

### RESPONSE TO THE LEGAL SERVICES BOARD'S CONSULTATION ON ITS DRAFT STRATEGIC PLAN 2015-2018 AND ITS DRAFT BUSINESS PLAN 2015-2016

#### *Introduction*

1. Bar Mutual welcomes the opportunity to comment on the Legal Services Board's ("LSB") consultation on its Draft Strategic Plan for 2015-2018 and Draft Business Plan for 2015-2016.
2. The breadth of the activities mentioned in the consultation paper ("the Paper"), and on which the LSB is considering whether (and, if so, to what extent) to concentrate, is noted. Given the nature of Bar Mutual's business, this response will focus solely on the suggestion in paragraph 76 of the Paper that the LSB may undertake a review of regulatory requirements concerning the restriction of choice of professional indemnity insurer imposed on legal services providers.
3. As far as Bar Mutual is aware, only two frontline regulators currently require their regulated communities to obtain at least their primary layer of professional indemnity insurance ("PII") from a compulsory scheme. The first is the Council of Licensed Conveyancers. It requires all of those it regulates to purchase PII on a "master policy" basis (that is, they must purchase cover via a single insurance broker on the same policy terms, the broker being responsible for finding sufficient underwriting support for the master policy).
4. The second is the Bar Standards Board ("BSB"), which (via rule C77 of its Handbook) requires all self-employed barristers to be members of Bar Mutual, the effect of which is to compel all self-employed barristers to purchase up to the first £2.5m of their PII from Bar Mutual.
5. In Bar Mutual's opinion, this requirement (which was first introduced by the Bar Council in 1988) has been of invaluable benefit not only to self-employed barristers, but also their clients, over the past 27 years. Bar Mutual firmly believes that, despite being a restriction on choice of insurer, rule C77 (and its predecessor provisions in the old Bar Code of Conduct) do not offend any of

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the regulatory objectives enshrined in section 1 of the Legal Services Act 2007 (“the Act”). Indeed, it believes that the combined effect of the absence of choice of insurer and the manner in which Bar Mutual operates actually serves to promote those regulatory objectives and is better able to secure their achievement than an open market solution to such an extent that the scope of rule C77 should be extended to include the entities to be regulated by the BSB.

### *The Formation of Bar Mutual – The Historical Context for Rule C77*

6. Self-employed barristers were first compelled to have PII as a pre-condition for practice in 1980, on the basis that a responsible profession had to have regard to the interest of consumers by ensuring that consumers with meritorious negligence claims should not be prejudiced by the potential inability of barristers to meet judgments entered against them. In introducing this requirement, the self-employed Bar rejected a proposal for a master policy, opting instead for an open market solution with the insurance being provided by various insurers.
  
7. By 1985, however, the number of insurers offering insurance to self-employed barristers had shrunk to only two, only one of which was willing to provide a quotation to barristers from all Chambers. Although insurers had agreed to adopt a common policy wording, premiums for each barrister were entirely at the discretion of the insurers and any claim (or even the threat of a claim) resulted in very substantial (sometimes in excess of 1000%) increases in premium, not only for the barrister in question but the other members of his or her chambers, whose own practices were self-evidently entirely separate and might focus on entirely different areas of law. Not only were premiums increasing but also there was no transparency as to how they were calculated. Furthermore, insurers could accept or reject barristers’ proposals for cover without reason. Finally, barristers were not receiving quotations (or refusals to quote) from insurers until the day before the expiry of their existing cover, which was causing immense uncertainty and rendering it impossible to obtain alternative quotations. In short, the supposed benefits of open market competition for the provision of PII had proved to be illusory, leaving a situation that was profoundly unsatisfactory for self-employed barristers and, indirectly but just as importantly, their clients.

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8. Responding to an urgent need for change, the Bar Council resolved at its Annual General Meeting in October 1987 to form Bar Mutual as the compulsory provider of primary layer PII to self-employed barristers practising in England and Wales. By establishing Bar Mutual, the Bar sought to guarantee the availability of both:
- fairly and stably priced PII to all self-employed barristers; and
  - a convenient means by which all clients (whether big or small) of self-employed barristers would be able to receive compensation for a meritorious claim without the need to pursue a recovery from a barrister's personal assets.

