RESPONSE OF THE BAR COUNCIL TO THE LSB CONSULTATION - "REGULATORY INDEPENDENCE"

A. Introduction

1. This document sets out the response of the Bar Council to the LSB Consultation Paper on Regulatory Independence ("the Paper"). There is a great deal in the Paper which the Bar Council agrees with.

2. In general terms the thrust of the LSB position is encouraging. It recognises that in framing Internal Governance Rules ("IGRs") the interests of the consumer and of the public can, and should, be protected by leaving to Approved Regulators ("ARs") and their regulatory arms a considerable margin of discretion to fine tune their regulatory regimes so as to maximise independent regulation to achieve the objectives set out in the Legal Service Act 2007.

3. The Bar Council and its regulatory arm, the Bar Standards Board ("BSB"), have now worked together for over 3 years and the relationship with both has been, and is, positive and cooperative. The Bar Council accordingly strongly supports the principle of devolved regulatory responsibility. It also supports the principle that the functions of the regulatory arm must be effectively independent and that the Bar Council's rules should in a proper manner entrench that functional independence.

4. The Paper also, in a manner of which the Bar Council approves, acknowledges that there is no room for LSB "empire building"[1]; it understands that a "one size fits all approach" is inappropriate[2]. It also recognises that the LSB has no right to "reopen" the regime contemplated by the Legal Services Act 2007 ("LSA 2007") and it seeks solely to build upon that[3]. It fully recognises the implications of the B+ model of regulation which the Act enshrines and which attributes to the AR the responsibility and duty to ensure on a continuing basis both the independence and indeed the effectiveness of its regulatory arm.

5. In this response the Bar Council, as the AR, sets out its response to the issues arising in the Paper. Since this is the first opportunity for the Bar Council to address issues of principle which will govern the relationship between the LSB, ARs and regulatory arms the Bar Council has also taken the opportunity to set out its analysis of the LSA 2007 in

1 Paper para 6 of Foreword

2 Paper para 9 of Foreword

3 Paper para 2 of Executive Summary page 6

so far as it impacts upon these issues.

6. The Bar Council has summarised the key legal principles below. These are elaborated upon at Section E. Whilst the Bar Council considers that these legal principles are very important, it nonetheless recognises that at the heart of the LSB's Paper is an attempt to ensure the creation of a set of IGRs which will work in practice. And in this regard the Bar Council wishes to stress that its own experience of working with the BSB has demonstrated that a fruitful and cooperative working relationship can evolve and that the problems which inevitably arise along the way are all capable of sensible resolution in a manner which fully respects the overarching theme of the Act, namely regulation in pursuit of the statutory objectives including the best interests of the consumer.

B. Relationship between an AR and its regulatory arm.

7. Turning to the central issue of the Paper, an initial observation is that the relationship between an AR and its regulatory arm will in large measure be affected by whether the AR and its regulator share facilities and services. This is the model operated by the Bar Council and it has proven remarkably effective over the past few years. The LSB will need to reflect the fact that IGRs which might be appropriate for a model where the representative and regulatory sides of a profession are split and divorced one from the other may be inappropriate in the case of a cooperative shared services model.

8. The main issues of principle arising are:

- the duties of the AR towards its regulatory arm;
- how these are to be exercised;
- the process of delegation;
- the duties of the regulatory arm.

The duties of an AR towards its regulatory arm: Section 28 LSA 2007

9. The duty of the AR towards its regulatory arm may be expressed as a duty to create an organ of the AR which can exercise regulatory functions[4]; delegate to that organ regulatory functions; ensure that those functions are properly exercised; and protect the organ from prejudice from the representative side of the AR.

10. The Bar Council does not materially disagree with the way in which the position is described in the Paper at paragraphs 3.8, 3.9, 3.25- 3.30. The Bar Council does have a number of points of detail which it makes in later parts of this response. But, in the main, the broad thrust of the Paper is agreed with in this regard as reflecting the purpose and structure of the legislation. In those paragraphs the LSB makes the following broad points about the constitutional structures to be observed:

- The regulatory arm of an AR should have entirely delegated to it the task of controlling and managing the discharge of the AR's regulatory functions;

4 There is no obligation upon the AR to incorporate such a body.

- the regulatory arm should be insulated from the risk or reality of prejudice or undue influence from the representative side of the AR;

- the AR "*must remain ultimately responsible for the overall discharge of the regulatory functions*";

- The AR is the body "*vested with the power to regulate*"[5] and it is "*the statutorily designated approved regulator (rather than its regulatory arm*)" and "*is responsible in law for the discharge of its regulatory functions*"[6] ;

- The AR should delegate to the regulatory arm the powers free from representative control or veto to determine its own procedures and processes and to determine the strategic direction of its work;

- Under section 31 it is the AR not its regulatory arm which is the body at whom action is to be directed by the LSB where it identifies a problem;

- In regulating the ARs supervision of its own regulatory arm the LSB will avoid overly detailed rules so as to avoid a one size fits all approach which would be inappropriate[7] .

11. The Bar Council does not understand the Paper to question or contradict the clear statutory position which is that the choice of *means* to achieve the objective of independent regulation is a matter for the AR. This is evident from section 28(2)(b) and the phrase "...*which the approved regulator considers most appropriate*...". There are no doubt many different ways in which real and effective regulatory independence can be achieved and it is the duty of each AR to choose the most appropriate means of implementation. There is no "one cap fits all".

12. The Bar Council has already adopted a series of detailed rules and regulations in the form of Part One of the Standing Orders conferring upon the BSB broad powers which are, in the view of the Bar Council, largely compliant with the LSA 2007. A copy of the existing Standing Orders is annexed.

13. The Bar Council is, in addition, committed to ensuring that these arrangements work well not just in theory but also in practice and is presently engaged in a wide-ranging debate and discussion with the BSB with a view to updating and modifying these rules in light of the Act and the Paper and the views of the BSB as to the arrangements which it feels are appropriate for it to be able to perform the AR's statutory duty. This dialogue and work will continue during the period up to the promulgation of the IGRs and thereafter.

