee (BSB 4).[222]

BSB's Standards Committee 15 December 2010

A3.29. The paper prepared by the member of the BSB's Standard Committee (BSB 4) for the 15 December 2010 meeting was entitled "*note on whether the BSB should endorse terms in light of disagreement of Law Society and SRA" .*[223] The paper was provided to a Bar Council member of staff (BC 11) by a BSB member of staff (BSB 15) at 9:44 on 8 December 2010.[224] The paper questioned the appropriateness of the contractual terms being the default terms and whether it was a matter for the regulator. The paper provided indirect references to the regulatory objectives. It also concluded that a number of comments from the SRA and Law Society on the new contractual terms necessitated amendment of the terms. The author observed that:

> *"It will be clear from this that there are some changes that could be made, and be seen to be made, in response to the observations of the Law Society and SRA. If the standard terms are to be presented to the LSB for approval, it would seem sensible to be able to point to these changes as having been made. In particular the changes suggested under (iv), (v), (ix), (x) and (xiv) [paragraphs 8.3, 9, 8.4, 11.3 and 13 of the new contractual terms] above seem sensible."*[225]

A3.30. In the event, only the suggestion at (x) to change paragraph 11.3 of the new contractual terms was reflected in the new contractual terms submitted to the LSB for approval. The paper notes in relation to paragraph 8.3 (suggestion number (iv)):

> *"Para[graph] 8.3 [of the new contractual terms] does seem to cut across everything that the Bar stands for and should stand for and should not be a term."*[226]

A3.31. However, this paragraph remained in the new contractual terms submitted to the LSB[227] for approval unchanged from the version the member of the BSB's

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[221] BSB Standards Committee meeting 24 November 2010, Annex B, attachment 7– application for approval under schedule 4, part 3 of the Legal Services Act 2007, see LSB item reference 14
[222] BSB Standards Committee meeting minutes 24 November 2010, *Item 3 – New contractual terms for barristers taking instructions from solicitors,* see LSB item reference 6
[223] BSB Standards Committee meeting 15 December 2010, annex B – note on whether BSB should endorse terms in light of disagreement of Law Society and SRA (paper by BSB 4), see LSB item reference 17
[224] See email from a BSB member of staff (BSB 15) to a Bar Council member of staff (BC 11) at 9:44 on 8 December 2010.
[225] Paragraph 3.1, page 5, BSB Standards Committee meeting 15 December 2010, annex B – note on whether BSB should endorse terms in light of disagreement of Law Society and SRA (paper by BSB 4), see LSB item reference 17
[226] Page 2, BSB Standards Committee meeting 15 December 2010, annex B – note on whether BSB should endorse terms in light of disagreement of Law Society and SRA (paper by BSB 4), see LSB item reference 17
[227] BSB (25 October 2011), Application for approval under Schedule 4, part 3 of the Legal Services Act 2007: Amendment to the "Cab Rank Rule" in paragraph 604(g)) and insertion of new paragraph 604(h) of the Code of Conduct of the Bar of England

Standard Committee (BSB 4) was commenting on. This was the version provided to the BSB Board for its meeting on 21 October 2010[228] and to the BSB's Standards Committee meeting on 24 November 2010.[229]

A3.32. On 15 December 2010 the BSB's Standards Committee considered the paper produced by a member of the BSB's Standards Committee (BSB 4). A member of the Bar Council's Implementation Committee (BC 5) and a Bar Council member of staff (BC 11) attended.

A3.33. At the meeting, the BSB's Standards Committee voted on whether:

- To not include the new contractual terms in the Code of Conduct – existing provisions in section 6 of the Code provide that barristers are not obliged to accept instructions if they are not on reasonable terms and for a reasonable fee;

- To adopt the "(BSB 4)" option - terms are matter for negotiation, but the Cab Rank Rule should apply to instructions made on the standard terms; or

- To adopt the "Bar Council" option – the terms should be included in the Code as contractual default terms".

A3.34. The BSB's Standards Committee voted in favour of the "Bar Council" option. One lay member voted for this option as did four barristers.

A3.35. The BSB's Standards Committee resolved for a further paper to be produced for the February 2011 meeting on the advantages and disadvantages of the three options. Two barrister members of the BSB's Standards Committee (BSB 5 and BSB 6) were asked to produce this paper, both of whom had voted in favour of the Bar Council's option.[230]

BSB's Standards Committee 9 February 2011

A3.36. A first draft of this paper was produced by a member of the BSB's Standards Committee (BSB 5). It was provided to another member of the BSB's Standards Committee (BSB 6) and a member of the Bar Council's Implementation Committee (BC 5) at 19:54 on 26 January 2011.[231] A member of the Bar Council's Implementation Committee (BC 5) provided comments and amendments on the paper at 13:21 on 27 January 2011. Many of these amendments were retained in the final version of the paper. The amendments were to make it clear that *"at present the Terms of Work are already acting as a*

& Wales, <http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/bsbcabrankruleapplication.pdf> [accessed 16 July 2013]

[228] BSB Board meeting 21 October 2010, Item 10: standard contractual terms for barristers, relevant passages of the current code of conduct, see LSB item reference 147

[229] BSB Standards Committee meeting 24 November 2010, Annex B, attachment 6: relevant passages of the current code of conduct, see LSB item reference 13

[230] BSB Standards Committee meeting minutes 15 December 2010, *Item 3 – New contractual terms for barristers taking instructions from solicitors,* see LSB item reference 16

[231] See email from a member of the BSB's Standards Committee (BSB 5) to a member of the BSB's Standards Committee (BSB 6) and a member of the Bar Council's Implementation Committee (BC 5) at 19:54 on 26/1/2011. Copied to a BSB member of staff (BSB 15) and the Chair of the BSB's Standards Committee (Charles BSB 3), see LSB item reference 152.

baseline."[232] The final paper refers throughout to the *"Bar Council's proposals*" and makes no reference to the regulatory objectives.[233] The paper states:

> *"So long as the Bar Council is satisfied that the content of the standard terms are fair and reasonable (having listened to all the substantive points made on the content), there is no regulatory reason why the Bar Council should not amend its own Code of Conduct without the agreement of the SRA and the Law Society. This is not the case of one professional group binding another, rather a question of when (as a matter of propriety) the Bar is obliged to accept work on the terms offered by solicitors."*[234]

A3.37. A member of the BSB's Standards Committee (BSB 5) presented the paper to the 9 February 2011 BSB's Standards Committee meeting. A member of the Bar Council's Implementation Committee (BC 5) and a Bar Council member of staff (BC 11) attended the meeting. The minutes state that the "*Bar Council raised the issue as to whether the cab rank rule should then apply to any set of reasonable terms (of which the new contractual terms were an example)" .* The BSB's Standards Committee concluded that the Code of Conduct should make the new *"contractual terms the baseline for the cab rank rule and that the cab rank rule should also apply to terms published by individual barristers".* Two members of the BSB's Standard Committee (BSB 5 and BSB 6) and a member of the Bar Council's Implementation Committee (BC 5) were asked to amend the paper so it could be tabled for the BSB Board on 28 April 2011. This amended paper would also be considered by the BSB's Standards Committee on 9 March 2011 in advance of the BSB Board meeting on 28 April 2011.[235]

BSB's Standards Committee 9 March 2011

A3.38. The paper for the BSB's Standards Committee meeting on 9 March 2011 consisted of the paper that was produced for the BSB Standards Committee meeting on 9 February 2011 with the addition of three boxes of text.[236] The deadline for papers for this meeting was 09:00 on 2 March 2011.[237] This deadline was not met. A member of the Bar Council's Implementation Committee (BC 5) provided to a BSB member of staff (BSB 15) at 11:03 on 7 March 2011 the paper for the meeting, amended draft contractual terms, proposed amendments to the Code of Conduct and an email from a member of the Bar Council's Implementation Committee (BC 6).[238] These documents and the email were sent to members of the BSB's Standards Committee members, BSB members of

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[232] See email from a member of the Bar Council's Implementation Committee (BC 5) to members of the BSB's Standards Committee (BSB 5 and BSB 6) at 12:41 on 26/1/2011. Copied to a BSB member of staff (BSB 15) and the Chair of the BSB's Standards Committee (BSB 3), see LSB item reference 153.
[233] BSB Standards Committee meeting 9/02/11, *Annex H: Contractual terms for barristers and amendments to the Code of Conduct,* see LSB item reference 19
[234] Paragraph 30 (5), BSB Standards Committee meeting 9/02/11, *Annex H: Contractual terms for barristers and amendments to the Code of Conduct,* see LSB item reference 19
[235] BSB Standards Committee meeting minutes 9 February 2011, *Item 6 – Standard contractual terms,* see LSB item reference 18
[236] BSB's Standards Committee meeting papers 9 March 2011, Annex E1 – Contractual terms for barristers and amendments to the Code of Conduct, see LSB item reference 36
[237] See email from a BSB member of staff (BSB 15) to members of the BSB's Standards Committee (BSB 5 and BSB 6) and a member of the Bar Council Implementation Committee (BC 5) at 16:10 on 24/2/2011, see LSB item reference 159
[238] See email from a member of the Bar Council Implementation Committee (BC 5) to a BSB member of staff (BSB 15) at 11:03 on 7/3/2011, see LSB item reference 163

staff, Bar Council members of staff and a member of the Bar Council Implementation Committee at 11:05 on 7 March 2011.[239]

A3.39. The email from the member of the Bar Council Implementation Committee (BC 6) argued against the amendments to the new contractual terms that had been proposed in the paper prepared by a member of the BSB's Standards Committee (BSB 4) for the BSB's Standards Committee meeting on 15 December 2010. The email also states *"revised draft Terms attached"*. An email from a member of the Bar Council's Implementation Committee (BC 5) states "w*e (Bar Council*'s *[Implementation] Committee) also have somebody who has undertaken liability to tweak the standard contractual terms to take into account (BSB 4's) points".* This may be a reference to the changes in the email. However, it is not clear who requested the member of the Bar Council's Implementation Committee (BC 6) to comment on the paper from the BSB's Standards Committee meeting in December 2010 and to make revisions to the draft new contractual terms.[240] The email does not refer to the regulatory objectives.[241]

A3.40. The Bar Council told the LSB in its letter dated 28 June 2013 that a member of the BSB's Standards Committee (BSB 5) was the primary author of the paper for the BSB's Standards Committee on 9 March 2011.[242] This member of the BSB's Standards Committee (BSB 5) wrote the paper for the 9 February 2011 meeting. We have not been provided with any papers that show that this member of the BSB's Standards Committee (BSB 5) wrote the additional text that appeared in the text boxes in the paper for the 9 March 2011 meeting. We have been provided evidence that shows the following:

- at 14:30 on 2 March 2011 a member of the BSB's Standards Committee (BSB 5) reported that a member of the Bar Council's Implementation Committee (BC 5) was due to make the amendments to the BSB's Standards Committee paper;[243]

- at 14:30 on 2 March 2011 a member of the Bar Council Implementation Committee (BC 5) had not provided anything to the member of the BSB's Standards Committee (BSB 5);[244]

- a member of the Bar Council's Implementation Committee (BC 5) states in an email at 11:03 on 7 March 2011 that a member of the

[239] See email from a BSB member of staff (BSB 15) to members of the BSB's Standards Committee, BSB members of staff, Bar Council members of staff and a member of the Bar Council's Implementation Committee at 11:05 on 7/3/2011, see LSB item reference 163
[240] See email from a member of the Bar Council's Implementation Committee (BC 5) to a BSB member of staff (BSB 15) and members of the BSB's Standards Committee (BSB 5 and BSB 6) at 16:24 on 24/2/2011, see LSB item reference 160
[241] See email included in the email from a member of the Bar Council Implementation Committee (BC 5) to a BSB member of staff (BSB 15) at 11:03 on 7/3/2011, see LSB item reference 163
[242] Page 4, Annex to the letter, BC 7 (Bar Council) to Chris Kenny (LSB) dated 28/6/2013, see LSB item reference 118
[243] See email from a member of the BSB's Standards Committee (BSB 5) to a BSB member of staff (BSB 15) at 14:30 on 2/3/2011, see LSB item reference 58
[244] See email from a member of the BSB's Standards Committee (BSB 5) to a BSB member of staff (BSB 15) at 14:30 on 2/3/2011, see LSB item reference 58

BSB's Standards Committee (BSB 5) did make amendments to the paper that was produced for the 9 March 2011 meeting;[245]

- we have not been provided with any evidence that the member of the BSB's Standards Committee (BSB 5) received the papers for the meeting on 9 March 2011 in advance of the papers being sent out to members of the BSB's Standards Committee at 11:05 on 7 March 2011;

- we have not been provided with any evidence that the member of the BSB Standards Committee (BSB 5) made any amendments to the new boxes of text that were in the paper.