Bar Mutual has consistently delivered precisely that since it commenced underwriting in 1988.

### *Bar Mutual – Cover and Structure*

9. Like all other PII written in this jurisdiction, the cover provided by Bar Mutual is written on a “claims made” basis – that is, it is the cover that is in place when the insured notifies the insurer of a claim (or of circumstances that may give rise to a claim in the future) that responds to that claim. The scope of cover is exceptionally broad – it encompasses all claims for civil liability for compensation arising from or in any way connected with the provision of legal services by a self-employed barrister. In the usual course, such claims are founded on allegations of professional negligence, but claims based on breach of fiduciary duty (for example, conflict of interest) are not unknown, as are libel and slander claims.
10. Defence costs incurred on behalf of an insured barrister are in addition to, not inclusive within, his or her limit of cover. This means that neither the barrister nor his or her former client is prejudiced by the limit of cover being eroded (or even exhausted) by that expenditure in the event that a claim is successful.
11. There is an exclusion for claims based on fraud and dishonesty (which reflects the rule that would apply in any event as a matter of public policy), although this has never had to be exercised, most probably as a result of the

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long-standing and continuing prohibition on self-employed barristers holding client monies. In addition, Bar Mutual is entitled to avoid cover where a barrister has fraudulently misrepresented or failed to disclose any material fact, although (again) resort to this remedy has not been necessary to date and there is an express power enabling Bar Mutual to pay any third party claim against the barrister and recover its outlay from him/her. Otherwise, Bar Mutual must meet a claim that has been notified late or where the insured barrister has failed to co-operate with the investigation of a claim, its remedy being against the insured barrister for damages for any prejudice it has suffered. In other words, a former client making that claim will not go uncompensated.

12. Once a claim is notified to Bar Mutual, it takes over conduct of the defence of the claim. The aim is always to investigate quickly so as to form as early a view on the claim as possible and, as appropriate, to settle meritorious claims for a fair sum as soon as possible. Other than for wasted costs claims and successful disciplinary proceedings (for which there is a £350 deductible), there is no deductible applicable to claim payments. Accordingly, claimants do not need to pursue the insured for this amount.
13. Since 2007 Bar Mutual has provided as an integral part of its cover an indemnity for the defence costs incurred in disciplinary proceedings brought by the BSB where the subject matter of those proceedings is capable of giving rise to a claim for civil liability that would fall within the scope of Bar Mutual cover. Framed in this manner, this extension of cover (for which no additional premium is charged) takes Bar Mutual outside the bounds of the Insurance Companies (Legal Expenses Insurance) Regulations 1990.
14. In addition, and well beyond what is offered by commercial providers of PII, Bar Mutual's terms of cover also contain an unfettered discretion permitting it to provide cover for claims that fall outside the scope of cover or which are expressly excluded, a power that is not infrequently exercised in appropriate circumstances.
15. As set out above, Bar Mutual was first established at the instigation of the Bar Council. While Bar Mutual's articles of association permit only members of the Bar Council to vote on resolutions concerning the (re)election of Directors at its annual general meetings, those Bar Council members who attend to

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vote on those resolutions do not do so as delegates of the Bar Council and have no mandate on its behalf. Nor has the Bar Council ever attempted to exercise any sort of supervisory role over Bar Mutual's Board of Directors or Managers. Indeed, it recently confirmed to Bar Mutual that it has no intention to do so. In any event, any attempt to do so would be staunchly resisted by the Board and the Managers, in accordance with their respective legal obligations to Bar Mutual.