14. The Bar Council believes that a profession such as the Bar will thrive provided that the representative side has confidence in its regulatory side. This confidence can be achieved through the regulator earning the trust and confidence of the regulated community and, in turn, the regulated community learning to trust its regulator. The Bar Council thus welcomes the important statement in the Paper that "*a regulatory arm should cooperate*

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5 Paper para 3.8

6 Paper para 3.25

7 Paper para 3.26 9

constructively with its representative overarching body …". The model which the Bar Council has instituted and which it is in the process of discussing with the BSB with a view to making appropriate changes is one which, it believes, reflects both in theory and in practice this aspiration.

The continuing nature of the duties of the AR towards its regulatory arm

15. In a B+ model the duty to regulate has to be delegated to a ring fenced regulatory arm. That body has no discrete obligations imposed upon it under the Act. It carries out the duty imposed upon the AR through delegated authority. As such the duties imposed upon the AR itself become those that must be adhered to by its regulatory arm.

16. The process of delegation plainly does not enable the AR to wash its hands of its responsibilities once the initial delegation has taken place. The LSB makes this perfectly clear, for example in paragraph 3.27 of the paper: "*Delegation of* functions *cannot divest a representative-led approved regulator of its responsibilities under the Act*". On the contrary, the duty of the AR towards the regulatory arm under the Act is an important and *continuing* one. The obligation on the AR is (in broad terms) twofold. First, it is to protect the regulatory arm (from prejudice to its independence) and, secondly, to ensure its proper performance. It is worth dwelling on these two points.

17. *Duty to secure proper performance*: If the regulatory arm fails then it is the AR which is subject to censure, directions or fines under LSA 2007 sections 32-44. This is made clear also in the LSB Paper. The AR remains at all times responsible for the performance of its regulatory arm. This is also reflected in section 31 under which the LSB can impose performance targets on the AR in respect of its regulatory functions. It is a feature built into the very fabric of the Act that the AR monitors and supervises the work of the regulatory arm. This has practical implications since it raises the question of precisely how the AR carries out this process of continuing supervision. This is addressed separately below.

18. *Duty of protection of independence*: It is also to be a continuing obligation of the AR to secure, on a lasting basis, the ability of its regulatory arm to function free from prejudice from the representative side. If these safeguards to the good working practices of the regulatory arm are not met, it is once again the AR which is liable under the Act. In practical terms, in relation to a good and efficient regulatory arm, the involvement of the AR in that regulatory arm will be relatively minimal. But this is not a given in all cases and at all times, and will depend upon circumstances. The assumption that, given good regulation, the need for AR intervention will be minimal does not alter the legal duty of the AR to ensure continuing supervision.

Who acts for the AR in its continuing duty towards its regulatory arm?

19. It is clear from the Act that the AR must on a continuing basis supervise the regulatory arm both for the purpose of ensuring that it performs its statutory functions and for the purpose of ensuring its independence. The AR must therefore maintain a proper and ***continuing*** relationship with its regulatory arm.

20. The question arises as to *which organ(s)* of the AR may – on a sensible basis – best perform this role.

21. In *practical* terms, the supervisory function is unlikely to be achieved by the members of

the AR in general meeting (e.g. at the regular Bar Council or Law Society *meetings*). It is hard to envisage how those members of the Bar Council, appointed to represent specific factional interests, could realistically be in a position to perform the continuing role which statute imposes on the AR.

22. Logically therefore the elected Chairman/Vice Chairman/Treasurer (or nominees) of the AR should accept the bifurcated role of both acting for the representational side of the body and performing the duties of the AR in relation to its regulatory role. The Chairman (VC/Treasurer) is appointed by all of the members of the body by election. That appointment must perforce be on the basis that the Chairman will, on behalf of the profession, carry out its statutory duties as well as the representational tasks. In this respect the Chairman and VC/Treasurer are therefore in a different position relative to the other members of the AR. The individual members are there to represent their factional interests; collectively they appoint officers to act for the profession as a whole which necessarily includes its regulatory tasks.

23. This suggests that under *the* new statutory régime that now applies the Chair/VC/Treasurer of the AR might in the future have to define their roles differently to the manner in which they have hitherto been framed. These officials of an AR have a clear, bifurcated, role which straddles both the representative and regulatory sides and this may well need to be reflected in constitutional documents. In a profession, such as the Bar, which operates upon the basis of shared facilities, employees of the Bar Council may well be required to perform dual rules. This might be particularly the case for the Chief Executive with a responsibility for administering the organisation.

24. The Bar Council is in the process of considering how the roles of certain key officials and officers should be reformulated in constitutional terms so as to reflect in a clear and transparent manner their dual functions.

The process of delegation and the limits thereupon.

25. The Act is silent as to the actual process of delegation.

26. This is therefore a matter for each AR to resolve and it falls within the legitimate discretion of each AR precisely how this is to be achieved (subject to compliance with the overall requirements of the Act). In practice there will be numerous permutations whereby this can be achieved.

27. There are two components to the delegation. *First*, there is the delegation of the duty to regulate and this must be done in a manner which meets the statutory requirement of independence. *Secondly*, the delegation must be subject to the AR's duty to supervise and monitor.

28. The Paper reflects these two strands. In relation to the regulatory arm's role the Paper uses (in paragraph 3.9) the verb "managing"; responsibility for managing the discharge of the regulatory function should be delegated entirely to the independent regulator. The Bar Council has no difficulty with this analysis. Indeed under Part One of the Bar Council Standing Orders the terms of reference of the BSB already include the duty on the BSB: "*To be responsible for all regulatory functions of the Bar Council*".

29. The Bar Council has in its Standing Orders already imposed upon the BSB regulatory duties and, as a concomitant, conferred upon it very considerable powers. These include

powers to set up its own committees and sub-committees and confer upon the BSB a wide discretion to determine its own working rules and practices etc.[8]

30. The key provision is Paragraph 7 in Part One which provides that the BSB is "*To be responsible for all regulatory functions of the Bar Council ...".* The language adopted is important and was drafted to be all embracing, hence the use of the word "*all*". The list of regulatory functions which follows is non-exhaustive and in no way qualifies the breadth of the delegation. This very broad conferral of regulatory power must of course be read in the light of the Act which defines what is regulatory. The use of a broad and sweeping delegation has proven uncontroversial in practice and has enabled the BSB to act with confidence that there can be no disputes about the scope of its powers. Indeed pursuant to paragraph 8 in the event of a dispute about what is regulatory, the decision which binds is that of the BSB.

