BAR
STANDARDS
BOARD

REGULATING BARRISTERS

Response to the Legal Services Board consultation on Regulatory Independence

1. Introduction and Summary of Responses

1.1 References in this response in square brackets are references to the Paragraphs in the LSB's Consultation Paper ("the Consultation").

1.2 The BSB responds fully to the Consultation and the questions asked by the LSB in the balance of this Response, but in summary, its response to the specific questions are as follows:

Q1 How might an independent regulatory arm best be 'ring-fenced' from a representative-controlled approved regulator in the way we describe (i.e. requiring a delegation of the power to regulate processes and procedures; and the power to determine strategic direction)?

The independent regulatory arm must be ring-fenced from a representative-controlled AR by a process of complete delegation of regulatory powers. Once delegated, the exercise of regulatory powers must be free from representative interference, undue influence, control or veto. Subject only to (a) residual oversight; and (b) the unavoidable duality of some functions within the B+ Model, the ring-fencing of the regulatory arm must be complete.

Q2 What do you think of our proposals relating to regulatory board appointees, set out under paragraph 3.15?

The BSB supports the LSB's proposals set out in [3.15], but believes that the core principles relating to appointments should be included within the IGRs themselves.

Q3 Is it necessary to go further than our proposals under paragraph 3.15, for example by making it an explicit requirement for the chairs of independent regulatory boards/equivalents to be non-lawyers?

Providing that the IGRs set out the core principles relating to appointments, the BSB does not consider that there is any need to go further than the proposals set out in [3.15]. The BSB does not consider that it is necessary to make an explicit requirement that the chair of a regulatory arm be a non-lawyer for the same reasons as underpin its reasons for opposing a requirement that the regulatory board of an AR should have an in-built majority of non-lawyers (see Paragraph 3.21 below). It is likely that the regulatory boards will choose to have a non-lawyer chair, but they should not be required to do so.

Q4 Do you agree with our proposals in respect of the management of resources, including those covering 'shared services' models that approved regulators might adopt? What issues might stand outside such arrangements as suggested in paragraph 3.22?

Subject to the points made in the body of this Response, the BSB agrees with the LSB's proposals in respect of the management of resources and the shared-services model. The two areas that the BSB believes should to stand outside the framework envisaged by [3.22] are pension provision (identified in [3.23]) and the employment issues identified in Paragraphs 3.29.4 and 3.29.9 below.

Q5 Is our proposed balance between formal rules and less formal (non-enforceable) guidance right? In what ways would further or different guidance be helpful?

The BSB considers that the proposed balance between the IGRs and guidance is appropriate and, as the guidance issued by the LSB can be updated and modified without the need for a cumbersome process of amendment of the IGRs, provides the advantage of increased flexibility.

Q6 What are your views on our suggested permitted oversight role for representative-controlled approved regulators over their regulatory arms? Are practical modifications required to make it work?

Subject to the comments made below about the exercise of residual oversight (Paragraphs 3.44 to 3.47 below), the BSB submits that the LSB's regulatory regime should be flexible enough to permit the current cooperative relationship between the Bar Council and BSB to continue unchanged. It clearly works, is well understood and readily accepted, enhancing the integrity and credibility of the profession. The BSB respectfully doubts whether there is need or would be value in structured monitoring, accountability or review arrangements of the kind laid out in the LSB's consultation document. The same – indeed arguably better – results can be achieved more easily and more effectively without them.

Q7 In principle, what do you think about the concept of dual self-certification?

The BSB supports the dual self-certification proposal.

Q8 If a dual self-certification model were adopted, how should it work in practice? Or would alternative arrangements be more appropriate, either in the short or longer term?

The BSB envisages it operating along the lines suggested in Paragraph 3.50 below.

Q9 Do you agree that the mandatory permitted purposes currently listed in statute should be widened to include explicit provision for regulatory objective (g), i.e. –increasing public understanding of the citizen's legal rights and duties?

The BSB welcomes and supports the proposed widening of the permitted purposes to include the regulatory objective of "increasing understanding of the citizen's rights and duties".

Q10 Should any other (general or specific) purpose be permitted under our section 51 rules?

No.

Q11 What do you think about our proposal to seek evidence that links to the regulatory objectives in the Act?

The BSB does not agree with the proposal in [4.13]-[4.17] of the Consultation that it should supply information in connection with its practising fee application that attempts to show how the proposed fee itself links to the regulatory objectives. It is the BSB's strategy and business plans that have to link with the regulatory objectives. The practising fee will merely be one of the sources of finance to fund its business plans.

Q12 What criteria should the Board use to assess applications submitted to it?

The BSB considers that the criteria that the LSB should use to assess fee applications should include:

- adherence to permitted purposes;
- how far prior year regulatory plans have been achieved and what remains to be delivered;
- achievement of value for money in expenditure on permitted purposes;
- extent to which other sources of income used to fund permitted purposes have changed or are forecast to change; and
- any exceptional necessary funding required as a result of legislation or unforeseeable requirements.

Q13 If they are adopted, what should Memoranda of Understanding between the Board and approved regulators contain? For approved regulators in particular, are there any particular implications for your organisations?

The Memorandum of Understanding might include:

- the timetable;
- the documents required to support a fee submission; and

- the criteria to be used in assessing an application.

Q14 Should there be a requirement on approved regulators to consult prior to the submission of their application each year – and if so, who should be consulted, and on what? Should there be a distinction drawn between approved regulators with elected representative councils or boards; and those which have no such elected body?

The BSB considers that a requirement to consult is appropriate. For ARs like the Bar Council and the Law Society that have elected representative councils or boards, the main (but not exclusive) consultees would be those expected to pay the fee. It would be appropriate, however, for the regulatory arms to receive consultation responses from any relevant stakeholders.

Q15 What degree of detail would be most appropriate to require when seeking to maximise transparency but be proportionate in terms of bureaucracy? Have we got the balance right?

The BSB considers that the LSB has got the balance right in its proposals.

Q16 Are there any issues in respect of practising certificate fees that you think we should consider as part of this consultation exercise?

No.

Q17 Please comment on our draft proposed rules, both in terms of the broad framework and the detailed substance.

See comments below in Section 5.

Q18 Are there any comments that you wish to make in relation to our draft impact assessment, published at Annex C alongside this consultation paper?

No.

Q19 Are there any other issues that you would like to raise in respect of our consultation that has not been covered by previous questions?

No.

2. The need for rules

2.1 Sir David Clementi's *Review of the Regulatory Framework for Legal Services in England & Wales*, December 2004 ("the Clementi Review") considered the various regulatory models that might be adopted to ensure greater transparency and protection of the public interest. The alternatives presented ranged from the establishment of an entirely separate regulatory body for the legal profession (Model A) to retaining the existing front-line regulators (Law Society, Bar Council, etc.) but making them subject to the oversight of a new Legal Services Board (Model B). Within Model B, consideration was given to requiring each of the front-line regulators ("FLRs") to separate their regulatory and representative functions (the so-called B+ Model).