A3.41. The new boxes of text in the briefing paper for the 9 March 2011 meeting of the BSB's Standards Committee include some minor references to the regulatory objectives.[246] The boxes of text, which were provided to the BSB member of staff (BSB 15) by a member of the Bar Council's Implementation Committee (BC 5),[247] regularly refer to what the *"Standards Committee concluded".* The paper also includes the following sentence:

> *"[T]he Bar Council representative to the Standards Committee indicated that while the Bar Council would prefer a "deeming" provision to be included in the Code of Conduct it recognised the fact that this was a matter of judgement on which there may well be differences in opinion, and was not in any event overwhelmingly important."*[248]

A3.42. The Bar Council told the LSB that:

> *"[a]ny input in drafting by the Bar Council officers or members was entirely under the supervision and direction of the BSB's officers".*
>
> *"At all times, the BSB was in full control of the process. The BSB made its decisions as it saw fit, sometimes contrary to what the Bar Council representatives sought. An instance of this is the Standards Committee meeting of 9 February 2011. The report of ([BSB 5]), member of the Standards Committee, referred, at issue 3, to the Bar Council's "ambition" that the new contractual terms should be the de facto "default terms" in the absence of any other agreement. The Standards Committee disagreed with the Bar Council and determined that the contractual terms should simply be the baseline for the cab rank rule and not be default terms. This was confirmed again at the Standards Committee meeting of 9 March 2011."*[249]

[245] See email from a member of the Bar Council's Implementation Committee (BC 5) to a BSB member of staff (BSB 15) at 11:03 on 7/3/2011, see LSB item reference 163
[246] BSB's Standards Committee meeting papers 9 March 2011, Annex E1 – Contractual terms for barristers and amendments to the Code of Conduct, see LSB item reference 36
[247] See email from a member of the Bar Council's Implementation Committee (BC 5) to a BSB member of staff (BSB 15) at 11:03 on 7/3/2011, see LSB item reference 163
[248] Page 11, BSB's Standards Committee meeting papers 9 March 2011, Annex E1 – Contractual terms for barristers and amendments to the Code of Conduct, see LSB item reference 36
[249] Letter BC 1 to Chris Kenny (LSB) on 20 May 2013, see LSB item reference 107

A3.43. A member of the Bar Council's Implementation Committee (BC 5) attended the BSB's Standards Committee meeting on 9 March 2011. The Committee approved the papers and the Code amendments, subject to some minor amendments. The papers were due to be submitted together with a one page summary to the BSB Board meeting on 28 April 2011.[250]

BSB Board meeting 28 April 2011

A3.44. The papers for the BSB Board meeting on 28 April 2011 were compiled and amended by a Bar Council member of staff (BC 11) and they were provided to a BSB member of staff (BSB 19) on 6 April 2011.[251] The minutes for the BSB's Standards Committee meeting on 9 March 2011 included an action that a BSB member of staff (BSB 15) was due to arrange for the paper to go to the April BSB Board meeting.[252] At 11:57 on 12 April a BSB member of staff (BSB 15) emailed a Bar Council member of staff (BC 11) to say that the papers prepared by the Bar Council had been provided to the Chair of the BSB Standards Committee (BSB 3) for approval.[253] The final approved set of papers for the BSB Board meeting were provided by a Bar Council member of staff (BC 11) to BSB members of staff (BSB 19 and BSB 15) at 12:42 on 18 April 2011.[254] Apart from text in the email from a Bar Council member of staff (BC 11) stating that *"attached is the final version (as approved by [BSB 3]) for the BSB*", no evidence showing that the Chair of the BSB Standards Committee (BSB 3) did approve the paper has been provided. The cover paper is largely the one considered by the BSB's Standards Committee on 9 March and includes some minor references to the regulatory objectives.[255] The following Annexes were also provided:

- Annex 1: Relevant passages of the Code of Conduct and proposed amendments;
- Annex 2: Revised Draft Standard Contractual Terms for the supply of legal services by barristers to solicitors;
- Annex 3: Draft rules relating to the List of Defaulting Solicitors;
- Annex 4: Draft Voluntary Joint Tribunal on Barristers' Fees rules;
- Annex 5: Draft scheme for complaining to the Bar Council for publically funded matters;

[250] BSB's Standards Committee meeting minutes 9 March 2011, *Item 5 – Standard contractual terms,* see LSB item reference 35
[251] See email from a Bar Council member of staff (BC 11) to a BSB member of staff (BSB 19) and copied to BSB members of staff (BSB 15 and BSB 23) at 10:34 on 6/4/2011, see LSB item reference 61
[252] BSB's Standards Committee meeting minutes 9 March 2011, *Item 5 – Standard contractual terms,* see LSB item reference 35
[253] See email from a BSB member of staff (BSB 15) to a BSB member of staff (BC 11) at 11:57 on 12/4/2011, see LSB item reference 61
[254] See email from a Bar Council member of staff (BC 11) to a BSB member of staff (BSB 19) and copied to BSB member of staff (BSB 15) at 12:42 on 18/4/11, see LSB item reference 62
[255] BSB Board meeting 28/4/2011*, BSB paper 027(11), Standard contractual terms for the suppy (sic) of legal services by barristers to solicitors,* see LSB item reference 21

- Annex 6: Equality impact assessment new contractual terms of work.

A3.45. On 10 March a BSB member of staff (BSB 15) asked if an equality impact assessment had been carried out. The Bar Council confirmed it was prepared by a Bar Council member of staff (BC 11) under the guidance and assistance of another Bar Council member of staff (BC 12).[256] The equality impact assessment was included in the rule change application to the LSB.

A3.46. A member of the Bar Council's Implementation Committee (BC 5) and a Bar Council member of staff (BC 11) attended the BSB Board meeting on 28 April 2011. The item on new contractual terms was presented by the Chair of the BSB's Standards Committee (BSB 3). A member of the Bar Council's Implementation Committee (BC 5) and the Bar Council member of staff (BC 11) were introduced to the BSB Board. The Bar Council member of staff (BC 11) tabled a tracked changes version of the new contractual terms at the BSB Board meeting.[257]

A3.47. The BSB Board resolved that the issue should be considered again by the BSB Board and a paper should be produced to consider the suggestions made by a member of the BSB Board (BSB 1). This suggestion was that the Cab Rank Rule would apply if the barrister was offered work on reasonable terms and guidance would state that the new contractual terms would normally be regarded as reasonable.[258]

BSB's Board meeting 19 May 2011

A3.48. In advance of the previous BSB Board meeting (28 April 2011) a member of the BSB Board (BSB 1) provided detailed comments on the new contractual terms to the Chair of the BSB's Standards Committee (BSB 3). These comments questioned the appropriateness of a regulator setting out contractual terms and having them as the baseline for the operation of the Cab Rank Rule.[259] The covering email stated*: "I have concern as to whether, in our keenness to protect and adapt the cab rank rule, we are overreaching our remit as regulators*."[260] The paper containing comments was provided by a BSB member of staff (BSB 15) to a member of the Bar Council's Implementation Committee (BC 5) at 10:49 on 9 May 2011.[261] The member of the Bar Council's Implementation Committee (BC 5) replied at 15:10 on 9 May 2011 stating that:

> *"In 2007/2008 we looked at what might be 'minimum' terms for the CRR to apply to – and concluded that it was practically impossible to clearly identify what they would be without ending up with something we have proposed today. In other words, (BSB 1's) point has been*

[256] See emails between Bar Council members of staff (BC 11 and BC 12) at 16:43, 16:44 on 28/3/11 and 16:12 on 29/3/11, see LSB item reference 164
[257] BSB Board meeting minutes 28/4/2011, *Item 10 – Standard contractual terms,* see LSB item reference 39
[258] BSB Board meeting minutes 28/4/2011, *Item 10 – Standard contractual terms,* see LSB item reference 39
[259] See paper from a member of the BSB Board (BSB 1), *Comments on BSB Paper 027(11),* see LSB item reference 109
[260] See email from a member of the BSB Board (BSB 1) to members of the BSB Board at 10:29 on 27/4/2011, see LSB item reference 165
[261] See email from a BSB staff member (BSB 15) to a member of a Bar Council implementation Committee (BC 5) at 10:49 on 9/5/2011, see LSB item reference 64

extensively considered, discussed and debated in the past, and rejected on the basis of impracticality rather than philosophy."[262]

A3.49. A member of BSB staff (BSB 15) created a first draft of a paper for the 19 May 2011 BSB Board meeting. This draft was provided to a member of the Bar Council's Implementation Committee (BC 5) at 13:57 on 6 May 2011 with a request for assistance with some of the arguments.[263] A further version, that had been reviewed by the Chair of the BSB's Standards Committee (BSB 3), was provided to a member of the Bar Council's Implementation Committee (BC 5) at 13:27 on 9 May 2011 by a BSB member of staff (BSB 15) asking the Bar Council to let the BSB know *"if they [the Bar Council] were happy with it or if you would like me to make any further amendments"* .[264]

A3.50. The deadline for papers was 09:00 on 11 May 2011.[265] A member of the Bar Council's Implementation Committee (BC 5) replied at 15:10 on 9 May 2011 with a number of comments.[266] Further changes were made by a member of the Bar Council's Implementation Committee (BC 5) and other *"leading members of the Bar Council's Implementation Committee"* and provided to the BSB member of staff (BSB 15) at 10:10 on 10 May 2011.[267] These were provided to the Chair of the BSB's Standards Committee (BSB 3) at 10:29 on 10 May 2011.[268]

A3.51. A reply from the Chair of the BSB's Standards Committee (BSB 3) was sent to the BSB member of staff (BSB 15) at 10:36 on 10 May 2011. The Chair of the BSB's Standards Committee (BSB 3) noted that the amendments from the Bar Council's Implementation Committee were *"a bit one sided so I have deleted some of them (and made a slight change to 1(1))".*[269] When comparing the paper as amended by the Chair of the BSB's Standards Committee (BSB 3) with the paper as amended by the members of the Bar Council's Implementation Committee and the final paper tabled to the BSB Board, no deletions by the Chair of the BSB's Standards Committee (BSB 3) can be seen and the only change is the following:

> ***From:*** *"It is highly desirable to update the Code of Conduct so that barristers no longer provide service in the normal course on terms that are not legally binding."*[270]
>
> ***To****: "It is necessary to update the Code of Conduct so that barristers no longer provide service in the normal course on terms that are not legally binding."*[271]

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[262] See email from a member of the Bar Council Implementation Committee (BC 5) to a BSB member of staff (BSB 15) at 15:10 on 9/5/2011, see LSB item reference 65
[263] See email from a BSB member of staff (BSB 15) to a member of the Bar Council Implementation Committee (BC 5) at 13:57 on 6/5/2011, see LSB item reference 64
[264] See email from a BSB member of staff (BSB 15) to a member of the Bar Council Implementation Committee (BC 5) at 13:27 on 9/5/2011, see LSB item reference 65
[265] See email from a BSB staff member (BSB 15) to a member of a Bar Council implementation Committee (BC 5) at 10:49 on 9/5/2011, see LSB item reference 64
[266] See email from a member of the Bar Council Implementation Committee (BC 5) to a BSB member of staff (BSB 15) at 15:10 on 9/5/2011, see LSB item reference 65
[267] See email from a Bar Council member of staff (BC 11) to a BSB member of staff (BSB 15) at 10:10 to 10/5/2011, see LSB item reference 66
[268] See email from a BSB member of staff (BSB 15) to a Bar Council member of staff (BC 11) at 10:30 on 10/5/2011, see LSB item reference 66
[269] See email from the Chair of the BSB's Standards Committee (BSB 3) to a BSB member of staff (BSB 15) at 10:36 on 10/5/2011, see LSB item reference 68
[270] Page 1, Draft BSB paper: *Standard Contractual Terms for the supply of legal services by barristers to solicitors (amended by ImpCtte 11 5 10),* see LSB item reference 110

A3.52. The LSB sought confirmation from the Bar Council that this is the only change and it confirmed that this was the case.[272]

A3.53. The final version of the paper for the BSB Board on 19 May 2011 was submitted to a BSB member of staff (BSB 16) at 10:47 on 10 May 2011.[273] The paper discusses the merits of adopting an amendment to the Code which would provide that the Cab Rank Rule would apply if the barrister was offered work on reasonable terms and guidance that would state that the new contractual terms would normally be regarded as reasonable as would terms on a chamber's own website. The paper referred to this as the (BSB 1) amendment. The paper has a short mention of the regulatory objectives.[274]

A3.54. A member of the Bar Council's Implementation Committee (BC 5) and a Bar Council member of staff (BC 11) attended the BSB Board meeting. The BSB Board did not accept the (BSB 1) amendment and favoured the original proposal from the BSB's Standards Committee. It approved the amendment of the Code and tasked a BSB member of staff (BSB 15) and a Bar Council member of staff (BC 11) to amend the Code of Conduct and submit a rule change application to the LSB.[275]

The application

A3.55. Six applications relating to the BSB's Code of Conduct were made by the BSB to the LSB during 2011 including the changes related to the new contractual terms. The BSB's business plan for 2011-12 did not directly mention the application or the implementation of the new contractual terms. The Bar Council included the implementation of the new contractual terms in its strategic plan for 2011-13 and in other corporate documents from 2008.[276] The BSB's Business Plan for 2011-12 included a reference to *"maintain and update the Code of Conduct"*. The Bar Council has told the LSB that this phrase covered BSB work on the Code amendments and that *"[t]he BSB does not generally indentify each and every proposed application to the LSB in its Business Plan."*[277] The six applications and, where apparent, specific text related to these applications from the Business Plan are set out in the table below.

