THE GENERAL COUNCIL OF THE BAR

LSB CONSULTATION PAPER ON APPROACHES TO QUALITY

RESPONSE OF THE BAR COUNCIL

1. The consultation paper raises many issues which will be of interest to the BSB and other approved regulators. The Bar Council does not propose to comment in detail on these issues or to respond in detail to questions 1 to 9 in the consultation paper. No doubt others will.

2. However, the Bar Council wishes to comment on the consultation paper as a whole and, in particular, to respond to question 10, which is in the following terms:

> "To what extent should the LSB prescribe regulatory action by approved regulators to address quality risks?"

3. The answer to this question is clear. It is "Not at all". It is not for the LSB to usurp the function of the approved regulators. This is an issue which was addressed in the Bar Council's response to the triennial review of the LSB, a copy of which is enclosed for ease of reference.

4. While it may or may not be helpful for individual approved regulators to hear and consider (and thereafter to adopt or reject as they see fit) views of the kind expressed by the LSB in the consultation paper, it would be quite wrong of the LSB to attempt to prescribe to the approved regulators how they should do their job.

5. Not only is this not the function of the LSB under the Legal Services Act, it is not even consistent with one of the central ideas expressed by the LSB in the consultation paper, i.e. the notion that a 'one size fits all' approach is inappropriate. It would be an equally inappropriate 'one size fits all' exercise for the LSB to prescribe its own preferred approach to regulation for all approved regulators, since it is for each regulator to determine, in the light of

their own knowledge and experience and the circumstance of their profession, the action which it is appropriate for them to take.

6. It is recognised that the consultation paper consists of a fairly high-level (and, indeed, at times rather abstract and academic) discussion of general issues. However, there is also a tendency on occasion to stray into more dogmatic and prescriptive assertions (e.g. as to what is "required" or "imperative": see paragraphs 39 and 43) and the stated aim (see paragraph 75) is to "finalise a framework for the regulators to identify and assess risks to quality". However, prescription by the LSB is to be avoided. If the LSB were to issue prescriptions for all approved regulators to follow, then it would be making rules without the power to do so and attempting to impose an inappropriate 'one size fits all' approach. Even worse, if the LSB were to issue prescriptions to individual approved regulators, then it would simply (and unlawfully) be usurping their function.

7. As stated above, the Bar Council does not propose to comment on the detail of the discussion in the consultation paper. However, it would be wrong to pass over the misguided claim in paragraph 42 in relation to the purpose of requirements for qualification for the legal profession that "Historically it was to erect a barrier to entry to protect the legal qualification from competition." It is troubling that the LSB should be determining its policy on the basis of such a false and misguided view of the regulatory arrangements which preceded its creation. So far as the Bar is concerned, the requirements for qualification were not intended to erect a barrier to competition, but to ensure quality. It is hoped that paragraph 42 is merely a slip, and that it is not indicative of any deeper misunderstandings or prejudices.

The General Council of the Bar

THE GENERAL COUNCIL OF THE BAR

RESPONSE OF THE BAR COUNCIL TO THE TRIENNIAL REVIEW BY THE MINISTRY OF JUSTICE OF THE LEGAL SERVICES BOARD

The Bar Council (BC) is the governing body and the Approved Regulator (AR) for all barristers in England and Wales. It represents and, through the independent Bar Standards Board (BSB), regulates over 15,000 barristers in self-employed and employed practice. Its principal objectives are to ensure access to justice on terms that are fair to the public and practitioners; to represent the Bar as a modern and forward-looking profession which seeks to maintain and improve the quality and standard of high quality specialist advocacy and advisory services to all clients, based upon the highest standards of ethics, equality and diversity; and to work for the efficient and cost-effective administration of justice.

Executive Summary

1. The BC believes that the Legal Services Board (LSB) has continuing functions to discharge in relation to its role as 'oversight regulator' of the Approved Regulators (ARs). Principally, this may include the licensing and supervision of alternative business structures (ABSs).

2. In relation to the other functions imposed upon it by the Legal Services Act 2007 (LSA) (principally the regulation of the legal profession, the establishment of the Office for Legal Complaints (OLC) and the Consumer Panel (CP)), however, the LSB has achieved the objectives entrusted to it by Parliament under the LSA, and has no remaining role to play.