2.2 The B+ Model has many advantages – retention of expertise, maintenance of the confidence of the profession, but mainly in economies of scale – in delivering proportionate regulation. The main disadvantage is that without proper and entrenched ring-fencing of the regulatory function, there may be actual or perceived prejudice to the independence of the regulatory arm and consequent diminishing of public confidence in the B+ Model. The ring-fencing must be sufficient to command public respect and withstand public scrutiny to demonstrate that the regulatory arm is acting in the consumer interest, free from any undue influence from the representative arm. The challenge is to achieve such ring-fencing while retaining the benefits of the B+ Model.

2.3 The LSB has correctly identified (in [2.3]) Clementi's view of the effect that this potential conflict of interest has on public confidence in the regulatory regime. The conclusions of the Clementi Review have been set out in Paragraph 4 of Annex B of the Consultation. For present purposes, the BSB notes that the Clementi Review recommended separation out of the regulatory function from the FLR.

2.4 We share the LSB's view that the legislative history of the relevant sections of the LSA provides valuable insight into the intended purpose of the Internal Governance Rules ("the IGRs"). Included in the Annex to this response are some further aspects of the history to the LSA that the BSB considers have relevance to the issue of regulatory independence.

3. Section 30: Internal Governance

3.1 **ss.29-30** LSA have been set out in Annex A to the Consultation.

3.2 The BSB considers that IGRs must set out the clear principles of independence and separation of functions against which the internal arrangement and rules of the ARs must be measured. The clearer the principles of entrenched independence and separation of regulatory/representative function in the IGRs, the more likely it is that the regulatory arms of the ARs will be able to discharge their regulatory function without prejudice from the representative function and, correspondingly, the less likely that it is that the LSB would need to intervene in the regulatory functions of the ARs.

3.3 Against this background, the first question to be addressed is the level of specificity that should be adopted in the IGRs. Although it might be possible to attempt to draft very detailed rules, the BSB's view is that such an approach would be inconsistent with the statutory objectives identified and would also be impractical and undesirable for two further reasons:

3.3.1 It is unlikely that very detailed rules would be appropriate given the very different functions and structures of the ARs.

3.3.2 The Regulatory Objectives of the LSA can be proportionately met with IGRs which operate at high-level principle and leave detailed rules to be moulded by each AR which are appropriate for that AR. As was observed in the Clementi Report (Chapter B §29(c)) "... the need for consistency in the regulatory regime should not be equated with uniformity, the requirement that an identical set of rules should apply to all lawyers." This was endorsed in the *White Paper* (§5.2):

> "... we recognise that [the demonstration of clear separation of functions] may present practical difficulties for smaller [ARs]. It will be for the LSB to consider suitable arrangements that maintain the integrity of this principle but also provide for the challenges faced by smaller [ARs]."

3.4 From a practical point of view, the adoption of high-level principles in the IGRs would also permit the LSB to monitor and review their efficacy and to supplement or amend the principles in a responsive, proportionate and evidence-based manner. An overly prescriptive or detailed set of IGRs runs the risk of the LSB being seen to be micro-managing the regulatory role which is not consistent with the objectives of the LSA (see Baroness Ashton's observations during the passage of the Bill: Hansard, 22 January 2007, column 907). The BSB considers that there is scope for the LSB to adopt IGRs which embody such high-level principles and, where necessary, to supplement these with further guidance.

3.5 **s.30(1)** LSA sets the *objectives* of the IGRs and **s.30(3)** sets out two specific matters that the IGRs must contain. Beyond those, it is a matter for the LSB to determine what the IGRs should contain to achieve the required objectives.

3.6 The BSB agrees that the IGRs must go further than merely replicating the effect of the high-level requirements of **s.30** itself. If Parliament had intended that there should merely be the very high-level requirements set out in **s.30** itself, then **s.30** would not have required the making by the LSB of the IGRs. Making such rules would be otiose if they were merely going to replicate what is already in the Act. The clear intention in the requirement of making such rules must be to set out more specific requirements which will ensure that the purposes identified in **s.30(1)** are achieved in practice.

3.7 The BSB considers that it is possible to identify key indicators of regulatory independence: the litmus test of independence without which an AR which has dual representative and regulatory functions cannot claim (or be seen) properly to have ring-fenced its regulatory function. Most of these have been identified by the LSB. Whilst the BSB considers that it would be open to ARs, under the IGRs, to go *further* in entrenching regulatory independence and separation of regulatory and representative functions, the BSB believes that the following are the *minimum* that in its view are required properly to safeguard regulatory independence, to protect the public interest and to promote public confidence in the regulatory framework.

3.8 The BSB suggests that the key areas of regulatory independence are:

A. Membership and exercise of regulatory functions and powers

3.8.1 The discharge of all the regulatory functions and powers (as defined in **ss.21** and **27** LSA and set out in [3.6]) of an AR must be carried out by people who are independent from those who discharge its representative functions.

B. Appointments, Appraisal and Renewal, and Termination

3.8.2 The process for appointing those responsible for exercising the regulatory functions of the AR must be independent from the representative interests of the AR that the public can be confident that the appointments have been made independently from the representative interests and solely on the basis of what is in the best interests of independent regulation.

3.8.3 Any process for renewing the appointments of or dismissing those exercising the regulatory functions of the AR must be wholly separate and independent from the representative interests of the AR.

C. Governance

3.8.4 Subject only to a duty to consult (where appropriate), the regulatory arm of the AR must be solely responsible for setting (and amending) its own rules and procedures in connection with the exercise of its regulatory functions and powers and must have sufficient delegated power to carry out those regulatory functions and powers as they consider appropriate, including the ability to initiate and participate in consultation with stakeholders and others.

3.8.5 The regulatory arm of the AR must be able to notify the LSB if it considers that its independence or effectiveness is being prejudiced.

D. Resources and staffing

3.8.6 The AR must ensure that such resources as are reasonably required by the regulatory arm are available for or in connection with the exercise of those functions. In determining whether the requirements are reasonable, the AR must not unreasonably seek to limit the regulatory objectives set by the regulatory arm. The regulatory objectives must be designed to meet the regulatory objectives specified in **s.1** LSA. They are to be set, after proper consultation and consideration of the resources required to achieve them, by the regulatory arm of the AR.

3.8.7 The AR must provide a mechanism for resolving any disputes that arise as to the reasonableness of the level of resources required by the regulatory arm. Such mechanism must ensure that the effectiveness of the discharge of the regulatory functions is not prejudiced.

3.8.8 Although the AR is likely to be the entity which employs the staff who work for the regulatory arm, line management responsibility for all members of staff of the regulatory arm must ultimately lie with the regulatory arm itself. This includes the power to dismiss employees of the regulatory arm, which although likely to be exercised by the AR, must only in practice be exercised with the concurrence of the regulatory arm.