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[271] Page 1, Draft BSB paper: *Standard Contractual Terms for the supply of legal services by barristers to solicitors (CH version),* see LSB item reference 111

[272] Bar Council letter (BC 7) to LSB (Chris Kenny) on 28 June 2013

[273] See email from a BSB member of staff (BSB 15) to a BSB member of staff (BSB 16) at 10:47 on 10/5/2011, see LSB item reference 67

[274] BSB Board meeting 19/5/2011, *BSB Board paper 031(11) – Standard contractual terms for the supply of legal services by barristers to solicitors,* see LSB item reference 29

[275] BSB Board meeting 19/5/2011 minutes, *Item 7- Standard contractual terms for the supply of legal services by barristers to solicitors,* see LSB item reference 28

[276] The report from the Bar Council Treasurer which appears in the Bar Council annual report and accounts for 2008 notes that "*Your membership fee has been and will continue to be applied for the purposes of developing, enhancing and supporting member services in such diverse areas as fee collection and development of contractual relationships with solicitors to promotion of the profession nationally and internationally as the reference point for high quality legal services."* The Bar Council's strategic plan 2011-13 (published 12 October 2011) states that one of the Bar Council's objectives for 2011-13 is to *"Provide an efficient fees collection service and implement new contractual terms for payment of barristers' fees."* However it was never mentioned in the BSB's corporate publications for the relevant period. See for instance BSB 2009 annual report (https://www.barstandardsboard.org.uk/media/1465907/bsb_an_rpt_2009.pdf;) BSB 2010 annual report: (https://www.barstandardsboard.org.uk/media/1465899/annual_report_2010_-_final.pdf;) BSB 2011-2012 annual report: (https://www.barstandardsboard.org.uk/media/1465876/bsb_annual_report_2011-12_.pdf); BSB Preliminary strategy 2010-2012 and 2010 Business plan (https://www.barstandardsboard.org.uk/media/1403351/bsb_20business_20plan_202010.pdf); and, BSB's Business Plan 2011-2012 (https://www.barstandardsboard.org.uk/media/18091/bsb_business_plan_2011_28pp.pdf)

[277] Bar Council letter (BC 7) to LSB (Chris Kenny) on 29 July 2013

Table 1 BSB applications during 2011 and text from BSB business plan 2011-12

BSB applications for 2011	**Relevant text from the BSB business plan for 2011-12 – 'activities for 2011'**
Application to LSB for approval to amend the Bar Code of Conduct – Barrister Participation in Alternative Business Structures	BSB considers how barristers may participate in ABSs regulated by others
Application to LSB for approval to amend the Bar Code of Conduct - Authorisation to Practise	Consultation on *draft Code of Conduct, including new pra*ctising certificate rules as part of new authorisation to practise regime, Implementation of new authorisation to practise regime
Application to LSB for approval to amend matters relating to Pupillage	Pupillage review implementation completed
Application to LSB for approval of amendments to the Bar Training Regulations	Code and Bar Training Regulations changes submitted to Legal Services Board
Application to LSB for approval of amendments to the Bar Training Regulations – International English Language Test	Implementation of 7.5 IELTS requirement, provided LSB approval given in early 2011
Application to the LSB for approval of changes to the Code of Conduct in relation to the Cab Rank Rule	No specific text apparent

A3.56. After the BSB Board meeting of 19 May 2011, the Bar Council member of staff (BC 11) provided a draft rule change approval application to be submitted to the LSB (originally prepared in October 2010). This was sent to a BSB member of staff (BSB 15) on 25 May 2011. The Bar Council member of staff (BC 11) notified the BSB member of staff (BSB 15) that the Bar Council's Implementation Committee would be making further revisions but asked the BSB staff member (BSB 15) to review and provide any comments.[278] A further version of the draft rule change application was provided by a Bar Council member of staff (BC 11) to a BSB member of staff (BSB 15) at 15:44 on 27 May 2011.[279] The BSB staff member (BSB 15) replied at 17:04 on 29 May 2011. The BSB member of staff observed that *"some of the regulatory objectives are a bit muddled".* The BSB member of staff also observed that the application did not include:

> *"a statement explaining how the Code amendments will comply with the BSB's obligations under section 28 of the Act to have regard to the Better Regulation Principles",*[280]

[278] See email from a Bar Council member of staff (BC 11) to a BSB member of staff (BSB 15) at 12:51 on 25/5/2011, see LSB item reference 70
[279] See email from a Bar Council member of staff (BC 11) to a BSB member of staff (BSB 15) at 15:44 on 27/5/2011, see LSB item reference 71
[280] See email from a BSB member of staff (BSB 15) to a BSB member of staff (BC 11) at 17:04 on 29/5/2011, see LSB item reference 71

A3.57. The draft application at this time was written in the Bar Council house style font and included a Bar Council member of staff (BC 11) as the contact for the application.[281]

A3.58. Following this, a Bar Council member of staff (BC 11) emailed the Chair of the BSB's Standards Committee (BSB 3) regarding a proposal to make a further amendment to the rule changes agreed by the BSB Board on 19 May 2011. The Bar Council member of staff (BC 11) suggested that the amendment was necessary because the words "*directly funded"* were omitted from the revised rule 604(h). The Bar Council member of staff (BC 11) argued that the rule needed to be amended again to include the reference to direct funding because:

> *"counsel (and this is mostly junior counsel) must be protected from having to accept instructions from non-paying solicitors in respect of CLR [Controlled Legal Representation] and unassigned Magistrates court work" .*

A3.59. The Bar Council member of staff (BC 11) further added that if the amendment was not made there would be:

> *"a lot of complaining as counsel would be in a worse position than they are now" .*[282]

A3.60. The BSB's Standards Committee determined at its meeting on 29 June 2011 that the proposed change needed to be added to the BSB Board's agenda on 13 July. The paper for the BSB's Standards Committee meeting closely resembles an email sent by the Bar Council member of staff (BC 11) to the Chair of the BSB's Standards Committee (BSB 3) on 21 June 2011.[283] A member of the Bar Council's Implementation Committee (BC 4) presented the proposed amendment to the BSB's Standards Committee on 29 June 2011. The minutes record that the paper was from the Bar Council and that the BSB's Standards Committee did not find it entirely easy to understand the point, but nevertheless agreed to the amendment subject to any contrary comments from members of the BSB's Standards Committee.[284]

A3.61. A BSB member of staff (BSB 19) wrote to another BSB member of staff (BSB 16) and a Bar Council member of staff (BC 11) at 11:24 on 30 June 2011 stating that the new contractual terms would need to be on the next BSB Board meeting agenda.[285] At 12:51 a Bar Council member of staff (BC 11) sent a report on the amendment for the BSB Board meeting on 13 July to the Chair of the BSB's Standards Committee (BSB 3).[286] We have not been provided with any evidence of approval of these papers by the Chair of the BSB's Standards Committee. On 7 July 2011 a Bar Council member of staff (BC 10) referred to

[281] Bar Standards Board, *Amendments to the Code of Conduct (11.5.27 LSB application draft),* See LSB item reference 112
[282] See email from a Bar Council member of staff (BC 11) to the Chair of the BSB's Standards Committee (BSB 3), copied to a BSB member of staff (BSB 15) and members of the Bar Council's Implementation Committee (BC 2 and BC 5), at 15:34 on 21/6/2011, See LSB item reference 73
[283] See email from a Bar Council member of staff (BC 11) to the Chair of the BSB's Standards Committee (BSB 3), copied to a BSB member of staff (BSB 15) and members of the Bar Council's Implementation Committee (BC 2 and BC 5), at 15:34 on 21/6/2011, see LSB item reference 73. And: BSB's Standards Committee paper, *Annex I – Standard contractual terms for barristers,* see LSB item reference 31.
[284] BSB's Standards Committee meeting 29/6/2011, minutes, *Item 9 – Standard contractual terms,* see LSB item reference 30
[285] See email from a BSB member of staff (BSB 19) to a BSB member of staff (BSB 16), copied to a Bar Council member of staff (BC 11) at 11:20 on 30/6/2011, see LSB item reference 74
[286] See email from a Bar Council member of staff (BC 11) to the Chair of the BSB's Standards Committee (BSB 3) at 12:51 on 30/6/11, see LSB item reference 75

the papers as "*our papers*".[287] In any event, the matter could not be considered by the July Board and instead was considered at the BSB Board meeting on 15 September 2011.[288]

A3.62. A representative from the Bar Council's Implementation Committee (BC 3) and a Bar Council member of staff (BC 11) attended the 15 September 2011 meeting of the BSB Board and were formally recorded in the minutes for the new contractual terms item. The minutes do not indicate who presented the paper to the BSB Board.[289] The purpose of the paper was to propose a further revision of the BSB Code of Conduct so that it tied in with the new contractual terms and did not leave junior counsel in a *"very vulnerable position".* The paper does not mention the regulatory objectives. The paper included the Bar Council member of staff (BC 11) as the contact.[290] The BSB Board meeting approved the amendment. After this amendment was approved, the Bar Council member of staff (BC 11) continued work on the application.

A3.63. The Bar Council member of staff (BC 11) provided a further draft application to the BSB member of staff (BSB 15) on 10 October 2011. At that time the application included commentary regarding implementation and training courses.[291] This was queried by the BSB member of staff (BSB 15).[292] The draft application was passed to another BSB member of staff (BSB 12) for approval.[293] An email from the Bar Council member of staff (BC 11) stated that undertaking significant publicity surrounding the rule to solicitors would be inadvisable. It was considered inadvisable because of the need to prevent the change being seen as "*the Bar Council insisting on these new contractual terms being used (and that of course is anti-competitive)".*[294]

A3.64. On 17 October 2011 a BSB staff member (BSB 12) provided comments on the draft application to a Bar Council staff member (BC 11).[295] This included the deletion of 18 references to the Bar Council and, where not already included, the insertion of references to the BSB. The examples below show how this changed the sentences in the document.

> ***Bar Council version: "****the Bar Council concluded it would not be feasible to draw up one set of standard terms that would suit both privately funded matters and such publicly funded matters as well"*[296]
>
> ***Final Version:*** *"the BSB concluded it would not be feasible to draw up one set of standard terms that would suit both privately funded matters and such publicly funded matters as well."* [297]

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[287] See email from a Bar Council member of staff (BC 10) to the Chair of the BSB's Standards Committee (BSB 3) and to the Chair of the Bar Council's Implementation Committee (BC 2) at 19:02 on 17/7/2011, see LSB item reference 76
[288] BSB Board meeting minutes 15/9/2011, *Item 4 – Standard contractual terms,* see LSB item reference 32
[289] BSB Board meeting minutes 15/9/2011, *Item 4 – Standard contractual terms,* see LSB item reference 32
[290] BSB Board meeting 15/9/2011, *BSB paper 063(11) – Standard contractual terms for barristers,* see LSB item reference 33
[291] See email from a Bar Council member of staff (BC 11) to a BSB member of staff (BSB 15) at 14:57 on 10/10/11, see LSB item reference 83
[292] See email from BSB member of staff (BSB 15) to a Bar Council member of staff (BC 11) at 10:08 on 11/10/11, see LSB item reference 83
[293] See email from BSB member of staff (BSB 15) to a Bar Council member of staff (BC 11) at 11:28 on 11/10/11, see LSB item reference 83
[294] See email from a Bar Council member of staff (BC 11) to a BSB member of staff (BSB 15) at 10:47 on 11/10/11, see LSB item reference 83
[295] See email from BSB member of staff (BSB 12) to a Bar Council member of staff (BC 11) at 13:49 on 17/10/11, see LSB item reference 84
[296]Paragraph 76, Bar Standards Board, *Amendments to the Code of Conduct (11 10.10 Application to LSB (BSB 12) comments),* See LSB item reference 114

Bar Council version: *"A total of 75 responses were received and having studied each response the Bar Council's comments are as follows".*[298]

BSB amendments: *"A total of 75 responses were receive and, having studied each response, the Bar Standards Board considered the Bar Council's analysis as follows"*.