16. With this in mind, the fact that the Bar Council is formally the approved regulator of barristers under the Act (albeit that it has delegated its regulatory duties to the BSB) does not create any realistic conflict of interest. Any suggestion to the contrary would be tenuous at best. For example, the provision of defence costs cover for disciplinary proceedings to self-employed barristers means that Bar Mutual is in constant conflict with the BSB, which is the prosecutor in such proceedings. Bar Mutual approaches such cases with its focus firmly on the merits of each case, not with an eye to what the Bar Council or the BSB may prefer. If the insured barrister has a defence with sufficient prospects of success, Bar Mutual will support that defence vigorously.
17. In one recent case, Bar Mutual funded a successful judicial review against the conviction and disbarment of a barrister, on the basis that a BSB staff member had deliberately withheld disclosure of important evidence relating to the credibility of a key witness. The effect of the Court of Appeal's decision in that case is to expose the BSB to the substantial risk of adverse costs orders of more than £200,000. These orders (and any other litigation steps) will continue to be pursued as vigorously against the BSB as they would be against any other opponent.
18. Unlike commercial insurers, Bar Mutual is a not for profit organisation and is a company limited by guarantee. It has members; it does not have shareholders. This means that to the extent it records a surplus on its operations for any financial year, that surplus is applied to its free reserves. By doing so, the amount of premium income Bar Mutual needs to obtain from its members is reduced. A commercial insurer, however, will be expected to use its profits to pay dividends to its shareholders.

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19. That Bar Mutual is owned by its members (namely, self-employed barristers), who are also its insureds/customers, ensures that it remains close to them and is able to respond swiftly to changes in their needs. The extension of cover to the defence costs incurred in disciplinary proceedings in 2007 for no additional premium cost is an example of Bar Mutual being able to move swiftly to meet such a need. On a broader level, the coincidence of ownership and customer means that the Directors and Managers always start with a strong presumption towards finding a way to assist members. Contrary to the approach of commercial insurers (which are accountable to their shareholders and must endeavour to generate profits to fund dividend income for those shareholders), it is exceptionally rare for a coverage dispute to arise between Bar Mutual and one of its members. The absence of such disputes is not just beneficial to self-employed barristers. It is also beneficial to their former clients, the consumers of their services, who do not face the potential uncertainty and delay in the handling of their claims that invariably arises when there is a dispute between insurer and insured.
20. This responsiveness is a reflection of the fact that all of Bar Mutual's Directors are themselves members of Bar Mutual – that is, they are self-employed barristers. They are all non-executive directors. Each of them devotes considerable amounts of their valuable professional time and expertise to overseeing the conduct of Bar Mutual's business in an ever increasingly regulated environment for no financial reward; no Bar Mutual Director, past or present, receives a director's fee.<sup>1</sup> Each of them sees their Bar Mutual work as an aspect of "giving back" to the Bar and as part of ensuring that the Bar takes responsibility for remedying the incompetence of those of its number who cause loss to their clients.
21. The Directors' consistent concern for the wider public interest is demonstrated by the scope of cover provided by Bar Mutual. It has never been necessary for the BSB (or the Bar Council, prior to the establishment of the BSB) to impose a minimum terms regime on Bar Mutual in order to ensure there is PII cover of sufficient breadth to meet potential liabilities to clients of self-employed barristers. Instead, the Bar Mutual Board has always been

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<sup>1</sup> Bar Mutual's Managers, Bar Mutual Management Company, are remunerated on a commercial basis. Bar Mutual Management Company is a subsidiary of Thomas Miller, a specialist provider of insurance management services with 130 years' experience of managing mutual insurance companies in the marine liability and professional indemnity fields.

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conscientious to maintain the wide scope of cover, for the mutual benefit of its members and those who make claims against them. Moreover, this high level of protection has been achieved while simultaneously keeping the premium cost of that protection stable, low and proportionate.

22. It will be readily appreciated that Bar Mutual's membership of 13,000 is a very sophisticated and articulate clientele. It is notable, therefore, that Bar Mutual has received extremely few complaints from its members over its life of 27 years. Those received in recent years have almost invariably had some sort of connection with a single barrister arising out of his role as a service provider to Bar Mutual (i.e. he was instructed to act as counsel on Bar Mutual funded cases), whom Bar Mutual has decided not to instruct again on new cases in the future.