31. Other delegated powers of note include paragraph 7(e) pursuant to which the BSB must carry out its regulatory functions "*...in the public interest to a standard appropriate to protect the interests of consumers of the Bar's services consistently with the duty to act in the interests of justice...".*

32. Further, under paragraph 10: "The *BSB is empowered to establish such committees, sub-committees, panels and working parties as it considers necessary to enable it to discharge its functions...*".

33. The Bar Council is considering with the BSB a revision of the delegated powers so as to ensure that the BSB has adequate powers to amend its own rules rather than having to seek the agreement of the AR when it seeks alterations to the rules which govern its functions. It is recognised that a proper degree of entrenchment is appropriate.

34. The delegation of rule-making power itself will need to be subject to proper constraints. For this to occur the legitimate sphere of regulation must be defined so that the AR and the BSB in cooperation can with confidence define, with sufficient clarity and certainty, the scope of the powers being conferred upon the regulatory arm and provide for its own supervisory duties to be guaranteed.

35. The finalisation of the revisions to the rules will follow the adoption of the IGRs. This fact should not however affect the nature of the IGRs which the LSB adopts since those should be set at a high level and leave to the AR the flexibility and discretion to work out precisely how those high level principles are to be fleshed out.

Principles governing supervision by the AR

36. The second component of the delegation is the checks and balances that necessarily accompany the vesting of authority in a regulatory arm.

37. These checks and balances flow from the fact that under the Act it is the AR that is the delegator and it is the AR that remains at all times responsible for the performance of its regulatory arm. In practical terms – as the Paper observes – this translates into supervision and monitoring.

38. Once again the Bar Council does not materially disagree with the analysis of the LSB in relation to supervisions and monitoring.

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[8] Subject to certain limitations set out in Standing Orders, part One, paragraph 10

39. The LSB Paper recognises[9] that, under the Act, the AR must supervise and monitor the performance of the regulatory arm. The LSB is concerned, properly, to ensure that supervision and monitoring by the AR of its regulatory arm is done in the spirit of the Act. In this regard the LSB sets out a number of principles which will govern the AR/regulatory arm relationship:

- The AR must not "*control*" the regulatory arm and this includes ensuring that the regulatory arm is not "*controlled by people who also carry out representative functions and so who could wittingly or unwittingly act in a way that is wholly or mainly in the profession's interest*"[10];

- The role of the AR in relation to regulation is "*residual*"[11];

- The AR and its regulatory arm should maintain a "*regular and frank two way communication…*"[12];

- The representative side has a "*perfectly legitimate interest"* in the regulation of its members[13];

- The representative arm should "*always have a voice*[14];

- but it should not exercise "*control*"[15].

40. The Bar Council agrees with these principles.

Intervention and monitoring

41. The LSB Paper refers to two types of AR participation: intervention and monitoring. Under the heading "Intervention" the LSB suggests the institution of a process for commissioning strategic reviews of the structural framework[16]. It is not however clear that this is a subject for the IGRs. The IGRs insofar as they are mandatory should represent the irreducible minimum which an AR should adhere to in order to ensure regulatory independence.

42. They should not extend into "rules" which may be desirable but which are not necessary to ensure the objectives of the Act are adhered to.

43. There is in this regard a distinction to be drawn between the IGRs and the promulgation

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9 Paper paras 3.25 – 3.39

10 Paper para 3.26

11 Paper para 3.28

12 Paper para 3.29

13 Paper para 3.29

14 Ibid.,

15 Ibid.,

16 Paper para 3.31. The paper refers to such reviews being conducted on an independent basis. It might well be that the AR and its regulatory arm agree that change is needed and as to how that change should come about and this might arise quite independently of independent review. This is not therefore something which the Bar Council considers is an essential. It might well be desirable but it is not the only way in which an AR – acting reasonably – can arrive at a decision that it needs to alter its regulatory arrangements.

through non-directive means of good ideas, or examples of good practice which ARs can adapt or adopt as circumstances demand. Having said that, the Bar Council nonetheless considers the proposal to be a good idea and would seek to consider with the BSB arrangements to move this forward.

44. The LSB also suggests that if, following a review, institutional changes were made then the LSB would have to approve the new arrangements. This is provided for in Schedule 3 part 4 of the Act which also lays down the procedure by which application to alter regulatory arrangements should be made.

The extent to which the LSB has a right to be involved in supervision by the AR

45. The Paper goes on to propose how supervision should operate in practice. Two issues arise in this respect. First, the extent to which a regulatory arm must consent to intervention by the AR. Secondly, the extent to which the LSB should play a role in such interventions.

46. *Supervision only with the consent of the regulatory arm*: In Paragraph 3.30 of the Paper the LSB seeks to impose a regime whereby the AR can only exercise intervention powers with the consent of the regulatory arm. There is however absolutely nothing in the Act which fetters the responsibility of the AR in this way. Indeed, it would be a very odd principle of regulation whereby a statutory supervisor had to receive the consent of the supervised body before it could act. As the LSB elsewhere has acknowledged, the AR cannot abrogate its duty to supervise its regulatory arm. The Act in any event limits the power of the AR in this regard by requiring that it operates proportionately, transparently, consistently, etc and by enabling the regulatory arm to complain to the LSB if it so desires and/or express its concerns in the course of the self certification process. So the AR cannot act unreasonably or capriciously.[17] But there is, it is to be re-emphasised, nothing which contemplates that the regulatory arm should be permitted to consent to intervention by the AR.

47. *The interpolation of the LSB into AR supervision*: This position is not ameliorated by a rule that the AR can act with the consent of the LSB because that introduces the LSB into the equation at a point in time before that which the Act contemplates. The LSB can *respond* to a complaint by a regulatory arm that, for example, the AR's conduct is in breach of its duties under the Act (eg it is acting disproportionately or not respecting the regulator's independence) but there is no basis in the Act which permits the LSB almost automatically and pre-emptively (ie before a complaint) to insert itself into a dispute between the AR and its regulatory arm. This would not be consistent with the statutory function of the LSB as a second stage, or residual, regulator.