Final version: *"A total of 75 responses were received. Each response has been studied and the Bar Standards Board's comments are as follows".*[299]

Bar Council draft: *"The Law Society repeated its concerns summarised above, considering that it was wrong for the Bar Council to provide terms, that individual barristers and/or chamber should instead have their own"*

BSB final application*: "The Law Society repeated its concern summarised above, considering that it was wrong for the Bar Standards Board to provide terms, that individual barristers and/or chamber should instead have their own"*

A3.65. Following a query by the BSB on 19 October 2011, a member of Bar Council staff (BC 11) incorporated comments by a BSB member of staff (BSB 12) that had been overlooked, such as "*[i]t would be useful if we could explain why this [the April 2010 consultation] was being led by the Bar Council rather than the BSB"*.[300] However, a number of amendments suggested by the BSB staff member (BSB 12) were not incorporated into the final application. This included comments asking for the Bar Council member of staff (BC 11) to amend the paper so that it explained why it would be the Bar Council that would be responsible for considering complaints about whether to add a solicitor to the List of Defaulting Solicitors. The BSB member of staff (BSB 12) also suggested that it would be useful to explain why the proposals would modernise the relationship between barristers and solicitors and promote the regulatory objectives. These changes were not reflected in the final version.[301] The Bar Council has stated that "*[o]nly one amendment suggested by the BSB member of staff (BSB 12) was not actioned (regarding paragraph 32 [why the Bar Council would be assuming the role of running the list of defaulting solicitors] of the application to the LSB). It is not now possible to provide you with documentary evidence but the firm recollection of [BC 11], the Bar Council staff member, was that some of*

[297] Paragraph 76, Bar Standards Board(25/10/11),, *Amendments to the Code of Conduct* http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/bsbcabrankruleapplication.pdf
[298] Paragraph 59, Bar Standards Board, *Amendments to the Code of Conduct (11 10.10 Application to LSB (BSB 12) comments),* See LSB item reference 114
[299] Paragraph 59, Bar Standards Board (25/10/11), *Amendments to the Code of Conduct* http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/bsbcabrankruleapplication.pdf
[300] See emails from a BSB member of staff (BSB 12) to a BSB member of staff (BSB 15) and a Bar Council member of staff (BC 11) on 17 October 2011 at 13:49 and emails between a BSB member of staff (BSB 15) and a Bar Council member of staff (BC 11) on 19 October 2011 starting at 09:39, see LSB items 84 and 86
[301] See Bar Standards Board *Amendments to the Code of Conduct (11 10.10 Application to LSB EM comments),* See LSB item reference 114 and Bar Standards Board (25/10/11), *Amendments to the Code of Conduct* http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/bsbcabrankruleapplication.pdf

(BSB 12's) amendments were discussed with (BSB 15) and it was concluded that paragraph 32 should not be altered as (BSB 12) suggested".[302]

A3.66. A BSB staff member (BSB 12) observed in an email on 17 October 2011 to a Bar Council member of staff (BC 11) and a BSB staff member (BSB 15) that:

> *"[w]e need to make sure that this is seen as a recommendation from the BSB in the light of our regulatory objectives – not something the that is being proposed by the Bar Council in the interests of barristers".*[303]

A3.67. The BSB staff member (BSB 12) stated that the application therefore needed to be made by the BSB's Professional Practice Team. The BSB member of staff (BSB 12) changed the contact from the Bar Council member of staff (BC 11) to a BSB member of staff (BSB 15).[304] On 25 October 2011, the BSB member of staff (BSB 15) emailed a Bar Council member of staff (BC 11). The email notified the Bar Council of the need to ensure that all of the documents were in Arial 11 font (the BSB's house style). All documents until then were in the Bar Council's house style of Palantino 11 font.[305] At that point, the font was changed and the final application was in Arial 11. However, the footer that records the date of the application remained in the font used by the Bar Council in all of the other attachments and in the earlier versions.[306] A Bar Council staff member (BC 11) provided a BSB staff member (BSB 15) with the final version of the application at 11:57 on 26 October 2011.[307] It was then submitted to the LSB by a BSB member of staff (BSB 15) at 12:29 on 26 October 2011.[308] According to the document properties the author of the application was listed as "(REDACTED and REDACTED)" this is thought to refer to a member of the Bar Council's Implementation Committee (BC 5) and to an individual unconnected to this investigation.

A3.68. The BSB's application to alter its regulatory arrangements in relation to the Cab Rank Rule and the introduction of the new contractual terms included the following Annexes that were due to form part of the BSB's Code of Conduct:

- Annex T1 – Standard Contractual Terms – according to the document properties the author of this document was a Member of the Bar Council's Implementation Committee (BC 6);

- Annex T2 – Voluntary Joint Tribunal on Barristers' Fees Rules – according to the document properties the author of this document was a Member of the Bar Council's Implementation Committee (BC 5);

[302] Bar Council letter to the LSB of 29 July 2013
[303] See email from a BSB member of staff (BSB 12) to a Bar Council member of staff and a BSB member of staff (BC 11) and a BSB member of staff (BSB 15) at 13:49 on 17/10/11, see LSB item reference 84
[304] See email from a BSB member of staff (BSB 12) to a Bar Council member of staff and a BSB member of staff (BC 11) and a BSB member of staff (BSB 15) at 13:49 on 17/10/11, see LSB item reference 84
[305] See email from a BSB member of staff (BSB 15) to a Bar Council member of staff (BC 11) at 9:15 on 25/10/11, see LSB item reference 87
[306] Bar Standards Board (25/10/11), *Amendments to the Code of Conduct* http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/bsbcabrankruleapplication.pdf
[307] See email from a Bar Council member of staff (BC 11) to a BSB member of staff (BSB 15) at 11:57 on 26/10/2011, see LSB item reference 88
[308] Bar Standards Board (25/10/11), *Amendments to the Code of Conduct* http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/bsbcabrankruleapplication.pdf

- Annex T3 – Scheme for complaining to the Bar Council for publicly funded matters– according to the document properties the author of this document was a Member of the Bar Council's Implementation Committee (BC 5);

- Annex T4 – Rules relating to the List of Defaulting Solicitors – according to the document properties the author of this document was a Bar Council member of staff (BC 11).

The LSB and the application

A3.69. The LSB had a number of meetings and exchanged correspondence with the BSB and with the Bar Council prior to the submission of the application and during the decision period. The most significant meetings and correspondence are set out below:

- on 10 December 2009 a LSB member of staff met with BSB members of staff (BSB 11 and BSB 21) and Bar Council member of staff (BC 11). The meeting was to discuss BSB rule changes in general;

- on 18 February 2010 a Bar Council member of staff (BC 11) emailed an LSB member of staff asking the LSB to review a list of potential consultees for the new contractual terms. The LSB member of staff replied noting that all approved regulators should be included in the consultation;

- on 18 November 2011 the LSB issued a number of questions to the BSB. A response was received on 2 December 2011;

- on 8 December 2011 a LSB member of staff met with BSB members of staff to discuss the Cab Rank Rule application;

- during December 2011 a LSB member of staff met with the Chair of the BSB's Standards Committee (BSB 3) to discuss the new contractual terms;

- on 28 June 2012 LSB members of staff met with a BSB Board member (BSB 1), a BSB member of staff (BSB 12) and adviser to the BSB to discuss the Cab Rank Rule application;

- on 25 July a BSB member of staff (BSB 12) asked the LSB to approve some further amendments to the application. This included standardising the use of the terminology of authorised person and the removal of Annexes T2, T3 and T4. The LSB replied at 16:29 the same day stating that it is not part of the LSB's role "*to critique the detailed drafting or substitute for the NCT [new contractual terms] a preferred form of drafting. However, we have looked at it to see whether it still gives effect to the regulatory policy purpose the*

BSB intended and we do not consider the minor alterations represent a material change to that purpose" .

The decision period

A3.70. The LSB issued a warning notice on 20 January 2012 because it was considering whether to refuse the application. The LSB chose to consider further the proportionality of the proposed changes, the impact of potentially restricting the availability of the Cab Rank Rule and/or the terms on which solicitors instruct barristers, and the process by which the proposals had been developed. The LSB sought advice from consultees to assist its consideration.

A3.71. The Chairman of the Bar Council (BC 2) responded by letter on 13 March 2012. The contact for the letter was a Bar Council member of staff (BC 11). The Bar Council response was significant in length (30 pages) and in favour of the entirety of the BSB's application.[309] The letter does not mention the Bar Council's involvement in the application. The BSB commented on the consultees' responses on 11 May 2012. The BSB's response set out a number of reasons why the changes proposed by the new contractual terms application was a regulatory matter and should form part of the BSB's regulatory arrangements.[310]

A3.72. A report on the LSB's warning notice and associated consultation was presented to the BSB Standards Committee meeting on 25 April 2012 for discussion and approval, along with the following Annexes:

- the seven representations made to the LSB;
- the advice received by the LSB from Hogan Lovells (a summary of which had been published on the LSB website, but the full advice had been provided by the LSB to the BSB on a confidential basis);
- the draft response to the LSB.[311]

A3.73. The report was drafted by a BSB member of staff (BSB 15) and presented by a member of the BSB (BSB 1).[312] The minutes of the meeting noted that the Chair of the Bar Council Implementation Committee (BC 3) was in attendance for this item, at which the confidential advice from Hogan Lovells was considered.[313]

A3.74. The Bar Council was provided with an updated draft of the BSB's letter to the LSB regarding the warning notice on 5 May 2012 as well as a version of the standard contractual terms. Members of the Bar Council's Implementation Committee (BC 3 and BC 4) amended the standard contractual terms and they were sent back to a BSB member of staff (BSB 15) by a Bar Council member of staff (BC 11) in an email dated 8 May 2012. The email from the Bar Council

[309] Page 5, Bar Council (13 March 2012), letter to the LSB, <http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/bsb_cab_rank_rule_application_responses_from_consultees.pdf>
[310] BSB (11 May 2012), letter to the LSB, <http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/letter_to_lsb_sct_110512_final.pdf>
[311] BSB Standards Committee papers dated 25/4/2012, Annex E1: Standard Contractual Terms and draft letter to LSB, see LSB item reference 115
[312] BSB Standards Committee paper dated 25/4/2012, Annex E1: Standard Contractual Terms and draft letter to LSB, see LSB item reference 115
[313] BSB Standards Committee minutes dated 25/4/2012, Item 6: Standard Contractual Terms, see LSB item reference 34

member of staff (BC 11) stated: "*As regards to the draft letter to the LSB, the improvements are excellent.*"[314]

A3.75. The email from the Bar Council member of staff (BC 11) also expressed concern about the BSB's proposal to extend the application to all authorised persons. The email stated that:

> *"There has been no time for proper consideration of the ramifications of the changes, there has been no opportunity to hold a meeting of the Implementation Committee to consider the proposals. It is not just the contractual terms that should be considered but also the joint tribunal standing orders and rules relating to the List of Defaulting Solicitors. The joint tribunal standing orders and rules relating to the List of Defaulting Solicitors are "solicitor specific". They certainly cannot be changed in an instant, without seeking the agreement of the other relevant Regulators first."*[315]

A3.76. On 11 May 2012 a number of emails were sent between Bar Council members of staff (BC 11, BC 9, BC 10, BC 8 and BC 13), the Chair of the Bar Council (BC 2) and BSB members of staff (BSB 15, BSB 12 and BSB 20 (on behalf of BSB 8)). The content of the emails included concerns from the Bar Council about the extension of the application of the rules to all authorised persons and the BSB stating that it was a regulatory matter and for the BSB to decide.[316]

A3.77. At 11:28 on 11 May 2012 a Bar Council member of staff (BC 9) sent an email to other Bar Council members of staff (BC 10, BC 11, BC 8 and BC 13) and the Chair of the Bar Council (BC 2). The email stated:

> *Joint Tribunals – Annex T2 is to be deleted because, as [a BSB member of staff] (BSB 15) says, 'the provisions relating to the Tribunal should not be in the Code because the tribunal is run by the Bar Council and the Law Society rather than the BSB'. As [a Bar Council member of staff] (BC 11) identifies, it would mean that the BC and Law Soc could not make awards enforceable between barristers and solicitors and, as she then asks 'Is it possible to confine the joint tribunal service (and the List of Defaulting Solicitors) to real solicitors as opposed to anything registered or licensed by the SRA? '*[317]

A3.78. This is the first time that a reference to the removal of any of Annexes T2, T3 and T4 was mentioned.