3. Given its demonstrable propensity to exceed its limited remit, to the detriment and cost of the ARs that will ultimately be passed onto consumers of legal services

themselves, the LSB should be actively discouraged by the Government from abusing the oversight regulatory powers envisaged by Parliament.

4. This measure would be in accordance with the Government's commitment to keep the size of the public sector, and expenditure on its activities, under careful control. That extends equally to bodies whose costs are met out of levies on particular sectors rather than general taxation. In the case of the LSB, many of those regulated perform civil and criminal legal services on behalf of public bodies, and any unnecessary overheads attributable to excessive or duplicated activity by the LSB result in upward pressure on the level of charges those bodies must meet when procuring these services.

5. The reining in of the LSB would therefore be a clear, concrete and deliverable step towards the Government's aims in undertaking this review, and one which would both produce a demonstrable saving of money and ensure that the regulation of the legal profession is carried out effectively, efficiently and in the way that Parliament intended.

Introduction

6. This is the response of the BC to the Triennial Review of the LSB launched by the Ministry of Justice in January 2012, as part of the Government's commitment to the Public Administration Committee's Report "Smaller Government: Shrinking the Quango State". A separate and independent response is being delivered by the BSB.

7. The LSA imposed a range of functions upon the LSB. Principal among these are:

   (1) An obligation so far as reasonably practicable to act in a way which the LSB considers most appropriate for the purpose of meeting the regulatory objectives[1] (s.3(2)).
   (2) An obligation to "assist in the maintenance and development of standards in relation to (a) the regulation by approved regulators of persons authorised by them to carry on activities which are reserved legal activities, and (b) the education and training of persons so authorised" (s.4).
   (3) The making of internal governance rules for requirements to be met by ARs (s.30).

[1] Defined by s.1 as (a) protecting and promoting the public interest; (b) supporting the constitutional principle of the rule of law; (c) improving access to justice; (d) protecting and promoting the interests of consumers; (e) promoting competition in the provision of [legal] services; (f) encouraging an independent, strong, diverse and effective legal profession; (g) increasing public understanding of the citizen's legal rights and duties; and (h) promoting and maintaining adherence to the professional principles [see s.1(3)].

(4) The ability to impose performance targets and sanctions upon ARs, on an ascending scale of severity (ss.31-48).
(5) The control of practising fees (s.51).
(6) Various functions in relation to ABSs (Part 5).
(7) The establishment and maintenance of a Consumer Panel (CP) to represent the interests of consumers (s.8(1)).
(8) Various functions in relation to the OLC (Parts 6 and 7 and Schedule 15).

8. This Response focuses upon the discharge by the LSB of the functions referred to in paragraphs (1) to (5) above.

9. In relation to ABSs (paragraph (6)), given the early stage in the timetable for the introduction of the new structures, for which the LSA has a pivotal role under the LSA, it would be premature for the BC to put forward a response in this Triennial Review.

10. This Response also addresses briefly the role played by the LSB both in relation to the CP and the OLC, and whether the LSB has a residual role to play in relation to either.

11. This Response focuses upon the following topics:

(1) The role of the LSB as oversight regulator of the BSB – paragraphs 12 to 46 below.
(2) The role of the LSB in education and training – paragraphs 47 to 58 below.
(3) The role of the LSB in research – paragraphs 59 to 62 below.
(4) The role of the LSB in equality and diversity – paragraphs 63 to 67 below.
(5) The costs of regulation – paragraphs 68 to 73 below.
(6) The CP – paragraph 74 below.
(7) The OLC – paragraphs 75 to 77 below.

It sets out its conclusions and recommendations in paragraphs 78 to 84 below.

(1) The role of the LSB as oversight regulator of the BSB

12. Section 49 of the LSA states that the principal role of the LSB is "*the oversight of approved regulators*". The LSB and BSB (and other frontline regulators) have therefore coined the expression "oversight regulator" as an apt means of characterising the relationship of the LSB to the BSB and other frontline regulators.