E. Residual Oversight of AR

3.8.9 Within the B+ Model there is an unavoidable constitutional impediment to fully entrenched ring-fencing. As the regulatory arm of the AR is part of the AR, and the AR retains control of the regulatory arm it is, in theory, open to the AR to dismiss all or part of the regulatory arm. The exercise of any such power requires limits, lest its use or threat or apprehension of use is used (or seen) to influence the regulatory arm.

3.9 Subject to the additions to the IGRs suggested below, the BSB considers that the LSB has adopted an appropriate level of specificity in the IGRs at this stage and that the draft IGRs cover the appropriate topics.

The separation of functions: ring-fencing

3.10 The BSB has set out above what it believes to be the statutory imperative behind the IGRs: they must be used to secure the demonstrable independence of a properly ring-fenced regulatory arm. The BSB therefore agrees with the principles outlined by the LSB in [3.7] and [3.8].

3.11 As identified by the LSB in [3.9], although under the LSA, the AR remains ultimately responsible for the overall discharge of the regulatory functions, the responsibility for managing the discharge of those regulatory functions should be fully delegated to the regulatory arm.

Defining the arrangements

3.12 The BSB agrees that proper ring-fencing requires delegation to the regulatory arm "free from representative interference, control or veto" [3.10]. The BSB considers that "control", in the sense that it is used in the context of regulatory independence, is used as shorthand for the principle enunciated by the LSB in [3.10]. It is not limited to "control", but embraces also interference, undue influence and veto. It would be unacceptable, in the BSB's view, for the representative arm of the AR to exert influence (beyond legitimate stakeholder participation, as recognised in [3.12] and [3.29]) over the work or constitution of the regulatory arm even if this stopped short of actual "control". Having a hand on any of the levers is objectionable even if such access does not give complete control [2.17].

3.13 The BSB believes that a key part of regulatory independence is self-governance. Subject only to a duty to consult (where appropriate), the regulatory arm must be solely responsible for setting (and amending) its own rules and procedures in connection with the exercise of their regulatory functions and powers and must have sufficient delegated power to carry out those regulatory functions and powers as they consider appropriate. Although this is not set out clearly in the body of the Consultation, the BSB considers that this principle is clearly and correctly enunciated in Rule 3(3)(b) of the draft IGRs in Part 5 of the Consultation.

3.14 The constitutional arrangements of the ARs differ, but the principle must be consistent: the rules and procedures to be adopted in connection with the exercise of the regulatory functions of an AR must be a matter solely for those exercising the regulatory functions and not the representative arm. The representative arm has a legitimate interest in being consulted on any major changes that the regulatory arm proposes, but the decision must be ultimately one for the regulatory arm as an essential part of regulatory independence.

3.15 In most instances, this will be achieved, with little difficulty, by the AR delegating sufficient rule making power to the regulatory arm to achieve this objective. The delegation of powers must be sufficient to allow the regulatory arm to take all steps necessary for it to exercise its regulatory functions and powers, including the ability to issue its own statements, initiate and participate in consultation with stakeholders and other regulators. If the constitutional arrangements of the AR do not permit a full delegation of sufficient powers to those responsible for exercising the regulatory function, then the AR must be placed under an obligation to ensure that any changes required by those exercising the regulatory functions in order to carry out their role are implemented.

3.16 The fall-back position, in the event of an unwillingness or inability to make the required change, would be that the regulatory arm would notify the LSB that its effectiveness was being prejudiced by the arrangements of the AR (a machinery which is required to be provided in the IGRs by **s.30(3)(b)** of the LSA and is set out in Rule 6(2)(a) of the draft IGRs in Part 5 of the Consultation). In practice, the existence of this safeguard makes it unlikely that a satisfactory agreement could not be reached. The BSB considers below how the AR's needs for monitoring information should be met but, in brief, the BSB considers that these requirements should be enshrined in a memorandum of understanding rather than by limiting the extent of the delegation to the regulatory arm.

3.17 In answer to **Question 1**, the independent regulatory arm must be ring-fenced from a representative-controlled AR by a process of complete delegation of regulatory powers. Once delegated, the exercise of regulatory powers must be free from representative interference, undue influence, control or veto. Subject only to (a) residual oversight; and (b) the unavoidable duality of some functions within the B+ Model, the ring-fencing of the regulatory arm must be complete.

Regulatory board appointees

3.18 Subject to Paragraph 3.21 below, the BSB agrees with and endorses the proposals outlined in [3.15]. The BSB considers that the area of appointment, appraisal, reappointment and dismissal of members of the regulatory arm of the AR (collectively referred to as "appointments" hereafter, save where the context otherwise indicates) is a critical area for regulatory independence. Consistent with this importance, the BSB considers that the LSB should include rules relating to appointments in the IGRs.

3.19 The BSB considers that the IGRs should entrench the following key principles in the area of appointments:

3.19.1 all appointments to regulatory boards should be made on the basis of best practice (identified by the LSB in the first sentence of the first bullet point) and should have a substantial number of non-lawyer members;

3.19.2 panels charged with appointments to regulatory boards must be demonstrably independent of the representative arm of the AR with an independent chair and a majority of non-lawyers;

3.19.3 any participation by the representative arm of the AR in the process of appointments must be transparent and must not allow the perception or reality of control (as defined in Paragraph 3.12 above);

3.19.4 after initial establishment, the regulatory arm should take the lead on the preparation and selection of the panel; and

3.19.5 the chair of the regulatory arm of the AR should serve on the panel charged with appointing members of the regulatory arm unless the panel is considering the reappointment of the chair.

3.20 In relation to reappointments and dismissal, the role of the representative side of the AR must be carefully limited. Those appointed to the regulatory arm must be free to carry out the regulatory functions free from a concern that their reappointment (or dismissal) may depend on the popularity of their decisions with the representative arm of the AR. To avoid an actual (or perceived) risk of the impairment of independence that would otherwise arise, the BSB considers that the IGRs should set out clearly that the representative arm should participate in any reappointment/dismissal process only as a stakeholder consultee.

3.21 The BSB favours a majority of non-lawyers and intends to move to majority of non-lawyers when it is able to do so, but the prime concern is ensuring that it always has the highest quality members. The BSB does not agree, however, with the LSB's suggestion that the IGRs should require that regulatory boards should be constituted with an in-built majority of non-lawyers. The requirements should be that all appointments should be made in accordance with best practice and that there be a substantial non-lawyer involvement (see Paragraph 3.19.1 above). The precise mix of lawyers and non-lawyers is for the regulatory arm of the AR to determine in accordance with what it perceives is in the best interest of the regulatory objectives.