A3.79. The BSB responded to the LSB's warning notice and the consultation responses on 11 May 2012. Paragraph 36 of the letter states that:

> *"We [the BSB] are also considering whether Annexes T-2 -4 need to be included in the code, or whether it might be more appropriate for them*

[314] See emails between BSB 15 to BC 11, BC 4 and BC 3 on 5/5/2012 and email from BC 11 to BSB 15 at 11:58 on 8/5/2012, see LSB item references 5 04 and 5 06.
[315] See email from BC 11 to BSB 15 at 11:58 on 8/5/2012, see LSB item reference 5 06.
[316] See emails between BSB and BC timed 9:46, 10:37. 11:09, 11:14, 11:27, 11:28, 12:11, 14:20, 14:25 and 15:21 on 11/5/2012, see LSB item references 5 08, 5 09 and 5 10.
[317] See email from BC 9 to BC 10, BC 11, BC 8 and BC 13, at 11:28 on 11/5/2012, see LSB item reference 5 10

to be published somewhere else, for example on the Bar Council's website.[318]

A3.80. A comment in the revised rules that accompanied the letter reiterated that the BSB was considering the status of Annexes T2 – 4.[319]

A3.81. On 19 June 2012 a memo by the Chair of the Bar Council's Implementation Committee (BC 3) was provided by a Bar Council member of staff (BC 11) to a BSB member of staff (BSB 21). Also attached was an amended version of the new contractual terms and proposed code amendments. It was requested that these documents be passed on to a member of the BSB Board (BSB 1). These proposals deleted the Annexes relating to the Voluntary Joint Tribunal rules, the scheme for publicly funded matters and the rule relating to the List of Defaulting Solicitors (Annexes T2, T3 and T4). The Bar Council's proposals also removed a number of clauses in the new contract terms that referred to the removed Annexes.[320]

A3.82. Also on 19 June 2012, a BSB member of staff (BSB 21) told a Bar Council member of staff (BC 11) that the Bar Council was not allowed to attend a meeting with the LSB. The Bar Council member of staff (BSB 21) stated:

"We need to maintain the separation between the BSB/BC when it comes to regulatory independence. The LSB already think we're a little too close for comfort and a joint meeting on proposed regulatory changes won't help this impression".[321]

A3.83. The Bar Council member of staff (BC 11) had expressed surprise at this decision and stated that: "*despite it being a BSB application, because it is the Bar Council who will be dealing with the fees collection issues and because the Bar Council, for historic reasons, has been instrumental in drawing up the new terms*".[322]

A3.84. On 25 July 2012 a BSB member of staff (BSB 12) emailed a Bar Council member of staff (BC 11) stating:

"they [LSB] need to know asap what further changes we propose to make to the rules. Looking at your proposed amendment attached, I note that you have proposed deleting the definition of "list of defaulting solicitors" from the definitions section of the Code. The reasons for doing this were not explained in [the Chair of the Bar Council Implementation Committee] (BC 3's) memo and seems somewhat illogical to me, given that the term is still going to be used in the Code."[323]

[318] BSB (11 May 2012), letter to the LSB, <http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/letter_to_lsb_sct_110512_final.pdf>

[319] BSB (11 May 2012),*The (New) Standard Contractual Terms for the Supply of Legal Services by Barristers to Solicitor 2012, Annex T1 to the Bar Code of Conduct,* <http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/bsb_representation_appendix_2_110512.pdf>

[320] See email from BC 11 to BSB 21, at 12:44 on 19/6/2012, see LSB item reference 167

[321] See emails between a BSB member of staff (BSB 21) and a Bar Council member of staff (BC 11) at 14:17, 14:44, 14:51 and 14:57 on 19/6/12, see LSB item reference 167

[322] See emails between a BSB member of staff (BSB 21) and a Bar Council member of staff (BC 11) at 14:17, 14:44, 14:51 and 14:57 on 19/6/12, see LSB item reference 167

[323] See email from BSB 12 to BC 11 on 25/7/2012, see LSB item reference 168

A3.85. The Bar Council member of staff (BC 11) replied to the BSB member of staff (BSB 12) and noted that the definition for the "List of Defaulting Solicitors" should be retained, saying *"we were so concentrated on fitting in with your chairman's desire to remove annexes T2, T3 and T4 from the Code of Conduct, that we got carried away!"*[324] The LSB asked the Bar Council to provide emails or correspondence between the Chair of the BSB and the council in relation to this. The Bar Council told the LSB that: "*there were no emails or other correspondence with the Chair of the BSB".*[325] The Bar Council member of staff (BC 11) also asked "*were the contractual amendments sent by [the Chairman of the Bar Council's Implementation Committee] (BC 3) on the 19 June accepted by (BSB 1)* [a member of the BSB's Board]*".* The BSB member of staff replied that *"(BSB 1)* [the member of the BSB's Board] *was happy enough that I send them off to the LSB."*[326]

A3.86. A BSB member of staff (BSB 12) sent a marked up version of the amendments to the BSB's regulatory arrangements to the LSB at 13:51 on 25 July 2012. The email stated:

> *"You will recall that we were considering amending so that only Annex T1 had to be part of the Code (T2-T4 could be published elsewhere, on the Bar Council website, for example).There is therefore some suggested redrafting to accommodate that."*[327]

A3.87. The document properties for the proposed amendments to the BSB's Code of Conduct that was provided to the LSB at 10:26 on 26 July 2012 states that a member of the Bar Council's Implementation Committee (BC 5) was the author.

A3.88. The application was approved on 27 July 2012 by the LSB. The final set of regulatory arrangements reflected those submitted by a member of the Bar Council (BC 3) to the BSB on 19 June 2012 albeit with the retention of the definition of the List of Defaulting Solicitors which had been omitted by the Bar Council. Therefore the final arrangements did not include Annexes T2, T3 and T4. The new contractual terms that were approved only comprised: template contractual terms for use by barristers when providing their services to solicitors (now Annex T) and changes to the Cab Rank Rule in the BSB's Code of Conduct.

A3.89. The LSB decision notice noted that there was tension between whether the changes related to a representative or regulatory function. The LSB stated in its decision document that since:

> *"[t]he Cab Rank Rule is clearly a regulatory arrangement and since the New Contractual Terms are inextricably linked to the Cab Rank Rule, it is logical to conclude that they are regulatory in nature and therefore subject to LSB approval, albeit that the consequence of the change has the potential to be of benefit to the profession".*[328]

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[324] See email from BC 11 to BSB 12 to BC 11 on 25/7/2012, see LSB item reference 168
[325] Bar Council letter to LSB (Chris Kenny) dated 29 July 2013, see LSB item reference 5 22
[326] See emails between a BSB member of staff (BSB 12) and a Bar Council member of staff (BC 11) at 11:51, 12:41, 13:52, 13:56 and 20:06 on 25/7/2012, see LSB reference 168
[327] See email from BSB 12 to LSB at 13:51 on 25/7/2012
[328] All relevant LSB papers for the rule change can be found here: http://www.legalservicesboard.org.uk/what_we_do/regulation/applications.htm#2011

A3.90. The new contractual terms that now form Annex T of the BSB's Code of Conduct include a reference to the Voluntary Joint Tribunal and the List of Defaulting Solicitors. Paragraph 604 (g) of the BSB's Code of Conduct includes a reference to the List of Defaulting Solicitors and there is a definition of the list in part X of the Code.

A3.91. The "rules relating to the List of Defaulting Solicitors and other Authorised Persons"[329] and the "scheme for Complaining to the Bar Council for Publicly funded matters" [330] appear on the Bar Council website. The Joint Tribunal's standing orders also appear on the Bar Council website.[331]

A3.92. The "rules relating to the List of Defaulting Solicitors and other Authorised Persons 2012" were approved by the General Council of the Bar on 20 October 2012 and amended by the General Council of the Bar on 2 March 2013. The "scheme for Complaining to the Bar Council for Publicly funded matters 2012" was approved by the General Council of the Bar on 20 October 2012 and amended by the General Council of the Bar on 2 March 2013. The Joint Tribunal Standing Orders were implemented on 30 June 2011.

Implementation and subsequent developments

A3.93. Following LSB approval of the application, an email from a Bar Council member of staff (BC 11) to a member of BSB staff (BSB 12) on 27 July 2012 suggested that it would be for the Bar Council to decide the effective date and put together a plan for the implementation activity.[332]

A3.94. The application to the LSB stated that it was "*intended to put the change into effect as early as possible after the proposed amendments are accepted by the Legal Services Board and after appropriate publicity and training has been undertaken.*"[333] However, a meeting note from 3 August reports that a Bar Council member of staff (BC 11) had told a BSB member of staff (BSB 12) that there were "*whinges emerging in the profession about [the] short period of implementation".*[334] The Bar Council member of staff on 6 September 2012 told a BSB member of staff that the profession was not happy with an October 2012 implementation date and wanted a further delay. The BSB member of staff (BSB 12) replied that:

> *"We would need to be able to justify any delay to the LSB, otherwise they may have general concerns about our governance and the effectiveness of our regulatory arrangements"*[335]

A3.95. On 2 October 2012 the Bar Council submitted a memorandum and attachment to the BSB. This formally requested delaying the implementation of

[329] Bar Council (March 2013), *Rules relating to the list of defaulting solicitors and other authorised persons 2012,* <http://www.barcouncil.org.uk/media/190651/12_10_20_rules_list_defaulting_sols__authorised_persons_2012_amended.pdf>
[330] Bar Council (March 2013), *The scheme for complaining to the Bar Council for publicly funded matters 2012* <http://www.barcouncil.org.uk/media/191139/12_10_20_scheme_complaining_for_public_funded_2012_amended.pdf>
[331] The Bar Council and the Law Society (June 2011), *Joint Tribunal Standing Orders,* <http://www.barcouncil.org.uk/media/9034/fees5.pdf>
[332] See email from a Bar Council member of staff (BC 11) to a BSB member of staff (BSB 12) at 12:05 on 27/7/2012, see LSB item reference 91
[333] Page 9, Bar Standards Board (25/10/11), *Amendments to the Code of Conduct* <http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/bsbcabrankruleapplication.pdf>
[334] See Telephone note of conversation between a Bar Council member of staff (BC 11) and a BSB member of staff (BSB 12) on 3/8/12, see LSB item reference 92
[335] See emails between a Bar Council member of staff (BC 11) and a BSB member of staff (BSB 12) on 6/9/12 at 14:40 and 15:00, see LSB item reference 94

the new contractual terms of work from the end of October 2012 to the end of January 2013.[336] The attachment also included an implementation plan. All actions in the implementation plan were due to be undertaken by employees of the Bar Council or representatives of the Bar Council.[337]

A3.96. A BSB member of staff (BSB 12) advised the Director of the BSB (BSB 8) and a BSB member of staff (BSB 10) that "*had they [the Bar Council] had the foresight to suggest [the revised implementation date] when we originally discussed the implementation date we would of course have accepted them".* The BSB member of staff (BSB 12) also reported that:

> *"the Bar Council are proposing to lead on communicating the changes to the profession, but we may want to think about a short statement ourselves".*[338]

A3.97. In considering the request for the delay from the Bar Council, the BSB Director (BSB 8) reported to a BSB member of staff (BSB 12) that:

> *"No need for formal board sign-off as this is now an internal implementation matter. We should of course agree to it. I did point out to [Bar Council members of staff] (BC 8) and (BC 9) that they had invented a bureaucracy in themselves in "applying" to us – notwithstanding that the supporting evidence of their plans is helpful and necessary. [A Bar Council member of staff] ([believed to be] BC 8) said they had wanted to be seen to be separating themselves from us. Not a bad thing of course, but could have been done with less paper and process. I suggest at some point in perhaps early November we inform the LSB of the implementation schedule, putting a positive communications etc spin on it."*[339]

A3.98. The BSB agreed to the delay and reported its decision to the Bar Council at 11:28 on 4 October 2012.[340] On 8 October 2012 a Bar Council member of staff emailed a BSB member of staff putting pressure on the BSB to provide an update on the contractual terms to the GMC. The Bar Council member of staff states that *"once the GMC is told, it will leak out. I really need to send out this email [a statement on the implementation date] to the profession this evening"* The BSB formally wrote to the Bar Council on 9 October 2012 confirming the decision.[341] A press release was issued by the BSB on the same day.[342]

A3.99. The Law Society was critical of the new contractual terms when they were published and released a guidance document for solicitors.[343] However, on 7 March 2013 the Bar Council and Law Society issued a joint statement announcing that:

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[336] Bar Council memorandum dated 2/10/12, From a Bar Council member of staff (BC 11) and a BSB member of staff (BSB 12), *Implementation date of Cab Rank Rule changes and new contractual terms,* see LSB item reference 96
[337] Bar Council, *work plan for the introduction of contractual terms,* see LSB item reference 175
[338] See email from a BSB member of staff (BSB 12) to the BSB Director (BSB 8) and copied to a BSB member of staff (BSB 10) at 11:08 on 4/10/12, see LSB item reference 76
[339] See email from the BSB Director (BSB 8) to a BSB member of staff (BSB 12) and copied to a BSB member of staff (BSB 10) at 11:16 on 4/10/12
[340] See email from a BSB member of staff (BSB 12) to a Bar Council member of staff (BC 11) at 11:28 on 4/10/12
[341] Letter dated 9 October from BSB member of staff (BSB 12) to Bar Council member of staff (BC 11), *Re: Implementation date of cab rank rule changes and new contractual terms,* see LSB item reference 103
[342] BSB press notice 9/10/12, *New standard contractual terms to take effect in January 2013,* see LSB item reference 105
[343] Law Society (24 January 2013), *Solicitors warned on how to protect themselves against barristers' terms,* <http://www.lawsociety.org.uk/news/press-releases/solicitors-warned-on-how-to-protect-themselves-against-barristers--terms/>

"We very much hope that differences which have arisen between the Bar Council and the Law Society in relation to the terms on which barristers and solicitors do business with one another can be overcome. The new contractual terms which have been designed by the Bar Council were intended to provide a flexible framework for solicitors to instruct members of the Bar and appropriate protection for barristers for work which they have done, without placing unnecessary constraints on either side.