13. This descriptor reflects the fact that, under the LSA, the LSB and the ARs are subject to *identical* regulatory objectives – the LSB under s.3(2); the ARs under s.28(2). It would make no financial or other sense for the LSB simply to duplicate the regulatory functions carried out by the ARs. The policy of the LSA was instead for the LSB to regulate only where necessary and proportionate – and otherwise to leave the ARs to comply unhindered with the regulatory objectives themselves.

14. During the passage through Parliament of the Legal Services Bill, the legal services professions and many Members voiced concerns that the LSB might yield to the temptation, familiar to bureaucracies everywhere, to micro-manage, over-regulate, and indulge in mission-creep, notwithstanding the stipulation in s.2(3) of the Legislative and Regulatory Reform Act 2006, repeated in s.3(3) of the LSA, that "regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed." Passages in Hansard that record some of these concerns are set out in Appendix I to this Report.

15. The Ministry of Justice will not need reminding that the BSB, and before the latter was established (on 1 January 2006), the BC, had a long history of furtherance of the regulatory objectives. Appendix II to this Report summarises the measures that had been adopted by the BC to promulgate what became the regulatory objectives, long before the enactment of the LSA and the creation of the LSB.

16. In particular, the BC made significant changes to its regulatory structure, pre-empting the enactment of the Legal Services Bill, and anticipating the implementation of an enhanced system of independent regulation and internal governance that it had itself already recognised as reflecting the need to satisfy the public interest.

17. Against the background of this activity on behalf of the BC, one would have expected the LSB to have let the BSB "get on with that job properly" (to use the Minister's assurance during the course of the evidence to the Joint Committee on the draft Legal Services Bill on 24 June 2006 - see Appendix I).

18. However, despite the fact that the BSB has demonstrably been acting effectively, the LSB has been determined to impress its own stamp upon the BSB. As the evidence in this Response demonstrates, the LSB has not left the BSB "to get on with the job properly". Instead, it has sought to micro-manage and extend its reach into areas where the BSB is achieving the regulatory objectives, and requires no assistance in that task from the LSB.

19. Symptomatic of the LSB's approach to its function is its identification of the following "goal" in its draft Strategic Plan 2012 – 15:

> "to reform and modernise the legal services marketplace in the interests of consumers, enhancing quality, ensuring value for money and improving access to justice across England and Wales."

This implies (without giving any detailed analysis) that some unspecified "reform" is necessary, and that the role of the LSB is to impose those "reforms". The statement of this "goal" exceeds the definition of the LSB's statutory functions by a substantial margin. It gives the strong impression that the LSB intends to use its statutory role to implement an agenda of its own. Statements of this kind, and many similar statements, equally vague and threatening, about legal education in particular have undermined the profession's trust and confidence in the LSB.

20. The following paragraphs of this paper identify specific areas (a) Internal Governance, (b) Alteration of Regulatory Arrangements, (c) Contractual Terms of Work, (d) Public Access, and (e) Chambers Complaints Handling – Signposting Requirements), in which the work being done towards the regulatory objectives by the BC and the BSB has been duplicated, and in some cases frustrated, by the LSB.

(a) Internal Governance

21. Section 30 of the LSA obliges the ARs to have internal governance rules to ensure that the frontline regulators have "such resources as are reasonably required for or in connection with the exercise of its regulatory functions", and that they can do so free from interference from the representative functions of the ARs. There are two prominent areas concerning the internal governance of the BC into which the LSB has sought without warrant to extend its regulatory reach.

22. The first concerns the staffing of the BSB. The BC is the single single employer of all staff, including those working for its independent regulatory arm, the BSB. The performance of its obligation under s.30 by the BC requires the exercise of a discretionary judgment. The BC should consult with the BSB, but has no obligation to obtain its consent in relation to issues for which the BSB bears no responsibility in law. Conversely, it follows that the BSB should not separately determine pay and conditions for its staff without the concurrence of the AR.

23. These points notwithstanding, the LSB has consistently sought to insist that the BSB should have absolute autonomy with regard to its staff, despite the fact that this goes

beyond the regulatory model in the Act and is potentially prejudicial of other statutory responsibilities binding the BC as AR.