### *Differences between the approaches of Commercial Market Insurers and Bar Mutual*

23. The differences between the approaches of commercial insurers and Bar Mutual stem from the difference in ownership mentioned above. Bar Mutual exists to help its insured members. A commercial insurer exists to make a profit for its shareholders, whose interests will frequently diverge from those of the customers who purchase insurance from the commercial insurer. This difference particularly manifests itself in the underwriting process.
24. Rating decisions by commercial insurers are crucially influenced by the need to pay for the following four things:
  - the insurance cover itself (namely, claims and defence costs);
  - the insurers' administrative costs;
  - the insurers' profits;
  - the broker's commission or fee.<sup>2</sup>
25. Bar Mutual's rating decisions are founded solely on the first two factors listed above, no broker being required by a member in order to obtain cover and there being no shareholders that expect to be paid a dividend.

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<sup>2</sup> This is often a commission of as much as 15 percent of the premium. If the insured deals directly with the insurer, the insurer will normally charge the same premium, but keep that part of it that would have gone to the broker.

26. Secondly, the reciprocal obligation of barristers to insure with Bar Mutual and of Bar Mutual to insure barristers means that the insurance of barristers has not been impacted by the typical insurance market cycle. This can be illustrated by what has happened repeatedly in the solicitors' PII market, one example being the participation of XL Insurance in that market.
27. Having not been a meaningful player in solicitors' PII prior to the October 2008 renewal, XL entered the market and built up a very substantial market share, especially among the one to three partner section of the market. At the renewals in each of 2010, 2011 and 2012, it provided the primary layer of PII to 28%, 32% and 22% of all solicitors firms in England and Wales. In doing so, it was insuring far and away the highest number of firms. At the 2013 renewal it effectively decided to exit the market, its percentage of policies written dropping by 90% to 2% of the market. In other words, one in five of all firms in England and Wales were forced to find another insurer because of a decision of a single insurer. When the departure from the market of Balva and ERIC (due to their respective insolvencies) for the renewal is also factored in, as many 33% of firms (in other words, almost one in three) were forced to find another insurer willing to cover them.
28. There can be little doubt that the cause of XL's departure will have been that, having gained a substantial percentage of the market by pricing the cover low, it was now facing substantial claims liabilities, paid and reserved, that served to render its solicitors' book disastrously unprofitable, a position which could not be remedied by an increase in premiums.
29. The contrast with Bar Mutual is telling. Because it does not need to set loss-leader, predatory premiums in an attempt to build market share, it is able to rate solely by reference to the amount of income it needs in order to meet the claims made against its members and to meet its operational expenses. That income requirement is met by apportioning the operational expenses on a per capita basis across the membership and by setting ratings for individual areas of practice by reference to their historical claims costs.
30. This means that premiums remain stable for all areas of practice (and thus for all self-employed barristers) from year to year, unless (most unusually) there is an unexpected and severe deterioration in the claims experience for an



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area of practice. Even then, Bar Mutual does its utmost to avoid a sudden increase (or decrease) in ratings and attempts to smooth any increase over a period of years. This longer-term view is only possible because Bar Mutual has the confidence of knowing that it will continue to insure all self-employed barristers. This stability is unique to the compulsory mutual insurance model exemplified by Bar Mutual. No open market solution can provide this stability, whether to insureds or to their clients, who are the ultimate beneficiaries of the insurance cover.

### *The Consequences of Removal of the Requirement in Rule C77 of the BSB Handbook*

31. Bar Mutual believes that any removal of the requirement in rule C77 of the BSB Handbook for self-employed barristers to be members of Bar Mutual and to purchase up to the first £2.5m of their PII would have a serious adverse impact on not only Bar Mutual's ability to provide comprehensive PII cover to the self-employed Bar but also, and even more importantly, the ability of the BSB to meet three of the section 1 regulatory objectives: namely, those concerning (i) the protection and promotion of the interests of consumers, (ii) the promotion of competition in the provision of legal services<sup>3</sup> and (iii) the improvement of access to justice.
32. We deal first with the impact on Bar Mutual. Bar Mutual's premium income at the renewal for the 2014 policy year was £14.96m. The underwriting process that generated that income is as follows. Premiums are calculated by reference to (i) the fee income received by the insured during the previous calendar year and (ii) the percentage breakdown of that fee income by reference to area of practice. Bar Mutual then applies its rating schedule (which sets out the different rates for each area of practice) to (i) and (ii), which then produces a basic premium that represents the minimum amount of premium that the member will pay for cover.
33. Self-evidently, the practices of some barristers (and collectively as Chambers) generate greater premium income for Bar Mutual than others. The figures for the 2014 renewal are instructive. Of the total premium income of £14.96m:

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<sup>3</sup> In this regard, Bar Mutual would like to draw attention to the fact the LSB's competition remit relates only to competition in the legal services market. It has no role (or statutory powers) relating to competition in the PII market.

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- £9.83m (65.7%) was paid by the 50 highest-paying chambers;
- £5.46m (36.5%) was paid by the 20 highest-paying chambers;
- £3.26m (21.8%) was paid by the 10 highest-paying chambers.

34. If the requirement to insure with Bar Mutual were removed, commercial insurers would be able to, and would undoubtedly attempt to, “cherry-pick” the “good”, premium-rich risks represented by the chambers referred to above. If the 970 barristers (from a total membership of 13,000) practising in the top ten chambers referred to above were to cease to insure with Bar Mutual, the loss of premium income to Bar Mutual would be of the order of almost 22% of its total premium income. The focus of the practices of the self-employed barristers in all bar one of those ten chambers is well-remunerated commercial litigation and advice, practices which would be very attractive to commercial underwriters willing to write on a loss-leader basis in order to secure at least a toehold in the new market, notwithstanding the potential for those practices to give rise to high-quantum claims. As composite insurers, they would be able (alternatively, willing) to rely (at least initially) on other lines of insurance to subsidise those loss-leader basis premiums. Bar Mutual’s monoline status means it is unable to do this.
35. However, the adverse consequences would not be confined solely to the loss of premium income. Bar Mutual’s ability to rate by area of practice in a transparent and non-discriminatory manner would be very seriously harmed if it were not insuring all self-employed barristers. At present it is obliged to, and is happy to, “take the rough with the smooth” (as it were), since it must provide cover to all self-employed barristers authorised to practise by the BSB. This means Bar Mutual is able to rate by reference to the largest possible pool and the totality of the underwriting and claims experience of all barristers working in each area of practice, thereby enabling it to assess accurately what is a fair and proportionate rating to apply to them.
36. The transparency of this process warrants emphasis. Rating by area of practice means that every self-employed barrister declaring fee income from it has the same rate applied to that fee income. There is no subjectivity. There is no risk of impermissible and irrelevant considerations entering into the underwriting process. The process by which Bar Mutual calculates premiums

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is set out on its website and in documents available to all members. If any member queries his or her premium, it is very simple to explain in an objective manner how the premium has been calculated.

37. The contrast with the entirely opaque process by which commercial insurers would calculate premiums is instructive. It is to be noted that the lack of transparency as to how commercial insurers have calculated premiums for solicitors firms since their mutual insurance arrangements ended in 2000 has led to not unreasonable allegations of racial discrimination against small BME firms, which have found it increasingly difficult (and in some cases, impossible) to obtain affordable PII.<sup>4</sup> The clientele of such firms disproportionately tend to be vulnerable individuals who lack the ability to deal with legal problems without assistance from firms of this type. Given that firms must have PII in order to practise, the indirect effect of the operation of the current insurance arrangements, therefore, has been to restrict effective access to justice for many of the most vulnerable.<sup>5</sup>
38. Moreover, and leaving aside the risk of impermissible subjectivity in the rating process, the large number of self-employed barristers who do not earn large fees on substantial commercial matters – and whose practices would therefore be unable to generate sufficient premium income to balance the breadth of the cover to be provided – would not be attractive to commercial insurers. Almost certainly Bar Mutual would become the insurer of last resort for those lower-earning barristers, but (unlike at present) without “the smooth” of the premium income generated from the higher-earning barristers.
39. Furthermore, if it were not obliged to insure all self-employed barristers, Bar Mutual would come under considerable pressure not to insure those barristers who have poor claims records.<sup>6</sup> After all, why insure someone if you do not have to? Indeed, the Bar Mutual Board would probably be remiss and in breach of its duties to the membership if it did not attempt to weed out poor risks if the company was no longer compelled to insure them.