The Bar Council and the Law Society will be working together in the coming weeks to ensure that the contractual arrangements on which members of the profession do business address the issues which have been identified between us and to promote our common goal, which is in our clients' and our professional interest".[344]

Omissions

A3.100. The LSB has not been provided with any request made by the BSB to the Bar Council to undertake the consultation in 2010 on the issue of new contractual terms. The Bar Council initially stated that *"[t]he Bar Council's involvement in the 2010 consultation was undertaken at the request of the BSB and with the benefit of guidance provided by the BSB*".[345] The Bar Council has since told the LSB that there was no need for the Bar Council to be "formally" instructed to carry out the consultation. It says that this is because a Bar Council member of staff (BC 11):

> *"[...] attended a meeting at the LSB with two members of the BSB staff on the 10 December 2009 at which the LSB made clear what its expectations were in respect of applications made to it. As a result of that meeting and subsequent guidance from the LSB, it was only reasonable and sensible that the Bar Council's Implementation Committee and secretariat should use that experience and take a lead on formulating and issuing the April 2010 consultation."*[346]

A3.101. The LSB has not been provided with any formal documents, service level agreement or other similar document to govern the provision of the assistance, services and/or expertise of the Bar Council to the BSB in relation to the issue of new contractual terms. No agreement in terms of supervision, reporting, quality and/or acceptance criteria of work produced by the Bar Council for the BSB was provided.

A3.102. The LSB has not been provided with information on when or why the BSB decided to make use of the Bar Council expertise and/or background knowledge in relation to the new contractual terms and associated alterations to its regulatory arrangements. It has stated that "*[...] it was obvious that the BC could (and should) assist the BSB if and when called upon to do so. It is not now possible to identify the first occasion on which a representative of the BSB decided to request such assistance, but it must have been shortly after the BSB*

[344]Bar Council (7 March 2013), *New Contractual Terms: Joint statement by the Chairman of the Bar and the President of the Law Society* <http://www.barcouncil.org.uk/media-centre/news-and-press-releases/2013/march/new-contractual-terms-joint-statement-by-the-chairman-of-the-bar-and-the-president-of-the-law-society/>
[345]Bar Council letter to the LSB (Chris Kenny) of 12 April 2013, see LSB item reference 186
[346]Bar Council letter to the LSB (Chris Kenny) of 29 July 2013, see LSB item reference 5 18

was set up".[347] No documentation was provided suggesting that the involvement of the Bar Council was reassessed by the BSB or the Bar Council following the commencement of section 28 and section 30 of the LSA. The Bar Council has told the LSB that:

> *"It was only reasonable and sensible that the Bar Council's Implementation Committee and secretariat should be utilised by the BSB. To have done otherwise could arguably have left the BSB open to the criticism that it had not used its own resources and the resources available to it in the most effective manner."*[348]

A3.103. No documentary evidence has been provided of any analysis by the Bar Council as to whether the negotiating and drafting of standard terms of instruction between solicitors and barristers was a representative or regulatory function. The Bar Council has confirmed that this does not exist. However, it has told the LSB that this is not surprising as the negotiations began in 2001.

A3.104. No documents have been provided on how the Bar Council satisfied itself that its involvement in relation to the new contractual terms, the associated alteration to BSB regulatory arrangements and provision of documents complied with the requirements of the section 28 of the LSA, section 30 of the LSA and the IGR. The Bar Council has confirmed that no documents of this description exist. The Bar Council told the LSB that "*it is unclear why it should be thought that it might have been appropriate for the Bar Council to conduct a formal analysis of this nature" .*[349] Additionally, no documentary evidence has been provided of any reassessment of the Bar Council's involvement in relation to the new contractual terms and associated alterations to the BSB's regulatory arrangements following the commencement of section 28 and section 30 of the LSA and the IGR.

A3.105. Generally, in relation to points 1.100 to 1.104, the Bar Council has said that because its staff had worked for many years on this issue:

> *"[...] it was therefore considered obvious, as well as logical and sensible, that the BSB should use that experience where it was likely to prove beneficial. This was particularly appropriate in the first few years of the existence of the BSB, which was taking up matters initially started by the Bar Council".*[350]

A3.106. In response to an LSB query on how it ensured compliance with the IGR, the Bar Council stated that it had put in place the BSB and that *"[t]he Bar Standards Board was an independent body whose members were individuals of integrity and independence. That remained the case after, as well as before, the commencement of the Internal Governance Regulations [...]. Any attempt to exercise undue influence or control over the Bar Standards Board would have been rejected by the Bar Standards Board and would have been raised by the Bar Standards Board with the Bar Council and/or the Legal Services Board in the manner considered appropriate by the Bar Standards Board"*.[351]

[347] Bar Council letter to the LSB (Chris Kenny) of 5 July 2013, see LSB item reference 169
[348] Bar Council letter to the LSB (Chris Kenny) of 29 July 2013, see LSB item references 518 and 5 19
[349] Bar Council letter to the LSB (Chris Kenny) of 29 July 2013, see LSB item references 518 and 5 19
[350] Bar Council letter to the LSB (Chris Kenny) of 29 July 2013, see LSB item references 518 and 5 19
[351] Bar Council letter to the LSB (Chris Kenny) of 5 July 2013, see LSB item reference 169

A3.107. In relation to our analysis on limited references to the regulatory objectives in the papers drafted by the Bar Council for BSB meetings, the Bar Council stated that members of the BSB *"were well aware of the regulatory objectives".*[352]

A3.108. In explaining these omissions, the Bar Council has told the LSB that as many of these events took place a number of years ago, documentation and email have been deleted as they were considered obsolete. Furthermore, "*a good deal of the liaison between staff of the Bar Council and of the BSB was verbal and informal. No written record was considered necessary."* The Bar Council also told the LSB that:

> *"Bar Council staff had worked for many years on this project and it was therefore considered obvious, as well as logical and sensible, that the BSB should use that experience where it was likely to prove beneficial"*[353]*.*

[352] Bar Council letter to the LSB (Chris Kenny) of 29 July 2013, see LSB item references 518 and 5 19
[353] Bar Council letter to the LSB (Chris Kenny) of 29 July 2013, see LSB item references 518 and 5 19

Table 2 Summary of BSB meetings when the new contractual terms formed part of the formal agenda (from 2010 to the approval of the changes)

Meeting date	Committee	Paper author	Paper presented by	Topic	Regulatory arrangement changes included	Regulatory objectives	Better regulation principles	Notes
21-Oct-10	BSB Board	Bar Council staff (BC 11)	Bar Council's Implementation Committee (BC 6)	Bar Council summary of consultation responses.	Changes to code and Annexes tabled	No reference in cover paper and only references in Annex of consultees' responses	No reference in cover paper and only references in Annex of consultees responses	Item was for discussion and noting. Meeting referred the matter to the BSB's Standards Committee
24-Nov-10	BSB Standards Committee	Bar Council staff (BC 11) with Bar Council's Implementation Committee (BC 6, BC 5 and BC 4)	Bar Council's Implementation Committee (BC 5)	BSB asked to approve the resubmitted code amendments and the submission to the LSB	Changes to code and Annexes included	No reference in cover paper and only references in Annexes in draft application	No reference to the Better Regulation principles in cover paper or Annexes	Papers provided by Bar Council after deadline. Draft application refers to matters the BSB has agreed. The BSB had not seen the application in advance. The BSB standards committee requested a further paper
15-Dec-10	BSB Standards Committee	BSB's Standards Committee (BSB 4)	Not known – presumed BSB Standards Committee Chair (BSB 3)	The paper considers whether the BSB should endorse terms in light of disagreement of Law Society and SRA	Changes to code and Annex discussed	Indirect references	No references	Bar Council staff were in attendance. The paper questioned the appropriateness of some of the contractual terms The meeting voted on whether in favour of the 'Bar Council's proposals'. Those that voted in favour were asked to produce a paper on the options that had been voted on

Meeting date	Committee	Paper author	Paper presented by	Topic	Regulatory arrangement changes included	Regulatory objectives	Better regulation principles	Notes
09-Feb-11	BSB Standards Committee	BSB's Standards Committee (BSB 5 and BSB 6) and Bar Council's Implementation Committee (BC 5)	BSB Standards Committee (BSB 5)	The paper was on the advantages and disadvantages of the three options: to include the (new) contractual terms in the code, that terms are matter for negotiation but the Cab Rank Rule applies to instructions made on the standard terms or "The Bar Council option – the terms should be included in the code as contractual default terms."	Changes to code and Annex discussed	The paper makes no reference to the regulatory objectives	Indirect reference to improving regulation	The final paper throughout refers to the Bar Council's proposals. The BSB's Standards Committee concluded that the Code of Conduct should make the new contractual terms the baseline for the Cab Rank Rule and that the Cab Rank Rule should also apply to terms published by individual barristers
09-Mar-11	BSB Standards Committee	The paper expands on the 9 February 2011 paper with additions by Bar Council implementation committee (BC 5 and BC 6). An email by the Bar Council Implementation Committee (BC 6) was also provided	Not recorded – presumed to be members of the BSB Standards Committee (BSB 5 and/or BSB 6)	The paper sets out the conclusion the BSB standards committee has reached. The email details why the BSB Standards Committee members (BSB 4) amendments were not appropriate	Changes to code and Annex discussed in the paper	Two of the text boxes make a reference to the regulatory objectives. However it is not detailed. The email does not mention the regulatory objectives	Indirect reference to improving regulation	There is no evidence of any amendments made by the BSB Standards Committee (BSB 5) despite this being stated. The papers were provided to BSB Standards Committee members on 7 March 2011. Bar Council representatives were in attendance of the meeting
28-Apr-11	BSB Board	Paper was substantially the same as 9 March 2011 papers for the BSB Standards Committee. Annexes (including EIA) were produced by the Bar Council	Chairman of BSB Standards Committee (BSB 3)	Paper as above (excluding email from Bar Council Implementation Committee (BC 6)). Annexes include the revised terms, various rules and the equality impact assessment	Changes to code and Annex discussed in the paper	Paper as above (excluding email from Bar Council Implementation Committee (BC 6))	Indirect reference to improving regulation	Bar Council representatives were in attendance

Meeting date	Committee	Paper author	Paper presented by	Topic	Regulatory arrangement changes included	Regulatory objectives	Better regulation principles	Notes
19-May-11	BSB Board	BSB's standards committee (BSB 3),BSB staff(BSB 15), Bar Council staff (BC 11) and members of the Implementation Committee (including BC 5)	Chairman of BSB Standards Committee (BSB 3)	The paper discusses the merits of adopting an amendment to the code that would provide that the Cab Rank Rule would apply if the barrister was offered work on reasonable terms and guidance would state that the new contractual terms would normally be regarded as reasonable, as would terms on a chamber's own website. The paper referred to this as the 'BSB 1 amendment'	Changes to code and Annex discussed in the paper	A short mention is provided	Indirect reference to improving regulation	BSB observed that the amendments by the Bar Council Implementation Committee were one sided. But they were not changed substantially. Bar Council representatives attended the meeting. The meeting did not favour the 'BSB 1' amendment and asked Bar Council and BSB staff to draft an application to the LSB based on the Bar Council's proposals but without the new contractual terms as the default terms
29 June 2011	BSB Standards Committee	The paper closely resembles an email sent by the Bar Council member of staff (BC 11) to the Chair of the BSB's Standards Committee (BSB 3) on 21 June 2011	A member of the Bar Council's Implementation Committee (BC 4) presented the proposed amendment	A further amendment of the code in order to ensure that junior counsel are not in a worse position than they currently were	Changes to code included	No mention	No mention	The minutes record that the paper was from the Bar Council and that the BSB's Standards Committee did not find it entirely easy to understand the point, but nevertheless agreed to the amendment
15 Sept 2011	BSB Board meeting	A Bar Council member of staff (BC 11) sent a draft paper to the Chair of the BSB's Standards Committee (BSB 3) We have not been provided with any evidence of approval	The minutes do not indicate who presented the paper to the BSB Board.	Same as BSB Standards Committee meeting on 29 June 2011	Code amendments included	No reference.	No reference	A representative from the Bar Council's Implementation Committee (BC 3) and a Bar Council member of staff (BC 11) attended and were formally recorded in the minutes