24. Secondly, the LSB has made it clear it believes that the BSB should be allocated its financial resources at the beginning of the year, with little or no requirement to report back to the BC's Finance & Audit Committee (FAC). The BSB does not have the authority to set its own budget, and cannot decide upon a strategy in isolation from the resource implications of that choice for the BC. Whilst the BSB would welcome greater financial delegation - and there is agreement in principle that will be reflected in a revised Finance Manual – it is not a BSB formally agreed position. It is not the preserve of the FAC to influence the financial governance of the AR in this way, as part of the response to the dual certification process. This is similarly true in relation to the LSB expressed preference that the BC should split the FAC.

25. In both these respects, the LSB's interference has led to the waste of much staff time and costs.

(b) Alteration of regulatory arrangements

26. Provisions concerning alterations by an AR to any of its regulatory arrangements are set out in Schedule 4, Part 3 to the LSA. Any such alteration requires approval from the LSB, unless the LSB decides to exempt the alteration from this requirement. Further, unless the LSB decides to approve the alteration within an initial decision period of 28 days (or fails to deal with the application), an elaborate decision procedure will ensue which may take up to 12 months (or 18 months if the period is extended) to complete.

27. The Parliamentary draftsman no doubt assumed that these provisions would be used in a flexible and reasonable manner – and not in such a way as to impede or delay desirable change and innovation. Such an interpretation of the provisions would be inconsistent with the policy of allowing properly constituted and independent front line regulators the freedom to regulate, and leads to the perverse result that the LSB has much greater power to intervene if a minor rule amendment is proposed than if existing rules are simply left unchanged. Unhappily, the LSB has shown that it is fully prepared to insist upon the letter of the law in applying the rules.

28. This attitude is compounded by the comparative lack of understanding by the LSB both of the way the legal profession works and of the content and effect of the proposed changes to regulatory arrangements. The LSB should accept that the applicant frontline regulator will have the primary expertise and experience in the

issue prompting the application. The LSB lacks this expertise and experience, and moreover has no cause to investigate the motivation and intention of the applicant. Despite this, it chooses to carry out its own investigations into applications, leading to confused, costly and protracted processes which are not in the interests either of the professions or consumers.

29. This point is well made by reference to the experience of the BC in relation to the proposed changes to introduce Contractual Terms of Work - see (c) below.

(c) Contractual Terms of Work

30. Any confidence that Parliament and the BC might have had that the LSB would adopt a flexible and proportionate attitude to proposed changes to its regulatory arrangements has not been justified.

31. The latest example of this is provided by the BSB's ongoing application to the LSB to approve changes to the Bar's Code of Conduct to facilitate the introduction of new Contractual Terms of Work. Appendix III to this Response sets out in detail why this application was necessary, and how it was dealt with by the LSB. It provides a very good example of how the LSB's processes can be heavy-handed, disproportionate and inefficient, adding a layer to the bureaucracy of regulation that exceeds one of mere oversight and descends into micro-management.

(d) Public Access

32. Although barristers are usually instructed by solicitors to act on behalf of their clients, the public access scheme allows a barrister to be instructed directly by a member of the public without the need for a solicitor.

33. At present, the BSB's public access rules do not allow a client who may be eligible for public funding to instruct a public access barrister. This is one of the rules the BSB proposed to change in a consultation paper. The paper also suggested that barristers should have a duty to ensure that, before accepting public access instructions, the client is able to make an informed decision about whether to apply for legal aid or to proceed with public access representation. This proposed change to the public access rules followed on from a mini consultation paper, published in July 2011. The paper sought views on the possibility of relaxing rule 3(1) of the public access rules to enable a client to have the discretion to use a public access barrister even if they are eligible for public funding.

34. In addition to reviewing rule 3(1), the consultation also proposed to relax the existing rule which currently prohibits barristers with less than 3 years' practising experience from accepting public access instructions.

35. Such rule changes are in the public interest, promoting as they do both consumer choice and increased access to justice. The consultation has now closed and the BSB is considering the responses. However, before the close of the consultation period, the LSB wrote to the BSB raising 14 points which set out its expectations for the BSB's submission should it decide to proceed with an application for a rule change. A number of these points reach beyond what is reasonable and proportionate for an oversight regulator, and again seek instead to micro-manage the BSB and the BC to the detriment of the public and the profession.