3.22 Separately, the BSB considers that the LSB should address the definition of a non-lawyer for the purposes of appointments. Anticipating the implementation of LDPs and ABSs, the BSB believes that the question of who a "lawyer" is likely to become a more difficult question to answer than historically it has been. The BSB considers that the principle should be that the term "lawyer" for these purposes should embrace all those who are part of the regulated cohort of lawyers (i.e. practising barristers, solicitors, managers and members of LDPs (including "lay" managers) etc.). Non-lawyers, by contrast, would be people who were not part of the regulated community. This is consistent with the principle that the involvement of non-lawyers in the self-regulation model must be sufficient to avoid the perception that regulation is self-interested.

3.23 The BSB therefore answers **Question 2** by endorsing the LSB's proposals, but believes that the core principles relating to appointments should be included within the IGRs themselves.

3.24 If this is done, and in answer to **Question 3**, the BSB does not consider that there is any need to go further than the proposals set out in [3.15]. The BSB does not consider that it is necessary to make an explicit requirement that the chair of a regulatory arm be a non-lawyer for the same reasons as underpin its reasons for opposing a requirement that the regulatory board of an AR should have an in-built majority of non-lawyers (see Paragraph 3.21 above). It is likely that the regulatory boards will choose to have a non-lawyer chair, but they should not be required to do so.

Management of resources

3.25 The issue of resources and budget is another area of the Clementi model that requires specific provisions in the IGRs. The BSB recognises that one of the key attractions of the B+ Model of representation is the economies of scale that can be achieved by not requiring complete separation of regulatory and representative function. For small professions, ring-fencing the regulatory function within the AR offers the opportunity to achieve substantial savings on fixed overheads. The BSB has, and would want to continue with, a "shared-services" model with the Bar Council.

3.26 Given that starvation of resources of the regulatory arm would be one way in which the representative arm of the AR could limit or curtail the activities of the regulatory arm, if such a model is to secure the regulatory objectives of the LSA, there is a corresponding requirement that the IGRs make specific provision to safeguard the regulatory arm's access to and governance of its share of the AR's resources.

3.27 The starting point is the requirement in **s.30(3)(a)** that AR is 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*". The determination of whether the resources are reasonably required must reflect the key principle of separation of functions. It is for those discharging the regulatory functions to set their regulatory objectives without interference from representative interests. The AR is limited, when assessing reasonableness, to the level of resources necessary to achieve those objectives. It is not for the AR to seek – through provision of resources – to limit or change the regulatory objectives set by those discharging the regulatory functions.

3.28 It is accepted that the regulatory arm of an AR must account properly for the sums it spends and budget properly for the sums it expects to need. This is important not only as a reporting mechanism to key stakeholders, but it is an essential part of setting the level of the practising fee, which must be approved by the LSB under **s.51** LSA. The principles of accountability and transparency mean that the LSB, the AR and those who are regulated are able to identify the true costs of regulation and how those costs have been incurred.

3.29 In practical terms the issues of resources breaks down into three areas: money, staff management and information. Taking each of the three heads of resources in turn:

A. Money

3.29.1 For these purposes "money" includes staff and IT costs. (The management of staff is dealt with in the next section below.)

3.29.2 The BSB agrees with the LSB's proposal [3.17] that there should be a requirement to have in place budget-settlement processes that do not subordinate the needs of the regulatory arm to representative interests.

3.29.3 The BSB recognises that a regulatory arm cannot require an AR to fund 'Rolls-Royce' delivery of every single one of its strategic objectives. For its part, the AR must recognise equally that it cannot cut the regulatory arm's budget in a way which prevents it from delivering its main priorities just because those priorities are not welcomed by certain sections of the regulated community. Somewhere between these two extreme and hypothetical positions is the correct way forward, which rests on open and practical co-operation between the regulatory and representative arms. The BSB believes it is best practice for the representative and regulatory arms to work together in a co-operative spirit on budgetary matters as it has done with the Bar Council. The BSB sees no reason why this should not become the norm.

B. Staff Management

3.29.4 Inherent in the B+ Model is the use, to some degree, of a shared-services model. As the LSB recognises, it will be common (if not inevitable) in such a structure that the AR would employ all the relevant staff and would effectively second staff members to carry out the work of the ring-fenced regulatory arm under its (the regulatory arm's) direction. Some members would be seconded full-time and others would have to divide their time between the representative and regulatory arms. The regulatory arm may not, under the shared services model, end up being the legal employer of any staff of its own.

3.29.5 The shared-services model does offer a number of clear benefits beyond economies of scale:

- a wider talent pool;
- cheaper recruitment;
- speedier and more flexible deployment;
- simpler internal processes, e.g. training, appraisal, appeals, discipline etc.

3.29.6 However, as the LSB recognises in [3.22], arrangements need to be in place to protect the integrity of the regulatory arm's independence and effectiveness where the shared-services model is used. Subject to the comments below, the BSB agrees that the matters identified under [3.22] are the minimum criteria that should be observed in order to protect regulatory independence.

3.29.7 The BSB agrees that there needs to be effective shared-service management arrangements in place but is not persuaded that those arrangements need to involve an external body not involved in the representative or regulatory functions [3.22 first bullet-point]. This would be unnecessarily bureaucratic for smaller ARs like the Bar Council and its regulatory arm, the BSB. The right to make a report to the LSB is a sufficient safeguard in the event that the arrangements fail to provide the facilities the BSB needs for its regulatory functions.

3.29.8 The BSB considers that a package of proper regulatory safeguards is required within the B+ Model. It is necessary that the IGRs provide express protection for the regulatory arm's access to resources. Providing there is no prejudice to the regulatory function, there can be no objection to (and, as identified above, there is much to be gained from) sharing common resources. However, it is for those discharging the regulatory functions to determine whether their regulatory independence would be prejudiced by being required to utilise common staff or services of the AR. If they determine that there would be such prejudice, then those discharging the regulatory function must be free (subject only to the agreed budgetary process) to obtain its requirements in terms of services or personnel from outside the AR. This point should be added to those listed in [3.22]

3.29.9 Some of the ARs, the Bar Council for example, cannot discharge their regulatory function through a ring-fenced regulator which is also an entity capable of employing staff. This has implications at both Chair and Board level as well as for the secretariat and support staff. If the practical arrangements of the AR mean that it is the only body capable of employing staff, then in relation to the Chair, Vice-Chair and, if applicable, any Board Members of the regulatory arm, these people must be engaged on contracts for services and not employed by the AR.

3.29.10 In connection with the regulatory arm having line management responsibility for all members of staff performing roles under the direction and control of the regulatory arm ("the regulatory arm's staff"), there is a potential area of conflict between the legal position of the AR as employer and the proposal that the regulatory arm have line management responsibility for its own staff. The BSB believes that – providing the principle of sole line management is clear and accepted by the AR – the fact that the AR is legally the employer need not pose a threat to regulatory independence. On a practical level, it is likely that

although the AR will strictly be responsible – as a matter of law – as the employer, in its dealing with the regulatory arm's staff it will not act without the concurrence of the regulatory arm.