Meeting date	Committee	Paper author	Paper presented by	Topic	Regulatory arrangement changes included	Regulatory objectives	Better regulation principles	Notes
25 April 2012	BSB Standards Committee	BSB member of staff (BSB 15)	A member of the BSB (BSB 1).	A report on the LSB's warning notice and associated consultation	No	No reference in BSB paper. Minor references in relation to the Hogan Lovells advice in the draft letter to the LSB	No reference in BSB paper. Minor references in relation to the Hogan Lovells advice in the draft letter to the LSB	The minutes of the meeting noted that the Chair of the Bar Council Implementation Committee (BC 3) was in attendance for this item, at which the advice from Hogan Lovells was considered. This was provided to the BSB on the expectation that it would be kept confidential to the BSB

Annex 4: The Internal Governance Rules

The Legal Services Board has, on 9 December 2009, made the following rules under Legal Services Act 2007 (c.29), section 30(1):

A. DEFINITIONS

1. In these Rules, a reference to "the principle of regulatory independence" is a reference to the principle that:

> **structures or persons with representative functions must not exert, or be permitted to exert, undue influence or control over the performance of regulatory functions, or any person(s) discharging those functions.**

2. The words defined in these Rules have the following meanings:

Act	the Legal Services Act 2007 (c.29)
Applicable Approved Regulator	an Approved Regulator that is responsible for the discharge of regulatory and representative functions in relation to legal activities in respect of persons whose primary reason to be regulated by that Approved Regulator is those person's qualifications to practise a reserved legal activity that is regulated by that Approved Regulator
Approved Regulator	has the meaning given in Section 20(2) of the Act
Board	the Legal Services Board
Consumer Panel	the panel of persons established and maintained by the Board in accordance with Section 8 of the Act
lay person	has the meaning given in Schedule 1, paragraphs 2(4) and (5) of the Act
legal activities	has the meaning given by section 12(3) of the Act
OLC	the Office for Legal Complaints established under Section 114(1) of the Act
person	includes a body of persons (corporate or unincorporated)
prejudice	the result of undue influence, whether wilful or inadvertent, causing or likely to cause the compromise or constraint of independence or effectiveness

regulatory board	has the meaning given by Rule B in Part 1 of the Table in the Schedule to these Rules
regulatory functions	has the meaning given by Section 27(1) of the Act
regulatory objectives	has the meaning given by section 1(1) of the Act
representative functions	has the meaning given by Section 27(2) of the Act
representative interests	the interests of persons regulated by the Approved Regulator
reserved legal activities	has the meaning given by section 12(1) of the Act
undue influence	pressure exercised otherwise than in due proportion to the surrounding circumstances, including the relative strength and position of the parties involved, which has or is likely to have a material effect on the discharge of a regulatory function or functions.

B. WHO DO THESE RULES APPLY TO?

2. These Rules are the rules that the Board has made in compliance with 30(1) of the Act relating to the exercise of Approved Regulators' regulatory functions.
3. Accordingly, these Rules apply to each Approved Regulator.
4. In the event of any inconsistency between these Rules and the provisions of the Act, the provisions of the Act prevail.

C. GENERAL DUTY TO HAVE IN PLACE ARRANGEMENTS

5. Each Approved Regulator must:
    a) have in place arrangements that observe and respect the principle of regulatory independence; and
    b) at all times act in a way which is compatible with the principle of regulatory independence and which it considers most appropriate for the purpose of meeting that principle.
6. Without limiting the generality or scope of Rule 6, the arrangements in place under that Rule must in particular ensure that:
    a) persons involved in the exercise of an Approved Regulator's regulatory functions are, in that capacity, able to make representations to, be

consulted by and enter into communications with any person(s) including but not limited to the Board, the Consumer Panel, the OLC and other Approved Regulators;

b) the exercise of regulatory functions is not prejudiced by any representative functions or interests;

c) the exercise of regulatory functions is, so far as reasonably practicable, independent of any representative functions;

d) the Approved Regulator takes such steps as are reasonably practicable to ensure that it provides such resources as are reasonably required for or in connection with the exercise of its regulatory functions; and

e) the Approved Regulator makes provision as is necessary to enable persons involved in the exercise of its regulatory functions to be able to notify the Board where they consider that their independence or effectiveness is being prejudiced.

D. REQUIREMENTS FOR APPLICABLE APPROVED REGULATORS

7. In the case of each Applicable Approved Regulator, the arrangements in place under Rule 6 must also meet the requirements set out in the Schedule to these Rules.

E. ENSURING ONGOING IMPLEMENTATION

8. Each Applicable Approved Regulator, jointly with its regulatory board, must:
    a) if it considers itself to be compliant with these Rules, certify such compliance in the form and manner prescribed by the Board from time to time; or
    b) if it considers itself not to be compliant with these Rules, in some or all respects, notify such non-compliance and set out:
        i) why it has been unable to comply in such respects as it has identified;
        ii) when it considers that it will be compliant; and
        iii) how it plans to achieve compliance, and by when, and how much it is expected to cost.
9. Subject to the agreement of the Board, an Applicable Approved Regulator may invite any other appropriate body, including a consumer panel associated with the Applicable Approved Regulator, to provide a certification in a similar form and manner.

F. GUIDANCE

10. Approved Regulators must, in seeking to comply with these Rules, have regard to any guidance issued by the Board under this Rule.
11. For the avoidance of doubt, any guidance issued under Rule 11 does not, of itself, constitute a part of these Rules.

Schedule to Internal Governance Rules

The requirements set out in this Schedule are that Applicable Approved Regulators, in making arrangements under these Rules, must:

a) adhere to the principles set out in the table below in respect of specified areas which arrangements must cover;

b) comply with the rules set out in the table below in respect of demonstrating compliance with the principles; and

c) take account of the illustrative guidance set out in the table below when seeking to comply with the principles and rules.

Principle	Rule	Illustrative guidance
Part 1: Governance Nothing in an Applicable Approved Regulator's (**AAR's**) arrangements should impair the independence or effectiveness of the performance of its regulatory functions.	**A.** Each AAR must delegate responsibility for performing all regulatory functions to a body or bodies (whether or not a separate legal entity/separate legal entities) without any representative functions (herein after '**the regulatory body**' or '**the regulatory bodies**').	An AAR should take all reasonable steps to agree arrangements made under these Rules with the regulatory body or, as the case may be, the regulatory bodies.
		If an AAR wishes otherwise than through its regulatory body/bodies to offer guidance to its members or more widely on regulatory matters, it should: (a) ensure that it does not contradict or add material new requirements to any rules or guidance made by the regulatory body/bodies; and (b) consult with the regulatory body/bodies when developing that guidance.

	B. The regulatory body or, if more than one, each of the regulatory bodies, must be governed by a board or equivalent structure (herein after the '**regulatory board**').	
	C. In appointing persons to regulatory boards, AARs must ensure that: • a majority of members of the regulatory board are lay persons; and • the selection and appointment of a chair is not restricted by virtue of any legal qualification that person may or may not hold, or have held.	
Part 2: Appointments etc (1) Processes in place for regulatory board members' appointments, reappointments, appraisals and discipline must be demonstrably free of undue influence from persons with representative functions.	**A.** All appointments to a regulatory board must be made on the basis of selection on merit following open and fair competition, with no element of election or nomination by any particular sector or interest groups.	If regulatory boards do not lead on managing the appointments process, it should have a very strong involvement at all stages. Best practice for public appointments should be taken into account. In particular, account should be taken of the Code of the Commissioner of Public Appointments insofar as relevant.
	B. The selection of persons so appointed must itself respect the principle of regulatory independence	Appointment panels or equivalent should be established following the guidance set out in the Board's letter of 2 December 2008[354].

	and the principles relating to "appointments etc" set out in this Part of this Schedule.	The chair of the regulatory board (or an alternate) should always form part of that panel, unless the panel is established to select the chair (in which case another member of the regulatory board should participate).
		The appointments process should be conducted with regard to the desirability of securing a diverse board with a broad range of skills. The framework applied at Schedule 1 paragraph 3 of the Act serves as a useful template.
	C. Decisions in respect of the remuneration, appraisal, reappointment and discipline of persons appointed to regulatory boards must respect the principle of regulatory independence and the principles relating to "appointments etc" set out in this Part of this Schedule.	1. Remuneration – decisions in respect of regulatory board pay and conditions should be made having regard to best practice and in any event should not be controlled wholly or mainly by persons responsible for representative functions; 2. Appraisals – while persons with representative functions may be consulted about regulatory board members' appraisal, they should not be involved formally in agreeing the outcome, or future objectives; 3. Reappointments – decisions should be guided by objective appraisals and the desirability of ensuring a balance between regular turnover and continuity.
	D. Except insofar as an AAR would be, or would reasonably be considered likely to be, exposed to any material legal liability (other than to pay wages, salaries etc) as a consequence of the delay required to obtain the	While the LSB accepts that there may be exceptional reasons which justify immediate dismissal without concurrence having first been obtained, it would expect a full explanation if such circumstances were ever to arise. An AAR should accordingly be prepared to justify why it could not comply with the relevant Rule.

(2) All persons appointed to regulatory boards must respect the duty to comply with the requirements of the Legal Services Act 2007.	concurrence of the Board, no person appointed to a regulatory board must be dismissed except with the concurrence of the Board.	Where an AAR proposes to discipline one or more member(s) of a regulatory board, where such discipline is short of dismissal, the Board should be consulted privately in advance of the action being taken, and the AAR should consider any representations the Board may chose to make.
	E. No person appointed to and serving on a regulatory board must also be responsible for any representative function(s).	Where possible, a person appointed should not have been responsible for any representative functions immediately prior to appointment. The longer the gap between holding responsibility for representative functions and taking up regulatory functions, the more likely it is that the principle of regulatory independence will be observed.
		Codes of conduct or equivalent for board members should highlight the importance of observing and respecting the regulatory objectives and the principles of better regulation, rather than operating to represent any one or more sectoral interests. Codes should also highlight the importance of respecting the principle of regulatory independence, as underlined by the provisions of sections 29 and 30 of the Act.

Part 3: Strategy and Resources etc Subject only to the oversight permitted under Part 4 of this Schedule, persons performing regulatory functions must have the freedom to define a strategy for the performance of those functions and work to implement that strategy independently of representative control or undue influence.	**A.** Defining and implementing a strategy should include: **1.** access to the financial and other resources reasonably required to meet the strategy it has adopted; **2.** effective control over the management of those resources; and **3.** the freedom to govern all internal processes and procedures.	The Act requires separation of regulatory and representative functions. Absent of corporate management structures that are robustly and demonstrably separated from the control of persons with representative functions, these Rules are likely to require a high degree of delegation to regulatory bodies in respect of the control of strategy and resourcing. What is or is not a regulatory function is determined in accordance with the Act. Subject to the Act, whether something is 'regulatory' should be for each regulatory body to determine, in close consultation with respective AARs.