48. It might be said that in practice there is not a great deal of difference between the LSB responding to a complaint from the regulated arm and the LSB becoming part of the

17. The ARs powers vis à vis the regulatory arm are clearly reserve or secondary powers. So, for example, *once* the AR has delegated responsibility to its regulatory arm to regulate, the latter will enjoy a regulatory discretion with which the AR cannot *prima facie* interfere. The ARs powers of supervision will respect the fact that the regulatory arm has this discretion and action by the AR to "supervise" the regulatory arm would not be justified simply because the AR disagreed with a decision of the regulator when it was acting within its proper discretion. The AR would at all times have to abide by the statutory duty of reasonableness, proportionality, etc in its dealing with its regulatory arm. The Act equips the regulatory arms with mechanisms which will enable it to protect itself from unwarranted interference by the AR: e.g. the right separately to consult the LSB, the right of self-certification etc.

initial dispute resolution mechanism. But there are two responses to this. *First*, the Act addresses this issue and as such Parliament's intent should be respected. The Act creates a structure whereby the AR must supervise its regulatory arm and which foresees that since theoretically this process could become problematic or contentious a protective mechanism for the regulatory arm should exist, namely a complaint. *Secondly*, there are dangers that the more or less immediate insertion of the LSB into a dispute could materially affect its resolution (which it is to be hoped will in any event be resolved through cooperation between an AR and its regulatory arm) and in any event the LSB should only intervene where proportionate and necessary, which it might not be. The Bar Council would suggest that this would risk hindering amicable solutions to problems between an AR and its regulatory arm since the early intervention of the LSB might risk hardening positions because one side or the other thinks the LSB will "side with it".

49. There are exceptions which the Bar Council recognises should exist. These are: (i) the so-called "nuclear option" whereby the AR was minded to revoke the delegation granted to its regulatory arm[18]; and (ii) threats by the AR to remove or suspend one or more members of the Board of the regulatory arm.. The Bar Council agrees that it would be proportionate for the LSB to be in a position whereby it can decide whether or not it wishes to intervene and assume responsibility. This can be achieved by a requirement that an AR notify the LSB in sufficient time prior to the taking of any of the above mentioned courses of action. Then, if the LSB decided it wished to intervene it would notify the AR of that decision and thereafter the AR could not act without the concurrence of the LSB. This procedure has the advantage that it does not tie the hands of the LSB should it decide that – for whatever reason – it has no need to intervene in the affairs of the AR.

50. The alternative, which is a simple rule that such decisions can never be taken without LSB concurrence, essentially takes the residual element of discretion away from the LSB not to intervene and force it to intervene whether or not (given a free decision) it would have chosen not to. Either solution however gives the LSB ultimate control.

51. Monitoring is addressed by the LSB in paras 3.34 – 3.39 of the Paper. In these the LSB makes a number of important points:

- The LSB acknowledges the importance generally of the AR monitoring its regulatory arm and the contribution that such monitoring might make towards both better regulation and an enhancement of the confidence of the regulated community in its regulator;

- The LSB suggests that it will be important for the AR to specify its needs and to act proportionately;

- Monitoring should stop short of permitting the AR to "require" actions or omissions from the regulatory arm;

- Monitoring should not result in "burdensome" compliance mechanisms falling to the regulatory arm;

- The AR would not need more that a subset of the data that the regulatory arm itself needed for its management and governance purposes;

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18 This is the scenario referred to in Paper para 3.33

- An AR would not need to know of information about individual regulatory cases;

- More generally the AR and its regulatory arm should cooperate constructively with each other and the precise scope of that cooperation should be left to the parties to agree;

- Management and discharge of supervisory functions "might" in practice best be left with a body that is demonstrably independent of representative control.

52. The Bar Council agrees with the core of these principles but has comments on certain of them.

53. First, it is unclear quite what the LSB is referring to when it says that burdensome compliance should not be imposed upon the regulatory arm. A distinction needs to be drawn between "a" burden and an "undue" burden. The Bar Council assumes that the LSB in fact has this distinction in mind. Any supervision might entail some degree of burden. The Bar Council accepts that such "burden" should be as light as possible consistent with it being proportionate. It is also unclear why it should ever become unduly burdensome. The main ways that an AR will supervise will be through attending meetings as observer, reviewing copies of papers etc, i.e., practical steps which in and of themselves should not involve any material burden for the regulatory arm. Indeed, so far as the Bar Council is concerned, the present working arrangements between the Bar Council (as AR) and the BSB enable the AR perfectly well to exercise supervisory functions and, it is worth making the point, the Bar Council has not to date found any cause to disagree with the BSB in the exercise of its regulatory functions.

54. Secondly, the suggestion that the AR might never need to see more than a "subset" of information held by the regulatory arm is an unclear statement and may well be far too sweeping a generalisation to be accurate. In relation to individual disciplinary cases the AR might never need to see information but the same might not be true of other *broader* policy issues where the view of the AR might be of considerable value to the regulatory arm and, in order for those views to be fully informed, the AR might need to see not just a "subset" but all of the information held by the AR. At base the amount of information that might be required will be case specific and it is not possible to be prescriptive in advance. This is a matter however which will be best decided at the level of day to day relations between the AR and its regulatory arm and will be governed by the principles of the Act (proportionality, necessity etc).

55. Thirdly, in terms of a *modus operandi* for ensuring supervision and resolving disputes the papers suggests the creation of some new independent body. The Bar Council has very strong reservations about this. It does not understand how this would work without adding considerable expense and extra layers of bureaucracy. This is *par excellence* a matter for the AR to work out with its regulatory arm. Clearly there have to be controls against the representative arm controlling or improperly interfering with the regulatory arm under the cloak of supervision and monitoring but this in truth is a far-fetched prospect and not one which could arise under the Bar Council's present arrangements with the BSB.