3.29.11 The regulatory arm – as the LSB recognises – must be free as part of the independence of its regulatory remit to have access to such staff at such grades and pay levels as it determines is required for and proportionate to its regulatory objectives. This includes setting the remuneration level of its staff (proportionately and having regard to salary levels across the AR), including in particular its senior executives and board members. Whilst recognising that the representative arm has a legitimate interest being consulted and engaged in the level of resources required by its regulatory arm and being satisfied that such resources are reasonably required for or in connection with the exercise of its regulatory functions, it must not be allowed to determine the levels of remuneration of BSB staff.

3.29.12 In relation to staff, the regulatory arm will necessarily have to consult with the AR because the relevant member of staff will be engaged by or retained by the AR. The LSB has correctly identified that within the shared-services model there can be a sensitivity to the regulatory arm wishing to amend the terms and conditions which apply to the regulatory arm's staff, and the BSB considers that the LSB's proposal that there should be specific consultation with the AR before such a change is made by the regulatory arm is appropriate. The BSB agrees that pension provision falls to be dealt with differently.

3.29.13 If the regulatory functions are discharged by means of a Board, the members of the Board, including the Chair and Vice-Chair, must not be employed by the AR, but must instead provide their services by means of a contract for services, which contract must expressly recognise the independence of the position.

C. Information

3.29.14 A shared-services model will also need to operate around information. Issues around money and people for IT will be handled as above. But information is also a resource, and it will usually be necessary for the AR and the regulatory arm to reach agreement on the confidentiality of information (e.g. that information held by the regulatory arm about the conduct of regulated lawyers be kept confidential from the AR).

3.29.15 Those discharging the regulatory functions of an AR must have access to and control of the data necessary for them to carry out their regulatory functions ("the Regulatory Data"). Subject to Data Protection legislation, those discharging the regulatory functions must, if they intend to share data with the AR, devise a data-sharing protocol setting out (a) the Regulation Data to

which the AR may have access; (b) the terms on which that access will be granted.

3.29.16 It is fundamental to the discharge of regulatory functions that those discharging the regulatory functions have access to and control the data necessary to do so. That will range from the records of those who are subject to the regulatory regime to the information collected and gathered in the process of carrying out the regulatory objectives. For most ARs, that data will be held centrally by the AR. However, proper respect for the principles of data protection (critically that data collected for a purpose will only be used for that purpose) requires that data collected for regulatory purposes is stored and processed only for regulatory purposes. In turn, this requires that those who are discharging the regulatory functions control the Regulatory Data.

3.29.17 It is likely that frameworks and protocols can be devised regarding data-sharing for some data, but these will have to be (a) consistent with the regulatory objectives and not prejudice the effectiveness or independence of the regulatory arm; and (b) compliant with data protection legislation. It may be necessary for the advice of the Information Commissioner to be obtained as to the extent that data-sharing can be permitted and what consents would need to be obtained from the data subjects. Special considerations are likely to apply to complaints data and findings of misconduct.

3.30 The AR must provide a mechanism for resolving any disputes that arise as to the reasonableness of the level of resources required by its regulatory arm. Such mechanism must ensure that the effectiveness of the discharge of the regulatory functions is not prejudiced. The BSB considers that the requirement to have such a dispute resolution process should be specifically imposed in the IGRs and would logically be added as a new part of Rule 5.

3.31 In answer to **Question 4**, subject to the points above, the BSB agrees with the LSB's proposals in respect of the management of resources and the shared-services model. The two areas that the BSB believes should to stand outside the framework envisaged by [3.22] are pension provision (identified in [3.23]) and the employment issues identified in Paragraphs 3.29.4 and 3.29.9 above.

3.32 The BSB welcomes the approach that is suggested by the LSB in [3.24]. Amending the IGRs once they have been adopted may be a cumbersome process. The BSB considers that this is another reason (in addition to those set out in Paragraphs 3.4 to 3.6 above) why the IGRs should be cast in terms of high-level principle with guidance being issued by the LSB as to compliance with the IGRs. In answer to **Question 5**, therefore, the BSB considers that the proposed balance between the IGRs and guidance is appropriate and, as the guidance issued by the LSB can be updated and modified without the need for a cumbersome process of amendment of the IGRs, provides the advantage of increased flexibility.

Monitoring and supervisory arrangements

3.33 The BSB accepts that the LSB needs to have adequate assurance that the ARs are operating to acceptable standards. At the same time the regulatory arm of each AR needs sufficient independence to be able to define its work in a way that makes sense for the legal community it regulates. The BSB believes that it should be possible to find a way of achieving these results without imposing undue burdens on the LSB, the BSB or indeed the Bar Council.

3.34 The BSB trusts that its general approach to regulation should in itself give the LSB a good degree of confidence. The BSB sets out to operate transparently, to treat everyone fairly and to make policy only after open consultation with opportunities for debate about the best method of achieving appropriate outcomes within its regulatory objectives. In doing so the BSB works closely with the Bar Council, with which it shares many common aims and interests – not least the good reputation of the profession.

3.35 While these common objectives generally make for a harmonious approach to policy making, supervision and discipline, there can be no doubt that the BSB operates independently in dealing with regulatory matters. It is free, and can be seen to be free, to make choices which the Bar Council finds difficult or inconvenient. The BSB sees no reason why other ARs, and their regulatory arms (where they are different), should not operate in similar fashion.

3.36 In practical terms, the BSB invites the Bar Council to all its monthly meetings. Its working committees often invite representatives of the Bar Council to join its meetings. Bar Council submissions of all kinds to BSB consultations are taken seriously but never achieve dominant status when it comes to decision making. There is frequent contact between the leaders of the Bar Council of the BSB to ensure mutual understanding with no surprises. The common location of the Bar Council and the BSB makes this frequent structured cooperation easy, natural and efficient without ever limiting the BSB's independence.

3.37 There is much sense in this approach: both the Bar Council and the BSB would risk loss of credibility with the Bar and the public at large were one to lose confidence in, or respect for, the other. This near constant dialogue ensures that the Bar Council is intimately involved in the BSB's affairs while not disturbing the freedom of the latter to make dispassionate and wholly independent decisions in the public interest.

3.38 For instance, the Bar Council never interferes with BSB decisions on complaints. Nor does it involve itself with individual cases. And in making policy decisions, such as the current active debate about possible new corporate structures for legal business, the Bar Council submits its evidence in the same way as other interested parties. Thus the BSB is free to make appropriate regulatory decisions weighing the public interest, as broadly understood, in the light of a variety of evidence.

3.39 These arrangements in practice mean that formal reporting channels, monitoring arrangements or dispute resolution processes have never been necessary. The Bar Council is always aware of the BSB's business. It has ready and immediate opportunities to join discussion on it, and does so. Thus it is constantly able to assure itself that the BSB is carrying out its duties professionally and in the public interest.