		Where members of staff are employed by an AAR to discharge regulatory functions under the delegated remit of a regulatory body, the position of the AAR as legal employer should be recognised in the arrangements made under these rules. However, in complying with these Rules, those arrangements should make clear how decisions with respect to the management and control of such members of staff are to be exercised. The presumption under such arrangements should be – subject only to being exposed to unreasonable liability (such as in creating a pension scheme) – that an AAR should always agree a reasonable request from its regulatory body. While an AAR has a right of veto, therefore, it also carries a responsibility to justify that decision in light of the principle of regulatory independence. The Board may from time to time issue further illustrative guidance on these issues under Rule 11 of these Rules.
		Each regulatory body should act reasonably when defining and implementing its strategy, and should in particular have regard to the provisions of Section 28 of the Act. It should also have due regard to the position of the AAR and in particular to any responsibilities or liabilities it may have as AAR.
	B. The regulatory body (or each of the regulatory bodies) must have the power to do anything within its	Each regulatory body should act reasonably when exercising its functions in accordance with this Rule, and should in particular have regard to the provisions

	allocated budget calculated to facilitate, or incidental or conducive to, the carrying out of its functions.	of Section 28 of the Act. It should also have due regard to the position of the AAR and in particular to any responsibilities or liabilities it may have as AAR.
	C. Insofar as provision of resources is concerned, arrangements must provide for transparent and fair budget approval mechanisms.	The process established by the AAR should provide appropriate checks and balances between it and the regulatory body (or bodies) so as to ensure value for money and observe the wider requirements of the Act, without impairing the independence or effectiveness of the regulatory body (or bodies).
	D. Insofar as provision of any non-financial resources is concerned (for example, services from a common corporate service provider, or staff), arrangements must provide for transparent and fair dispute resolution mechanisms.	Subject only to the formal budgetary approval process and the operation of its dispute resolution mechanism(s) , an AAR's arrangements should not prevent those performing regulatory functions, where they believe their independence and/or effectiveness is compromised or prejudiced, from obtaining required services otherwise than through the AAR.
		AARs and regulatory bodies should be particularly careful to ensure that, in respect of public and/or consumer-facing services (including media relations and marketing-type activities), the principle of regulatory independence should be seen to be met, as well as being met.
		When considering whether arrangements meet the required standards, the Board will consider factors such as: **1.** evidence that the provision of services to the regulatory body (or bodies) is not subordinate to the provision of services to any other part of the AAR;

		2. provision being made for service level agreements agreed between respective parties; and **3.** transparent, fair and effective dispute resolution mechanisms being in place.
Part 4: Oversight etc Oversight and monitoring by the AAR (which is ultimately responsible and accountable for the discharge of its regulatory functions) of persons performing its regulatory functions must not impair the independence or effectiveness of the performance of those functions.	**A.** Arrangements in place must be transparent and proportionate.	In making its arrangements, an AAR should balance its ultimate responsibility for the discharge of regulatory functions with its responsibilities to ensure separation of regulatory and representative functions.
		In considering proportionality, AARs should consider the risk of Board intervention. Note the Board's policy statement on compliance and enforcement powers, and in particular the Board's intention to use its most interventionist powers only when other measures (including informal measures) have failed.
	B. Arrangements in place must prohibit intervention, or the making of directions, in respect of the management or performance of regulatory functions unless with the concurrence of the Board.	In determining whether to give concurrence, the Board will consider the extent to which the process leading to the proposed intervention or directions complies with the principle of regulatory independence.

Annex 5: The section 55 notices

The Annex sets out the texts of the section 55 notices addressed to the Bar Council

Request 1, dated 27 March 2013

(a) An explanation of the role performed by the Bar Council ("the Council") in the drafting of the New Contractual Terms submitted by the Bar Standards Board ("BSB") to the LSB in its application on 26 October 2011 ("the BSB application");

(b) All written communications and notes of meetings and phone conversations between the Council and the BSB, concerning the New Contractual Terms in each of the following periods: namely, the three months prior to the commencement of the BSB's consultation in April 2010; the period commencing with the close of the BSB's consultation in July 2010 until the submission of the application on 26 October 2011; and from the LSB's decision to approve on 27 July 2012 to 7 March 2013;

(c) Any analysis conducted by the Council, prior to the submission of the BSB application, as to whether the negotiating and drafting of standard terms of instruction between solicitors and barristers was a representative or regulatory function;

(d) Any documents produced by the Council, prior to the submission of the BSB's application, as to its compliance with the Internal Governance Rules when designing the New Contractual Terms; and

(e) Any documents produced by the Council, following the LSB's decision to approve the addition of the New Contractual Terms to the BSB's regulatory arrangements, as to its current or future compliance with the Internal Governance Rules in relation to the Standard Terms given its stated aim to work together with the Law Society "in the coming weeks to ensure that the contractual arrangements on which members of the profession do business address the issues which have been identified".

Request 2, dated 9 May 2013

a. State BSB 17's job title and provide an explanation of his role

b. State BC 11's job title and provide an explanation of her role

c. State BC 4's job title and provide an explanation of his role

d. State who presented Item 3 on "New contractual terms for barrister taking instructions from solicitors" to the BSB's Standards Committee on 15 December 2010 and explain their position in either the Bar Council or the BSB

e. State who presented Item 5 on "Standard Contractual Terms" to the BSB's Standards Committee on 9 March 2011 and explain their position in either the Bar Council or the BSB

f. Provide "BSB 1's" comments mentioned in the email from BSB 15 to BC 5 of 6 May 2011

g. Provide a copy of the tracked changes version of the paper mentioned in the email from BC 11 to BSB 15 of 10 May 2011

h. Provide a copy of the paper mentioned in the email from BSB 3 to BSB 15 of 10 May 2011 (at 10:36) showing the changes made by BSB 3

i. Provide copies of any emails sent or meeting notes of discussions held related to the issues in the email of 26 May 2011 from BSB 15 to BC 11 concerning the drafting of the rule change submission

j. Provide a copy of the paper sent by the Bar Council to the BSB mentioned in the email from BC 11 to BSB 15 of 27 May 2011

k. Provide the reply from BSB 3 to the email of 21 June 2011

l. Provide a copy of the report mentioned in the email from BC 11 to BSB 3 of 30 June 2011

m. Provide an explanation of what the reference to "13 July" means in mentioned in the email from BC 11 to BSB 3 of 30 June 2011

n. State who drafted the paper for Item 4 on "Standard Contractual Terms for Barristers" presented to the BSB Board on 15 September 2011 and an explanation of their role

o. Provide copies of notes from all participants of any discussions that took place following the email from BSB 12 to BSB 15 and BC 11 on 17 October 2011 and from BSB 15 to BC 11 on 18 October 2011

p. Provide a copy of BSB 12's comments referred to in the email from BSB 15 to BC 11 of 19 October 2011 (at 09:39)

q. Provide a copy of the paper for Item 6 on "Standard Contractual Terms" presented to the BSB's Standards Committee on 25 April 2012 with an explanation of who wrote it and their role

r. Provide copies of the BSB's procedures for authorising the submission of rule change applications to the LSB, including any scheme of delegation

s. Provide an explanation of how those procedures and any delegation was applied in the rule change application made on 18 January 2012 concerning barristers' standard contractual terms

Request 3, dated 21 June 2013 (as amended on 24 June 2013)

B) Explain how, when and by whom, it was first decided by the BSB that the contractual terms for barristers intended to be introduced under the BSB Code of Conduct ("the Contractual Terms") presented a problem, risk or issue that was a priority that the BSB should devote resources to and provide documents (or refer to those already given to us) to support that explanation

C) Explain how, when, and by whom, it was decided that the BSB would make use of Bar Council expertise and background knowledge in relation to the Contractual Terms and associated alteration to its regulatory arrangements, and how and when this was communicated to the Bar Council, and provide documents (or refer to those already given to us) to support that explanation

D) Explain how it was ensured that, as stated in your letter of 20 May 2013, "[a]t all times the BSB was in full control of the process". This should include an

explanation of how BSB officers supervised and directed drafting by Bar Council officers and members of papers and documents associated with, and including, the application to the LSB on changes to the Code of Conduct related to the Contractual Terms, and provide documents (or refer to those already given to us) to support that explanation

E) In relation to the December 2008 rule change application to the Ministry of Justice:

   i) State the names, job titles and whether employed by the BSB or Bar Council of those who

      a) drafted

      b) approved

      c) submitted, and

      d) withdrew the application

   ii) Provide a copy of the final submission to MoJ

   iii) Provide evidence to support your answers to points i (a) to (d)

F) Explain the circumstances that led to the cessation of negotiations with the Law Society in 2009, along with the Bar Council's understanding of how the matter would be taken forward, and provide documents (or refer to those already given to us) to support that explanation

G) In relation to the paper on the Contractual Terms for the BSB Standards Committee meeting on 20 September 2009 (referred to in your letter of 12 April 2013):

   i) State the names, job titles and whether employed by the BSB or Bar Council of those who

      a) drafted the paper and

      b) approved it for submission to the Committee

   ii) Provide copies of the final paper, agenda and minutes of the meeting

   iii) Provide evidence to support your answers to points i (a) and (b)

H) In relation to the paper on the Contractual Terms for the BSB Board meeting on 22 October 2009 (referred to in your letter of 12 April 2013):

   i) State the names, job titles and whether employed by the BSB or Bar Council of those who

      a) drafted the paper and

      b) approved it for submission to the Board

   ii) Provide copies of the final paper, agenda and minutes of the meeting

   iii) Provide evidence to support your answers to points i (a) and (b)

I) In relation to the October 2009 rule change application to the Ministry of Justice:

   i) State the names, job titles and whether employed by the BSB or Bar Council of those who

a) drafted

b) approved and

c) submitted the application.

ii) Provide a copy of the final submission to MoJ

iii) Provide evidence to support your answers to points i (a) to (c)

J) Explain how the Bar Council ensured compliance with the Internal Governance Rules from the point of their introduction, and thereafter, in relation to the Contractual Terms and associated alteration to BSB regulatory arrangements, and provide documents (or refer to those already given to us) to support that explanation

K) Provide a copy of BC 3's article in Counsel magazine in June 2010 relating to the Bar Council's consultation on the Contractual Terms

L) In relation to the BSB Board meeting of 21 October 2010:

i) Provide page 2 of the Board agenda sheet

ii) Confirm whether "Code changes" referred to in BSB 11's email to BC 11 of 10:28 on 15 October 2010 were presented to the Board

iii) Provide documents (or refer to those already given to us) to support your answer to point ii

M) In relation to the paper on the Contractual Terms and associated attachment 7 for the BSB Standards Committee meeting on 24 November 2010:

i) State the names, job titles and whether employed by the BSB or Bar Council of those who

a) drafted the paper and attachment and

b) approved each of them for submission to the Committee

ii) Provide evidence to support your answers to points i (a) and (b)

N) Provide all the responses to BSB 4 from the recipients of his email of 19:06 on 07 December 2010

O) In relation to the paper on the Contractual Terms for the BSB Standards Committee meeting on 09 March 2011:

i) Provide evidence of the input that BSB 5 and/or BSB 6 had in the drafting of the document

ii) State when it was sent to BSB 5 and/or BSB 6 for comment and provide evidence of any comments they made

iii) State who approved the paper for submission to the Committee and provide evidence to support you answer

P) Explain who (a) drafted and (b) approved the equality impact assessment relating to the rule change application to the LSB in October 2011, and provide documents (or refer to those already given to us) to support your answers to points (a) and (b)

Q) State BSB 16's job title and provide an explanation of his role

R) Provide the covering email to the comments by BSB 1 on BSB Board paper 027(11) (item 2f of your response of 20 May 2013) and all the responses that were sent to her

S) Confirm that the version provided to the LSB (item 2h of your response of 20 May 2013) of BSB 3's amendments to a Bar Council draft of the BSB Board paper (provided to BSB 3 by BSB 15 at 10:29 on 10 May 2011) was the correct version and shows in tracked changes all the amendments that he made

T) State who approved the draft report referred to in BC 11's email to BSB 3 of 12:51 on 30 June 2011, and provide documents (or refer to those already given to us) to support that explanation

U) State who prepared and who approved the drafting amendments referred to BSB 12's email to the LSB of 13:51 on 25 July 2012, and provide documents (or refer to those already given to us) to support that explanation

V) In relation to Bar Council requests to delay implementation of the Contractual Terms and associated alteration to BSB regulatory arrangements:

   i) Explain how the BSB considered such requests

   ii) What factors the BSB took into account in reaching its decisions

   iii) Who made final decisions

   iv) Provide the "Work plan of implementation" listed as an attachment to the "Bar Council submission to BSB for postponement" dated 02 October 2012

   v) Provide evidence to support your answers to points i to iii

   vi) Explain any other points that the Bar Council considers are relevant to the LSB's investigation, and provide documents (or refer to those already given to us) to support that explanation

Request 4, dated 16 August 2013

2. Concerning the BSB's response dated 11 May 2012 to the LSB following the BSB's receipt of advice from consultees on the LSB's Warning Notice of 20 January 2012

   a. The attachments to the email from BC 11 to BSB 15 of 8 May 2012 that show the Council's comments on the BSB's draft response to the LSB; and

   b. State whether and when the Council had made any comment on earlier versions of the BSB's draft response, prior to its submission to the LSB on 11 May 2012, and provide copies of those comments and the earlier versions of the draft response.

3. Concerning the removal of Annexes T 2 – T4 of the original rule change application from the final rule change application:

   a. All emails or other correspondence between the Chair of the BSB and the Council

4. An explanation of why the Bar Council considers it appropriate to charge a Members' Services Fee to enable barristers to make a request to the Chairman of the General Council of the Bar to include the solicitor on the List of Defaulting Solicitors.

Section 55 notice addressed to the Law Society

Request 1, dated 21 June 2013

12. Describe the circumstances that led to the cessation of negotiations in late 2008 and early 2009 between the Bar Council and the Law Society on replacing the "Terms of Work on which Barristers offer their services to solicitors and the Withdrawal of Credit Scheme 1988," along with the Society's understanding of how the matter would be taken forward and provide associated document in support.