The Section 30 test – identification of the vice which is to be avoided as a guide to the relationship between an AR and its regulatory arm

56. The Act provides, in section 30, guidance on how the AR should behave in relation to its

regulatory arm by setting out very clearly the vice which is to be avoided and which is at the very heart of the relationship between the AR and the regulatory arm. Parliament has not required a separation of powers as a means in itself. On the contrary, it has required that separation to ensure that the *representative* actions of the AR do not prejudice its *regulatory* actions. It is this severance of regulation from representation that explains the Act's requirement for the institution of a discrete regulatory arm.

57. Accordingly where any action or conduct by the AR arises *in relation to* its regulatory arm the following question (derived by inverting section 30) should be asked: Does that act or conduct in question by the AR prejudice the exercise of the regulatory arm's functions?

58. It is plain from the Act that not every action of an AR in relation to its regulatory arm will "*prejudice*" the regulatory arm's legitimate functions. The question therefore in a given case is *not* is the AR *intervening* in the regulatory arm or even is it *prejudicing* the regulatory arm? On the contrary the pivotal question has two cumulative components to it. These are: is the AR intervening in a way that (a) *prejudices* the regulator (b) where the "prejudice" emanates from the representative side? The two stages to this question are very important. The way in which Parliament has framed this issue reflects the fact that an AR will necessarily maintain a supervisory role over the regulatory arm and to that extent some intervention is inevitable in the workings of the regulatory arm *but* the vice to be avoided is undue prejudice *by virtue of* the AR's representative activities.

C. Some logistical issues relating to implementation.

59. In this Section the Bar Council addresses some practical issues arising.

Funding

60. Parliament has conferred upon the AR the responsibility for ensuring that its regulatory arm receives adequate funding but made this subject to a test of reasonable practicality. In practice the Bar Council has worked with a cooperative and consensual set of procedures designed to reconcile the BSB's need and right to genuine independence and the inevitable constraints brought about by budgetary limitation. These arrangements have worked well and, as has already been pointed out, the Bar Council as AR and the BSB are engaged in a detailed review of these arrangements with a view to their improvement and updating in the light of experience.

61. The proposed IGR rules of an AR require each AR "*to take 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*": section 30(2)(3)(a). Whilst the AR must take *reasonably practicable* steps to provide adequate funding the regulatory arm is entitled to *reasonable* funding. This necessarily means that that AR has discretion and must exercise judgment. Its decision can be challenged but only on "Wednesbury" or other acknowledged principles of administrative law.

62. To this extent the suggested Rule 3 (on independence of arrangements) goes too far in conferring upon the regulatory arm "authority" for resourcing. This is too simplistic in the case of a shared services profession, such as the Bar. The regulatory arm does not under the Act have "authority" to set its own budget and then require that the pre-determined sum be handed over. As is recognised elsewhere (eg in Rule 5) the exercise of budgetary resolution is more complicated and requires a much more cooperative approach to be adopted in balancing reasonable need with reasonable practicability.

63. Most importantly, on this basis both the AR and the regulatory arm have commensurate rights and obligations and the AR must act reasonably towards its regulatory arm and provide reasonable resources, but subject to reasonable practicability. The regulatory arm has the right to receive reasonable funding but again subject to reasonable practicability.

64. There necessarily has to be close cooperation between AR and regulatory arm in the resolution of resources issues and this is especially the case where shared services and resources are a feature of the AR and its regulatory arm.

65. The proposed Bar Council/BSB solution of an expanded Finance Committee that deals with resources more generally will enable the rights and interest of both AR and regulator to be worked out. In the event of a disagreement a "two chairs mediation" solution (possibly involving an independent third party as well) should serve to resolve most if not all outstanding disputes. And if that fails either party can resort to the LSB as a tie breaker. The present arrangements for governing finance are set out in the Bar Council's Standing Orders at Part three and Annex A. They have worked well in practice.

66. As with other issues arising, the fact that the Bar Council and the BSB are cooperating fruitfully does not warrant anything other than broad based principles to be adopted in the IGRs. The detail is a matter to be worked out as between the AR and its regulatory arm.

Participation by the AR in regulatory arm meetings: transparency and accountability

67. The regulatory arm must in regulating act in a consistent, transparent and accountable manner. These are duties that it owes to its regulated constituency and to the wider public. The Act does not specify how these duties are to be satisfied and, again, this is therefore a matter for the legitimate discretion of the AR's regulatory arm.

68. The Bar Council is of the view that transparency and accountability can be achieved between any AR and its regulatory arm that function well and cooperatively together by mutual presence at meetings and access to relevant information. The LSB Paper indeed acknowledges that there should be "fruitful" communications between the AR and its regulatory arm. A fruitful interflow of ideas and views will serve to improve the quality of regulatory decision making.

69. It goes without saying that such participation has of course to meet the section 30 acid test: it must not result in regulatory decisions being prejudiced by the representative side or otherwise leading to a compromise of independent decision-making.

70. Rules and procedures can cater for this, the most obvious being (i) as to who can attend for the AR (e.g. Chairman, VC, Treasurer, CEO, etc); (ii) rights of participation (i.e. to receive papers in advance, to speak but not to vote); and (iii) exceptions to rules (eg where the BSB needs to discuss issues entirely *in camera*). These rights serve a number of purposes: to improve confidence in the regulatory arm's decision-making; to improve the quality of the decision-making; to enable the AR to be appraised of matters arising so that it can satisfy its own statutory duty of supervision.

71. The Bar Council's present way of working with the BSB reflects these principles but, as already observed, they are presently under review and new rules will be introduced following the adoption of the IGRs.

Appointments

72. The Act is silent as to the *modus operandi* of appointments. As such this is also *prima facie* a matter to be resolved by the AR itself, but of course again by reference to the statutory principles.

73. Does the AR have a role in actual selection panels? The answer to this must be "yes" since it is the AR which is directly responsible for the regulator's performance and the AR therefore has a legitimate interest in the persons who will discharge the AR's duty in regulatory matters. The AR cannot abrogate its responsibility in this regard.

74. This is reflected in the LSB Paper which makes clear that the AR should participate in appointments but should not "*control*" the process.