3.40 There may be a case for setting out these arrangements in a memorandum of understanding so as to give the Bar Council, as the AR, the assurance that it will continue to have the information and involvement it needs to carry out its oversight responsibilities. The BSB is not persuaded that an additional body is needed to exercise this oversight function as suggested in [3.37]. This would introduce another and costly layer of administration. The proposed duty of co-operation (Rule 7, with which the BSB agrees) and the right to report to the LSB are sufficient safeguards for both the AR and the regulatory arm if serious problems emerge in practice.

3.41 The BSB accepts that the AR should be able to commission occasional independent strategic reviews. This is good practice. But such reviews should normally only be commissioned in agreement with the regulatory arm. In the unlikely event that such agreement cannot be reached, the AR should have to seek the LSB's agreement to its proposals.

3.42 The BSB agrees that any significant change to the BSB's structure, however it were to arise, would call for LSB assent. The BSB expects that any such changes are more likely to be evolutionary than revolutionary.

3.43 In response to **Question 6** and subject to the comments made below about the exercise of residual oversight (Paragraphs 3.44 to 3.47 below), the BSB submits that the LSB's regulatory regime should be flexible enough to permit the current cooperative relationship between the Bar Council and BSB to continue unchanged. The BSB respectfully doubts whether there is need or would be value in structured monitoring, accountability or review arrangements of the kind laid out in the LSB's consultation document. The same – indeed arguably better – results can be achieved more easily and more effectively without them.

Residual Oversight

3.44 The BSB agrees with the LSB's proposals regarding intervention by the AR *in extremis* to replace a member of a regulatory board or the entire regulatory board [3.33]. The existence of the power to take such a step is an inherent part of the B+ Model, but as the LSB recognises the use of such power must be restricted and subject to careful scrutiny by the LSB before it is exercised, lest it become a threat to regulatory independence of ring-fenced regulatory arm.

3.45 It is another unavoidable consequence of the B+ Model that the AR is, in theory at least, free to repeal all arrangements it has made regarding the ring-fencing of its regulatory function. In an extreme case, as has been highlighted, an AR could seek to remove and

replace the entire delegated regulatory function. This residual power, if not subject to restriction in the IGRs, has the potential to undermine the independence of the regulatory arrangements of the AR. Entrenched independent regulation is an illusion if it depends on nothing more than the tolerance of the AR.

3.46 Respectful of the constitutional arrangements of the ARs and the fact that Parliament has determined that they should be the front-line regulators, but consistent with the statutory requirements of **s.30**, the BSB considers that the IGRs should require that the ARs are not, without the permission of the LSB, to make any changes to their regulatory arrangements which would, or might, prejudice the independence or effectiveness of the entity or person(s) who for the time being are charged with discharging the regulatory functions of the AR. Given the Clementi model, entrenching the independence and effectiveness of the regulatory function can only be achieved by imposition of such a rule by the LSB. Without it, the ARs are in theory free to dismiss the regulatory arm (in whole or in part) or limit its powers if it did not agree with the decisions it was making.

3.47 Such a safeguard would not preclude the AR proposing changes to the model for delivering effective and independent regulation (or even devising an entirely new model of regulation which met the statutory objectives), but such changes (if they threatened to jeopardise the effectiveness and/or independence of the current arrangements) could only be implemented after the LSB was satisfied that the proposed changes would not prejudice the effectiveness and/or independence of the regulatory function of the AR. Such a rule would prevent any precipitate steps being taken by an AR (however unlikely that might be) and any potential regulatory void to the detriment of consumers.

Compliance with the rules

3.48 The BSB welcomes the suggested approach of dual self-certification as a practical and economical approach to enforcement which is properly commensurate to the relevant risks. The BSB shares what it believes to be an appreciation by the LSB that excessive imposition of formality in independence of governance could place an excessive burden particularly upon some of the smaller ARs and could limit the potential for dynamic development flowing from the regulatory changes being put in place. It is most important that whilst appropriate rules are drafted at a high level, appropriate flexibility in their practical application should be provided.

3.49 As recognised in [3.43], although this does not absolve the LSB of satisfying itself as to compliance with the IGRs, the dual-certification process should provide an early-warning system of any problems that require investigation by the LSB.

3.50 As to the practicalities, the certification should be in a form acceptable to the LSB. If an AR (or its regulatory arm) were unable to provide the required certification, the LSB should require (1) identification of the particular problem or issue which prevents the certification; and (2) proposals for the remedial action that the person providing the certificate considers would be required before the certificate could be provided and a time frame within which the issue would be resolved (in most instances no more than 6-

months). In the first instance, it would be an internal matter for the AR to attempt to resolve the identified problem within the timeframe, but if it were not possible for the AR to resolve the matter internally within the timeframe, the LSB would have to consider what further steps were necessary.

3.51 The BSB agrees that the certification process should take place, initially, annually, but would suggest that this could be relaxed to every two years when the LSB is satisfied that the arrangements in the AR are working satisfactory. In the nature of things, once regulatory arrangements are set up in conformance with the IGRs they are unlikely to undergo significant change.

3.52 Therefore, in response to **Question 7**, the BSB supports the dual-certification proposal and, in response to **Question 8**, the BSB envisages it operating along the lines suggested in Paragraph 3.50 above.

4. Practising Fees and the links with section 30

4.1 The BSB agrees with the LSB's analysis in [4.1] to [4.5]. It is important with the B+ Model not to fall into the trap of regarding the money raised by the practising certificate fee ("PCF") as belonging to the AR for which the regulatory arm must then approach for its share.

The Permitted Purposes

4.2 At present the funds received from the compulsory PCF may only be used for regulatory expenditure and for other purposes approved by the Lord Chancellor under **s.46** Access to Justices Act 1999 (AJA 1999)[1]. Until now the way in which the Bar Council has calculated and applied income from PCFs has been subject to regular audit by Ministry of Justice officials.

4.3 The LSB is proposing to make rules under **s.51(3)** LSA specifying the purposes for which an AR will be permitted to apply amounts raised by the PCF. The six purposes which must be specified under **s.51(4)** LSA cover the same five purposes that the Lord Chancellor had already approved under **s.46** AJA 1999 with the addition of payment of the levy on the AR.

4.4 **ss.27-28** LSA set out the functions and duties of the ARs. It is important that it should be possible to use funds raised from practising certificate fees to support all such activities. In response to **Question 9**, therefore, the BSB welcomes and supports the proposed widening of the permitted purposes to include the regulatory objective of "increasing understanding of the citizen's rights and duties".

4.5 All the purposes previously specified by the Lord Chancellor under **s.46** AJA 1999 are already covered by the proposed rules. In answer to **Question 10**, the BSB therefore sees no need at present for any other purposes (general or specific) to be added to the proposed rules under **s.51(3)**.