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<sup>4</sup> [Race bias claim over insurance for black and minority ethnic lawyers | Law | The Guardian](http://www.theguardian.com/law/2010/jun/06/black-minority-lawyers-race-row)  
<http://www.theguardian.com/law/2010/jun/06/black-minority-lawyers-race-row>

<sup>5</sup> In this regard, see the reports commissioned by the Law Society in respect of recent annual insurance renewals, especially that in 2010: <http://www.lawsociety.org.uk/policy-campaigns/research-trends/research-publications/>

<sup>6</sup> It should be remembered that it is not necessary for an insured to have had claims paid on his or her behalf (or for there to be one very substantial claim payment to have been made) for him or her to have a “bad” claims record. For example, a barrister on whose behalf no claims have been paid but whose claims has caused an insurer to pay substantial defence costs will also be deemed to be a poor risk.

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40. If these eminently foreseeable circumstances were to arise if rule C77 were amended to remove the requirement to insure with Bar Mutual, the Directors of Bar Mutual may well be forced to conclude that the only course of action consistent with their legal duties as directors and to the membership as a whole would be to wind up Bar Mutual and (ultimately) distribute the company's surplus assets, rather than to limp on and jeopardise that surplus.
41. The LSB should be under no illusion about the size of the catastrophe that would flow from such an outcome. All 13,000 self-employed barristers would need to find a new source of PII at the same time. It is very difficult to envisage how the commercial insurance market, both broking and underwriting, would be able to cope with arranging PII for 13,000 individual insureds with the same expiry date and still manage to rate the cover in the sensible and proportionate manner that is a trademark of Bar Mutual's offering to its members.
42. Turning then to the impact on the Bar of a removal of the requirement to insure with Bar Mutual, as indicated above, some would be able to find cover, although the Bar's experience of the open market in the 1980s (when the claims risks it posed were markedly lower than they are now) strongly suggests that the market would only be competitive for a very short time – and certainly no longer than it took for the claims notified on the first year of open market cover to mature towards payment.
43. Others, however, practising in less remunerative and/or more risky areas of practice, would be very likely to struggle to obtain cover and, despite satisfying the BSB requirements concerning their fitness to practise, may be forced to cease practice. As has occurred for solicitors, the insurance market would end up becoming a de facto regulator of the self-employed Bar, a state of affairs that is not sought by insurers and which would conflict with the outcomes that the regulatory objectives seek to achieve.
44. Entirely correctly, the BSB requires all self-employed barristers to have in place PII as a pre-condition of being permitted to practise. Such a requirement is not for the benefit of the barristers themselves, although it obviously serves to alleviate (at least to some extent) the risk of their having to meet a claim from their personal financial resources or being bankrupted

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by an inability to meet a claim. Rather, the justification for a duty to purchase PII is the need to protect the interests of consumers, who may have a meritorious claim against a self-employed barrister but who would struggle to enforce payment of that claim (alternatively, enforcement of payment would be an expensive and time-consuming process) if the barrister did not have PII.