75. The main points arising in the Paper may be summarised as follows:

- appointments should be made on the basis of merit, independent scrutiny, equal opportunity, probity, transparency and proportionality etc;
- appointments should not be made upon the basis of election or nomination;
- there should be no limitation on selection of chair/equivalent on the basis of the holding of qualifications;
- it is acceptable to make provisions about the balance of lawyers/non-lawyers to sit on the Board
- unless statute requires otherwise boards should have an in-built majority of non lawyers;
- panels charged with selection should be independent of the representative side;
- the AR should participate in the process but should not control it;
- non-lawyers should be in the majority on selection panels;
- objective appraisal processes should be put in place.

76. The Bar Council is generally comfortable with these principles and has only a few observations to make on this.

77. The Bar Council's points are as follows.

AR participating on selection panels

78. *First*, the Bar Council as AR endorses the LSB paper to the effect that the AR must have the right to participate but not control any panel. Subject to this it is the Bar Council's view that the mechanics of appointment are otherwise for the BSB to determine upon the basis that in any event the BSB would adhere to best regulatory practices in setting up such panels.

79. In practical terms the Bar Council's position is that the Chairman of the Bar Council (as the elected official with responsibility for (inter alia) ensuring the independence of the

regulatory arm (or an alternate) is the person who should be on panels. He (or she) would be one out of a quorum of (probably) 5 or 7. He or she could thereby easily be outvoted and there is no sensible prospect of the representative side being able directly or even indirectly to "control" the process or exercise undue influence. The Chair will sit wearing the AR hat as supervisor of the regulatory arm. This is a proportionate and reasonable means of enabling the AR to ensure observance of its supervisory obligations.

80. This would of necessity extend to re-appointments as it would apply to initial appointments. This must follow from the continuing duty of the AR to supervise and monitor the regulated arm. Again, given that the Chair would or could be a minority of one there is no real prospect of control. In practical terms the Bar Council has agreed with the BSB that a slightly different procedure would be adopted for re-appointments whereby the Chair of the AR and the Chair of the BSB would attend such re-appointment meetings and have a voice *but no vote*.

81. As to arrangements for convening panels and for fixing the constitution thereof (save for the Chairman of the AR) the Bar Council would agree, as is set out above, that this is essentially a matter for the regulatory arm to determine subject to the principles referred to in the Act.

Lawyer/lay majority; lawyer/lay chairs.

82. Secondly, in terms of lay majorities the Act is silent as to whether regulatory arms should be subject to lay or legal majority or whether this is simply a matter for the judgment on a case by case (best person for the job) of the regulatory arm.

83. The LSB seems to suggest that the principle should be lay majority. There is however no basis at all for this in the Act. In the Paper[19] the LSB reverses the logic of normal statutory interpretation. It says that in the absence of an indication in the Act that requires lawyer majority, non-lawyers' majority should prevail. The LSB is thus inserting into the Act a presumption that lay majorities should prevail, but no such presumption exists in the Act.

84. There are serious legal and conceptual difficulties with this position.

85. First, since the governing principle should be that in section 30 of the Act the question should be asked whether, if a regulatory arm's committee has a legal chair, its independence from the representative side is prejudiced or otherwise suffers a conflict of interest? The answer has to be "no".

86. On this basis it is hard to understand why as a matter of principle lay majorities should be a *required* norm. Even applying a slightly broader (and non-legal) test, could it be said that there would be a public perception that the regulatory arm was in some way deficient? The answer must also be negative, since any reasonably well-informed observer would see that the regulatory arm had the necessary independence and would (in any event) have a substantial representation from lay persons. A well-informed observer might actually consider it surprising that in regulating a profession where very complex and sensitive issues of rights of access to courts and to justice, preserving the independence of the legal profession, increasing public awareness of citizens' legal rights etc (*pace* section 1), that lawyers were not at the helm at least in certain respects where

[19] Paper para 3.15 first bullet point. 25

complex legal issues habitually arose. At all events the test in the Act is not public perception.

87. The second point is that the requirement to have non-lawyer majorities is illogical and risks biasing selection panels *away from* the best person for the job. It also risks creating real anomalies. Under the Act a lawyer is someone who is legally qualified. But that does not mean that such a person is necessarily not "lay". There are innumerable persons in public life, in academia or in business, who are legally qualified but who will have spent a good part of their working careers acting in non-legal roles. These persons – who might more properly be described as hybrid – might well be *precisely* the sorts of person who the BSB might desire most to participate on committees and Boards. But they would risk being excluded simply because they had a legal qualification. It would be ridiculous if that person were disqualified because after (say) 20 years not practising that person were labelled a lawyer and precluded from standing.

88. The short point is that the distinction is artificial. The Bar Council's position is therefore that it is wrong in law to specify that there should be non-lawyer majorities. The Bar Council considers that the correct legal answer is that the composition of committees and boards is a matter for the discretion of the regulatory arm who will seek to select the best person for the job. If that means lay majorities then so be it. The Bar Council can see no objection to a requirement that there be a substantial or significant lay representation but it should also be understood that a person is not to be disqualified as being "lay" simply because they had the misfortune to be qualified as a lawyer some 30 years earlier.

89. In this regard the Bar Council should not in any way be seen as being in opposition to lay participation. On the contrary, the Bar Council recognises that if the BSB decides, in the exercise of its regulatory judgment, that lay majorities should be the norm then that would be entirely proper. But the crux of the issue is that what qualifications govern a majority is a matter for the discretion the regulatory arm. It is not something that Parliament has mandated.

D. <u>LSB internal governance rules</u>

90. The points made above determine the Bar Council's view of the proposed IGRs. The Bar Council's view is also informed by the legal analysis set out in Section [E] below

91. Under section 30 the LSB must make internal governance rules. These rules are to lay down "requirements" which ARs must adhere to. The views of the Bar Council to the draft IGRs are evident from the text above.

92. More specifically, the Bar Council would make the following broad points about the draft IGRs:

    (a) The Bar Council approves of the general tenor of the draft IGRs which are to set out as high level principles the requirements to be followed;

    (b) The Bar Council approves of the fact that in the main the IGRs are designed to reflect the statutory framework

    (c) The Bar Council also approves of the recognition that some issues may very well be better left to guidance rather than rules.