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1 **s.46(2)(b)** AJA 1999 provides that the General Council of the Bar "may not set fees with a view to raising a total amount in excess of that applied by the Council for the purposes of the regulation, education and training of barristers and those wishing to become barristers." This subsection was then amended by statutory instrument (2001 No. 135) as follows:
"In section 46(2)(b) of the Access to Justice Act 1999, after "purposes of " insert "(i)" and at the end insert
"(ii) the participation by the Council in law reform and the legislative process,
(iii) the provision by barristers and those wishing to become barristers of free legal services to the public,
(iv) the promotion of the protection by law of human rights and fundamental freedoms, and
(v) the promotion of relations between the Council and bodies representing the members of legal professions in jurisdictions other than England and Wales.".

The Application Process

4.6 The effective and efficient running of any organisation requires appropriate advance planning and budgeting. To that end it is important that the annual process of submitting for and obtaining approval of the proposed PCF should not impede the proper management of business, nor be unduly bureaucratic.

4.7 An organisation's annual budget should set out its forecast income and expenditure in the year in question. The practising fees will form part of its income. But the budget does not stand by itself. It should be driven by the strategic plan of the organisation and the business plans that flow from its strategic plan.

4.8 The annual budget for an organisation cannot therefore be separated from its planned activities and outcomes. The LSB will undoubtedly wish to review how well an AR is fulfilling its functions and duties under the LSA. However, it is far from clear that general oversight should be undertaken annually as part of the arrangements for approving the PCF. Rather the approval of the PCF should draw on the work that will already have been done in connection with the main oversight activities.

4.9 In light of this inextricable link between funding and proper management of a regulatory arm's activities and the very different activities of the ARs, the BSB agrees that one size will not fit all for the rules governing the application process. It welcomes the proposed approach to set general criteria and a requirement for each AR to agree appropriate arrangements with the LSB.

4.10 The BSB stresses that it will be important for the process to be proportionate. The PCF for barristers has for many years been the subject of audit by the Ministry of Justice. Furthermore the BSB has published its strategy, business plans and Annual Reports that show how the funds from practising fees have been spent. The approval of the PCF should not be unnecessarily onerous.

The need for evidence

4.11 The material required by the LSB to support approval of the PCF should draw on the information that an organisation needs to run its affairs efficiently, effectively and economically. This should not impose additional requirements. The process for approving a practising fee should not be a substitute for the general oversight undertaken by the LSB.

4.12 In response to **Question 11**, the BSB therefore does not agree with the proposal in [4.13]-[4.17] of the Consultation that it should supply information in connection with its practising fee application that attempts to show how the proposed fee itself links to the regulatory objectives. It is the BSB's strategy and business plans that have to link with the regulatory objectives. The practising fee will merely be one of the sources of finance to fund its business plans.

4.13 It is therefore suggested that applications for approval of the PCF should be assessed initially against the strategy and business plans of the organisation and the reported performance against previous plans. However, it should not be necessary to undertake a full assessment of this every year. Rather, as suggested in [4.15], once the initial analysis has been done, it should be possible to assess the proposed fee by reference to the previous year's PCF and the progress in delivering the business plans. It would only be necessary to have a much fuller assessment when there is a significant shift in the strategy or business plans.

4.14 In answer to **Question 12**, the BSB considers that the criteria that the LSB should use to assess fee applications should include:

- adherence to permitted purposes;
- how far prior year regulatory plans have been achieved and what remains to be delivered;
- achievement of value for money in expenditure on permitted purposes;
- extent to which other sources of income used to fund permitted purposes have changed or are forecast to change; and
- any exceptional necessary funding required as a result of legislation or unforeseeable requirements.

Timing

4.15 The process must be timely. The LSB should set out the timetable for the whole process so that all parties have a clear understanding of what will happen and when. It has to fit in with the annual business planning cycle and must have regard to the need for appropriate consultation with the representatives of the profession as a whole (i.e. approval by the Bar Council in full meeting).

Memoranda of Understanding

4.16 It would be helpful to have the arrangements governing the application and approval of the PCF set out clearly in a MoU so that both the LSB and the AR know what to expect and so that other interested parties are aware of how these arrangements apply. In answer to **Question 13**, the MoU might include:

- the timetable;
- the documents required to support a fee submission; and
- the criteria to be used in assessing an application.

Consultation

4.17 It is clearly good practice for those paying the PCF to be consulted on any proposal to increase it. In some professional organisations this is done through approval of the proposed fee in Annual General Meeting. The Bar Council already has in place arrangements for the annual review of the PCF and its approval by the Bar Council in a full meeting. This comes at the end of an extensive process of discussion and consultation between the Bar Council and the BSB and approval by the Bar Council Finance Committee (on which the BSB has full representation).

4.18 In answer to **Question 14**, the BSB considers that a requirement to consult is appropriate. For ARs like the Bar Council and the Law Society that have elected representative councils or boards, the main (but not exclusive) consultee would be these representative councils or boards. It would be appropriate, however, for the regulatory arms to receive consultation responses from any relevant stakeholders.

Maximising Transparency

4.19 The BSB agree with [4.19]-[4.20] and the proposals in [4.21]. In answer to **Question 15**, the BSB considers that the LSB has got the balance right and in answer to **Question 16**, the BSB does not consider that there are any other issues relating the PCF which should be considered as part of this Consultation.

5. Draft Rules

5.1 Subject to the following points, the BSB considers that the draft IGRs proposed in Part 5 of the Consultation strike the right balance between rules and guidance.

5.2 As set out above, the BSB considers the IGRs should additionally contain one further specific provision.

5.3 As explained in Paragraphs 3.18-3.22, the BSB believes that the IGRs should contain specific provisions about appointments of members of the independent regulatory authority (which embraces appointments, appraisal, reappointments and dismissal). The BSB's suggestions as to what should be included are set out in Paragraphs 3.19 and 3.20. The BSB recommends that the LSB provides a definition of "non-lawyer" for this purpose and the BSB's suggestion is set out in Paragraph 3.22 above.

5.4 As to the specific draft IGRs, the BSB comments as follows.

Rule 2

5.5 **s.30(2)(b)** LSA provides:

"The internal governance rules must require each approved regulator to have in place arrangements which ensure - ... (b) that the exercise by those persons of [its regulator powers] is not prejudiced by the approved regulator's representative functions and is, **so far as reasonably practicable**, independent from the exercise of those functions."

5.6 Within the B+ Model, the emphasised words arguably represent statutory authority for something less than complete ring-fencing. The BSB does not agree with this interpretation. **s.30(2)(b)** is in these terms precisely because Parliament was envisaging the B+ Model. For some ARs, the constitutional arrangements make total independence impossible. For bodies like the Bar Council and Law Society, there will inevitably be some sharing of resources and personnel. The emphasised words recognise this and permit such sharing, but they do not prevent still less mandate less than full ring-fencing of the regulatory arm within the AR.

5.7 The BSB does not consider that it is necessary or appropriate for the LSB to attempt to define "reasonably practicable" in the context of Rule 2. It would be difficult to attempt to do so given (a) the very different circumstances of the various ARs; and (b) the inherently fact dependent nature any inquiry into "reasonable practicability" would involve. The BSB considers that this is an area on which it is preferable for the LSB to give guidance as to "reasonable practicability" in light of the experience and circumstances of the various ARs.