45. In this context the principal concern of consumers is that there is PII of a sufficiently broad scope *available* to self-employed barristers and in place, ready to meet their claims, not only when they instruct those barristers but at the future date when (i) they advance their claims and (ii) those claims are resolved, whether by agreement or by judgment.
46. The LSB will be aware that several commercial providers of solicitors' PII, both rated and unrated, have become insolvent or have been required to cease underwriting due to the risk of becoming unable to meet claims under their existing policy commitments. Independent Insurance collapsed in June 2001, leaving many solicitors to find replacement cover (at considerable cost) in the middle of the policy year. In recent years, all of Quinn, Lemma, Balva and ERIC have had to exit the market in such circumstances, having previously provided cover to (at least) not insubstantial numbers of firms. Whether any (never mind all) of these underwriters will be able to meet the claims notified to them remains uncertain, which would be an outcome exactly the opposite of the BSB's (and the LSB's) regulatory objective to protect and promote the interests of consumers. Further, two unrated insurers (Alpha and Elite) continue to have a substantial share of the market.
47. There is no solvency risk under the current rule C77 regime. Bar Mutual is entitled to make unlimited supplementary calls on its members if it requires further capital to meet claims or to bolster its reserves to meet its regulatory capital. In reality, Bar Mutual is never likely to need to make a supplementary call. It has very strong reserves. Any surge in claims would almost inevitably take several years to erode its free reserves. In the meantime, the Board would have responded to these developments by appropriate rate increases, a reduction in the premium deferral given to members each year and the purchasing of further reinsurance. In short, provided a self-employed barrister purchases sufficient PII cover with Bar Mutual, no consumer will be deprived of compensation for loss caused by a self-employed barrister under

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the current regime. The same cannot be said for the current open market arrangements for solicitors PII.

48. If the requirement to insure with Bar Mutual were ended and commercial insurers were permitted to write the claims-intensive primary layer of PII, it is difficult to see how the BSB would be able to avoid having to establish some sort of compensation fund in order to eliminate the previously non-existent risk of claimants being unable to recover the full compensation due to them as a result of the failure of an insurer. While the Financial Services Compensation Scheme might assist in some cases, it would be very unlikely to pay out if the annual fee income of the insured barrister were to exceed £1m and, even then, any payment would be limited to 90 percent of the value of the claim, up to the limit of cover. As the LSB will be aware from its dealings with the Solicitors Regulation Authority, the additional regulatory costs involved in operating a compensation fund are substantial, all of which would have to be passed on to the profession itself, at the ultimate expense of consumers.
49. In addition, the PII must not only be *available*; it must also be *affordable* to all the self-employed barristers authorised by the BSB as fit to practise, who must purchase it. The fact that it is available and affordable is in the interests of consumers for three important reasons. Firstly, it enhances competition for legal services because PII is not operating as a fetter on the ability to practise or on the way in which the practitioner carries on practice (for example, a self-employed barrister can choose whether to set up locally by him/herself or to join a set of Chambers without having to worry about PII implications). Secondly, the lower cost of PII can reduce the cost of legal services because the practitioner's costs which he/she has to pass on in the fees charged will be lower. Thirdly, the combination of these two factors means that there is enhanced access to legal services for the poorer members of society through the availability of practitioners able to offer cheap legal services in the knowledge, in the case of Bar Mutual, that continuity of affordable PII is assured.

### *Conclusion*

50. The existing insurance arrangements for the self-employed Bar have been in place for 27 years. It is no exaggeration to say that they are the envy of other

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professions, both here and abroad. Over that period of time, in stark contrast to the disruption and not infrequent turmoil seen in the PII regime for solicitors, the hallmarks of those arrangements have been stability and security. No consumer has been left out of pocket and without an effective remedy against a self-employed barrister. No self-employed barrister certified as fit to practise by the BSB has been unable to obtain PII that is priced commensurate only with the risk posed by the areas of practice in which he or she works.

51. As such, the current PII arrangements for self-employed barristers not only do not operate as a barrier to entry into the legal services market; they are a positive aid to entry into that market. The compulsion is mutual; all self-employed barristers are required to insure with Bar Mutual and Bar Mutual must provide them with cover. Their effect is to assist the BSB in promoting competition and innovation in the legal services market because they remove PII (at least up to £2.5m) from the equation of the commercial viability of practice at the self-employed Bar. This must serve to increase the number of self-employed barristers available for consultation by consumers, which in turn promotes access to justice. Any difficulties surrounding entry to the legal services market have nothing to do with the requirements of rule C77 and its predecessors.
  52. Accordingly, it is the view of Bar Mutual that the absence of choice for the purchase of primary layer PII by self-employed barristers is not a subject that warrants the LSB's attention in the near future.
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