E. Overarching Legal Considerations flowing from the LSA 2007

The role of the LSB

93. As explained at the start of this response, the correct legal analysis is an important underpinning to the debate set out in the Paper. This involves not just an analysis of the legal relationship between the AR and its regulatory arm but also an analysis of the legal relationship between the AR (including its regulatory arm) and the LSB. This analysis informs the discussion as to the correct level of detail at which to pitch IGRs.

94. The LSB is required under section 3 to act in a manner which is compatible with the regulatory requirements listed in section 1(1)(a)-(h). It also has a duty to ensure that in the exercise of an AR's regulatory functions no prejudice arises from the representative functions of that AR: section 29(2).

95. The LSB in its Paper recognises that its role is secondary. It describes itself as having an "oversight" role (Paper para 2.6). It makes the valid point that if ARs perform their roles properly then the LSB will have little role to play.

96. These conclusions are correct and reflect the legal implications which flow from the LSA itself. The Bar Council successfully fought for appropriate checks and balances to be included in the Act, and the legislation as adopted reflects the results of those struggles. In administrative law terms the question might be asked - when under the Act is the LSB entitled to intervene in relation to the decisions and actions of the AR? The "AR" in this context means, for most practical circumstances, its regulatory arm, in the case of the Bar Council this of course is the BSB.

97. There are a number of clear limitations upon the ability to act which are imposed upon the LSB by the language of the Act.

The limitations on the powers of LSB in relation to an AR

98. It is clear from the Act that the LSB does not have a free hand to intervene, *even if* it finds itself in disagreement with an AR or its regulatory arm. There are three overarching limitations upon the powers of the LSB. These apply not only to cases of possible individual intervention but also govern the extent to which the LSB can adopt IGRs.

(i) Implications of the B+ structure

99. *First*, the powers of the LSB must be understood in the context of the fact that Parliament deliberately selected the B+ model of regulation and enshrined it in statutory language. This is key to an understanding of the powers and duties of front line regulators – the ARs – whose specific statutory duty it is to regulate providers of legal services.

100. The LSB is not therefore a primary regulator; its powers and duties are to be understood as default or secondary. This is reflected not only in the inferences which are necessarily to be drawn from the very structure of the Act, but also from the manner in which the LSB's role is defined. By way of illustration in relation to standards of regulation and

education and training the duty of the LSB is simply to "assist", there is no right to "devise": see section 4 of the Act. The B+ point is very important since it is the backdrop against which the LSB must measure the need or proportionality to intervene or act in any particular case. The IGRs should therefore reflect the fact that it is the AR that has the day to day responsibility for regulation.

101. In large measure the Bar Council accepts that the draft IGRs set out in the Paper reflect this principle. They are set at a high level of principle thereby leaving it to individual ARs to fashion specific rules which meet their individual needs.

(ii) Implications of reasonableness requirements

102. *Secondly,* the ability of the LSB to intervene is also limited because, when allocating responsibility to the AR, Parliament has used language which makes it clear that the AR has a discretion as to how it acts. It is important in this respect that the separation of powers operates as between the LSB and both (a) the AR itself and (b) the regulatory decisions of the regulatory arm, here the BSB.

103. In relation to the regulatory decisions of the AR (ie the BSB) Parliament has conferred upon that regulator a broad discretion. Thus, for example, in discharging its regulatory functions the AR (here meaning the BSB) must: "*so far as practicable"* act in a way which is compatible with the regulatory objectives (Section 28(2)) "*have regard to the principle of*" proportionality, accountability, consistency and necessity etc (section 28(3)(a). This is statutory language which makes it plain that the BSB has a traditional margin of appreciation to take those decisions which it considers appropriate. The breadth of that discretion is supported by the nature of the principles which under section 28(3)(a) the BSB must have regard to . It is not, as a matter of ordinary administrative law, therefore open to the LSB to question those decisions save in exceptional circumstances where the BSB has acted in an unlawful manner. It follows also that the LSB cannot adopt IGRs which trespass upon that legitimate discretion which has been accorded to the AR's regulatory arm.

104. In terms of the relationship between the AR and the LSB, it is therefore clear that Parliament has not accorded to the LSB the right to interfere in front line decision making of the AR simply because the LSB might disagree. This is, or should be, trite law. For every regulatory issue there may be more than one reasonable solution; there may indeed often be a wide range of acceptable but quite different regulatory solutions. The fact that the BSB adopts solution A does not entitle the LSB to require solution B to be adopted simply because it prefers it, *unless* the LSB can show that the BSB has acted in an irrational way as that term is understood in administrative law.

105. The short point is that the ARs are, by virtue of their close proximity to the market place, far better placed to measure how the various regulatory requirements should be balanced one against the other.

106. There may very well be circumstances where different policy objectives in section 3 are mutually inconsistent e.g. consumer interest and competition (in the form of lower prices) on the one hand as against improving access to justice, promoting the rule of law, encouraging independence, diversity etc on the other hand (which might suggest higher prices). The point is further made by the fact that the "consumer" in the context of the legal system is extremely heterogeneous. A consumer might be a middle-income couple conveying a house but it also includes a defendant facing prosecution or a victim of

crime seeking justice from the judicial system. The consumer is very often not the payor and often is therefore disinterested in price. The very nature of the judgment calls that the Act requires regulators to make will limit the ability of the LSB to intervene or to seek to impose its judgment over that of the ARs themselves. These are decisions which fall within the legitimate discretion of the AR and cannot be second guessed by a third party such as the LSB *unless* the decision is unlawful in an administrative law sense. In the exercise of its duties the AR and its regulatory arm of necessity have to take decisions respectively which are ones of "judgment". So, for example, in taking decisions the BSB may take decisions which reconcile the often conflicting regulatory objectives in section 1 and it may have to exercise judgment in deciding what is proportionate, or necessary within section 28(3).

107. Once again the Bar Council acknowledges that in very large measure the draft IGRs do reflect this principle; they are high level and leave to individual regulators the exercise of specific regulatory discretion.