Rule 3

5.8 Rule 3(1) provides that the internal governance arrangements of an AR must be approved by the LSB (by the mechanism imposed by Rule 9(1)). Rule 3(7) provides that the AR may intervene in the discharge of the regulatory arm's functions only with the express approval of the Board. These are both important provisions, but consistent with the analysis in Paragraphs 3.44 to 3.47 above the BSB considers that it is necessary to include a provision (either in Rule 3 or in the suggested new Appointments Rule – see Paragraph 5.3 above) restricting the AR's ability to dismiss any or all of the members of the regulatory arm without the consent of the LSB. Consideration might also be given to whether a similar restriction should also be imposed on any (or any substantial) change made to the internal governance arrangements by any AR once they have been approved by the LSB under Rule 3(1).

5.9 The BSB considers that Rule 3(3)(b) is very important to regulatory independence (see Paragraph 3.13 to 3.16 above). The body of the Consultation does not explain or expand upon the principle embodied in this Rule. The BSB considers that some guidance is required as to extent of the delegation that is envisaged by this Rule. The BSB considers that the delegation of governance powers to the regulatory arm should be complete, subject only to a memorandum of understanding relating to access to information for monitoring purposes (see Paragraph 3.16 above).

Rule 5

5.10 For the reasons set out in Paragraph 3.30, the BSB believes that Rule 5 should additionally provide that the AR must include within its internal governance arrangements a procedure for resolving any disputes that arise as to the provision of resources required by the independent regulatory authority. The mechanism itself must ensure that the discharge of the regulatory functions of the AR is not prejudiced.

5.11 The BSB also considers that the Rule 5 should be clearer in providing express protection for the regulatory arm's access to resources (see Paragraph 3.29.8 above).

Annex

Bar Council Response to Clementi

A.1 In its initial consultation paper of 25 February 2005, the General Council of the Bar ("Bar Council") in recommending the establishment of the BSB stated (emphasis added):

> "5. The BSB will be completely ring-fenced from interference from representative interests within the Bar Council. It will be required at all times to put the public interest first. It will initiate proposals. It will provide an independent assessment of the regulatory matters referred to it by the regulatory committees and of their performance.
>
> 6. The Bar Council will remain the single governmental and representative body for the Bar of England and Wales, subject to this entrenched separation of functions..."

White Paper

A.2 In its White Paper, *The Future of Legal Services: Putting the Consumer First* (October 2005), the Government set out its proposals for legislation. It accepted the B+ Model, subject to the requirement that the regulatory functions were independent, and seen by consumers to be independent, from the representative functions of the existing FLRs.

> "**Independence:** consumers do not have enough confidence in the current system. They are not reassured by bodies that act as both the team manager and the referee." (*White Paper*, §3.4)
>
> "Existing FLRs will need to demonstrate to the LSB that they have appropriate governance arrangements in place. For most this will mean demonstrating a clear separation between their regulatory and representative functions. This will provide the assurance that consumers need that FLRs are not driven by the interests of their members." (*White Paper*, §5.2)

Response to the White Paper

A.3 In the introduction to its response to the *White Paper*, in January 2006, shortly after the establishment of the BSB, the Bar Council stated (emphasis added):

> "Both the Bar Council and the Law Society have now separated their regulatory functions from their representative ones. These new arrangements will have substantially stronger lay involvement and, in the case of the Bar Council's Bar Standards Board (BSB), a lay Chair. The work of the regulatory side of the Bar Council will have a new focus. The separation of functions will mean that any perception of a regulatory system being tainted by the representative side will disappear, and the result will be a Front Line Regulator (FLR) well able to discharge its functions in the consumers' and public interest. The public will be able to have confidence in the integrity of the system and its decision-making."

A.4 Responding to the establishment and function of the LSB, the Bar Council submitted (§5):

"...We would emphasise that this is supposed be a "light touch" regulator. This implies that the FLRs are intended to be entrusted to do the bulk of the work. The FLRs will be able to be trusted to do this because (a) their regulatory sides will be bodies appointed on Nolan principles, independent in terms of decision-making from the representative side; and (b) the LSB will have been required to satisfy itself that their structure and systems are appropriate."

A.5 For its part, the Law Society, in its response to the White Paper, in January 2006, endorsed the need for proper separation of regulatory and representative functions within the FLRs (§70):

"We agree that Front Line Regulators should demonstrate to the LSB that they have appropriate governance arrangements in place. The Law Society strongly supports Sir David Clementi's recommendation that regulation should continue to be based on the professional bodies, subject to them making appropriate governance arrangements, in particular to achieve proper separation between regulation and representation. The Law Society has already established new arrangements which meet those requirements."

Passage of the Legislation

A.6 The draft Legal Services Bill was introduced in Parliament on 24 May 2006. It did not contain any specific provisions regarding the separation of regulatory and representative functions of the Approved Regulators ("ARs") – see clauses 22-23.

A.7 On 25 July 2006, the Joint Committee of both Houses published their Report on the Government's draft Legal Services Bill. Recommendation 7 is recorded in Paragraph 11 of Annex B of the Consultation.

A.8 In their detailed commentary, the Joint Committee explained more fully the basis of their recommendation in Paragraphs 113-117, before concluding (at Paragraph 118):

"Again, we support the approach taken by Sir David Clementi on this issue. We welcome the steps taken by most existing regulators towards separation of their regulatory and representative functions and note the intention to follow suit expressed by the remaining regulators with representative functions. We hope that these important reforms will be completed in full. We recommend that the draft Bill should be amended to require approved regulators to separate fully their regulatory and representative functions. This separation should require all regulatory decisions to be taken by an independent regulatory arm; that arrangements must be made to ensure the regulatory arm has the resources it reasonably requires; and that the regulatory arm should be entitled to seek the intervention of the LSB should it feel that any action or inaction on the part of the relevant professional body is damaging to its independence or effectiveness. This will help ensure that the LSB acts proportionately—if approved regulators separate fully and transparently their regulatory representative functions there will be a high level of public confidence and less reason for the LSB to intervene."

A.9 On 24 November 2006, the Government published the final Legal Services Bill, setting out its proposals for the regulatory reform of legal services in England and Wales. It accepted the recommendation of the Joint Committee. Clauses 28 and 29 were

introduced and dealt expressly with separation of regulatory and representative functions. These provisions ultimately became ss.29 and 30 of the Legal Services Act 2007 ("the LSA").

A.10 Under the B+ Model there is an unavoidable institutional synthesis between regulation and representation for ARs like the Bar Council and Law Society. Whilst Parliament did not require institutional separation, the BSB agrees that the legislative history shows that there was a clear expectation that there should be "clear and robust separation" of the regulatory function, "both in terms of appearance and reality" [B19].