108. In relation to the AR itself (as opposed to its regulator arm), the AR must secure regulatory independence so far as "*reasonably practicable*" (section 28(2) and section 30(2)(b)). The Act makes it clear that the person who decides what is reasonably practicable is the AR who must act in a way "*which the Approved Regulator considers most appropriate*" (section 28(2)(b)).

(iii) Transparency, accountability, necessity, consistency, targeting etc

109. *Thirdly*, the LSB itself in discharging *its* regulatory functions must have regard to: "... *the principles under which regulatory activity should be transparent, accountable, proportionate, consistent and targeted only in cases in which action is needed...*": (section 3(3)).

110. Two of these requirements in particular are significant in serving to limit the lawful right of the LSB to intervene. The requirements of proportionality and targeting are especially important since they both impose actual limitations on what the LSB can and cannot do.

111. Proportionality (broadly) means that the LSB must before it acts (i) identify the (legitimate) object to be achieved and (ii) ensure that the means used to achieve that object are the least intrusive to those affected as possible. To cite Lord Diplock, the LSB should "*not use a sledgehammer to crack a nut when a nutcracker would do*".

112. Targeting means that regulatory action must be as focused as possible. The word "only" in section 3(3)(a) is important. The LSB must establish a need; it can "only" act where there is a "need".

113. The application of these principles in practice is plainly affected by the B+ structure of the Act and the scope of the discretion conferred upon ARs (see above) since where there is a front line regulator which has the principal responsibility for regulation the proportionality or need for LSB action is very greatly reduced. The LSB cannot therefore act where the ARs are acting, since to do so would be neither proportionate nor needed.

114. Once again, it is not the Bar Council's position that the draft IGRs offend against these principles and the fact that they posit high level principles is a proper reflection of the statutory régime.

(iv) The position of the LSB?

115. An omission from the paper is as to the means by which the LSB proposes to satisfy its own duty of transparency and accountability imposed upon it by section 3 of the Act. The LSB plainly has views as to how ARs should seek to achieve transparency and these obligations should apply with equal force to the LSB.

116. For example, there is no clarification in the paper as to how the LSB proposes to make any of its board and other papers available to ARs, or indeed the public. There is no explanation of how the LSB proposes to satisfy the ARs that it is not overspending. The LSB will understand the many reasons why this is important.

117. First, given that the LSB has the right in appropriate circumstances (discussed above) to intervene in the conduct of the AR and its regulatory arm then there must of necessity be a properly defined relationship between the LSB and the ARs. Part of that relationship will depend upon each regulator (LSB and AR/regulatory arm) maintaining open relationships with each other and the public at large and having a fair and reasonable understanding of the operations and thinking of the other.

118. Secondly, the costs of the LSB will be passed on to ARs and ultimately to practitioners who will treat these costs as practice costs to be passed on, in due course, to clients and consumers. The regulated community who will bear these costs, and of course consumers, should be able to know as much as they can about the workings and thought processes of the LSB.

119. The Bar Council would welcome clarification upon these important issues.

F. Answers to Questions

120. Question 1: See above. See also the Bar Council existing Standing orders. The regulatory arm should have delegated to it the duty to perform "*all* "regulatory responsibilities on behalf of the AR. Drafted in such broad terms a delegation necessarily includes within it all such matters as are to be performed by the independent regulatory arm under the Act. This includes the "strategic direction" to be adopted by a regulator in the performance of its duties. The practical arrangement should then be left to the AR and its regulatory arm.

121. Question 2: See comments above at paras 72-81.

122. Question 3: No – see above at paras 82-89.

123. Question 4: In large part we pick this up at paras 60 and 66, and in particular our proposals at para 64 are likely to be a consensual way forward for the AR and its regulatory arm. Concern remains over paragraph 3.22, 2nd and 5th bullets. The line management freedoms of the regulatory arm are in law circumscribed by the legal obligations of the AR as the employer. For instance the proposal that the regulatory arm has an effective right to change staff terms and conditions risks prejudicing the statutory employment obligations of the employer. More generally, it is inappropriate to address in the IGR detailed issues about the day to day operation of an AR. In the case of the Bar Council – as has been explained in the text above – work is underway to expand the

operation of the Finance Committee so that all of the respective rights and obligations of BSB and AR are properly respected and implemented. The Bar Council suggests that in practice the risk of problems arising will be remote.

124. Question 5: The Bar Council agrees that the IGRs should be limited to broad principles and that guidance from the LSB is the optimal way to address other issues.

125. Question 6: This vital theme runs throughout our response, and informs the analysis from paras 19 to 58.

126. Question 7: Subject to the IGRs and guidance (see our response to Q5) being acceptable both to the AR and its regulatory arm, the Bar Council supports the notion of dual certification.

127. Question 8: If a dual self-certification model was to be adopted, we would expect it to work well. In practice, one might expect the most likely cause of any local disagreements to involve resources, for which the resolution procedure described at paragraph 65 was designed.

128. Question 9: Yes, subject to the overriding requirement of reasonable practicability.

129. Question 10: No.

130. Questions 11 – 16: We agree the approach you take at para 4.18 in terms of the impact on budget cycles of ARs. But at present it is difficult to see how the Bar Council's detailed annual budgeting process can be shoe-horned into a new process involving a possible additional consultation exercise and an application to the LSB. This has particular implications for our ability to deliver the sensible proposal for transparenrcy at para 4.21 (with which we agree). The greater the pressure in the cycle, the less likely will be any meaningful dialogue with our 'authorised persons'.

A further one-on-one exercise is likely to be required on almost all aspects of an AR's Application to the LSB. For example, it is arguable that the additional demands of the LSB for a full Application every year for every AR will be both disproportionate and beyond the realistic capacity of the LSB to deal with. For early discussion should be the need for any annual Applications, notwithstanding the points you make at para 4.15. It is noteworthy that in some respects we already satisfy your transparency and outreach objectives by the level of detail in our 2008 Annual Report and Accounts (see p49), which is widely available to stakeholders.

131. Question 17: We contributed to your original draft proposals, and look forward to commenting on the rules as amended by our comments above.

132. Question 18: We note the draft impact statement, and look forward to commenting on further changes.

133. Question 19: We would expect to respond to the outcome of your consultation in July, and in that regard we are content for you to publish our comments.