(e) Chambers Complaints Handling – Signposting Requirements

36. Section 112(1) of the LSA provides that ARs must direct those whom they regulate to "establish and maintain procedures for the resolution of relevant complaints". Section 112(2) allows the LSB to specify requirements regarding these procedures. The LSB has risen to this challenge.

37. In particular, the LSB has required the BSB to oblige barristers to inform their lay clients, *at the point of first instruction*, of their right to make a complaint to their chambers, and as necessary to the Legal Ombudsman. The BC (and the BSB) objected that this requirement betrayed a fundamental lack of understanding on the part of the LSB about how the working relationships between barristers, solicitors and clients actually work in practice. They were overruled. The notion that the LSB has the knowledge and experience to override the BC in this way calls for close examination.

38. The BC understands and accepts the principle that the lay client (as ultimate consumer of the legal services) should be informed of the right to complain. Its real objection was that the obligation imposed by the LSB does not reflect the reality of practice at the Bar. For example:

(a) Barristers frequently have clients who are undergoing serious stress (e.g. under arrest or caught up in difficult personal problems). The LSB does not understand that the first thing the barrister needs to do is gain the trust and confidence of the client. Handing out information about potential complaints on the first encounter is at best a distraction, and at worse will undermine that trust and confidence.

(b) Barristers often have no personal/contact details at all for the lay client (for example, in relation to emergency applications in international child custody disputes where the relevant parties may have little command of the English language); what exists tends to remain with the solicitor.

39. Although it is right to say that the LSB's original stance was modified following discussion with the frontline regulator, a great deal of time was expended to create a barely workable solution, while the BSB's more appropriate and proportionate approach was overruled by the LSB.

40. None of this should have been necessary. The LSB's stance throughout this unfortunate saga revealed a lack of understanding of the way in which the Bar works in practice, and of the clients whose cases it takes forward. It also revealed a disregard by the LSB both of the balance struck under s.49 of the LSA, and of the limitations to its role under s.3(3).

41. The consequences for the Bar and the BC have been profound. The BC had to spend a great deal of time with practitioners trying to explain the desirability of an appropriate set of arrangements and to devise a scheme that would be workable in practice. As a consequence, the credibility of the LSB with practitioners was further undermined and the willingness of the profession to become constructively engaged in further initiatives was undoubtedly affected adversely as a result.

The role of the LSB as oversight regulator of the BSB - conclusions

42. As the areas considered above show, the LSB has a record of insisting upon:

(a) work being done which conflicts or interferes with work that the BSB already has in hand;
(b) topics and timetables for action that are unrealistic and which interfere with the BSB's own programmes for regulatory activity; and
(c) compliance with the LSB's own (less well-informed) approach to issues in preference to the BSB's own, well-researched and fully considered approach.

43. The results of this activity by the LSB are as follows:

(a) there has been over-regulation of the Bar which has been inefficient and excessive, and this has led to unnecessary cost being incurred;
(b) regulatory activity has not been being tailored properly and proportionately to what, in the public interest, the regulation of the Bar requires (in accordance with the regulatory objectives);

(c) regulation has failed properly to reflect the circumstances of the profession which the BC and BSB regulate.

None of these outcomes is desirable or in the public interest; nor does any of this accord with the role envisaged and laid down for the LSB by Parliament.

44. The BC does not intend to suggest that the LSB is not well motivated in its desire to oversee the regulation of the ARs. The point that the BC makes is that there will often be two perfectly reasonable points of view concerning governance rather than one "right" approach. Both the LSB and the BSB have as their targets well-regulated governance, independent of the professions. The fact that the LSB might choose to go about approaching its conceptual target in a different way should not entitle it to dictate that approach to the BSB, unless (which has not been suggested) the way in which the BSB is proceeding is palpably wrong.

45. There is little sign that the LSB has understood this point. To the contrary, in paragraph 8 of its Final Business Plan for 2011/12, the LSB states:

> "We expect that the [ARs] will act in accordance with the regulatory objectives and better regulation principles, as required by the Act, *limiting the need* for us to use either our direct regulatory or enforcement powers, and *reducing to a minimum any requirement for us to duplicate* work undertaken competently by others." (emphasis supplied).

The obvious point to make is that, in the event of compliance by the ARs with the regulatory objectives, there will be *no* need – not a limited need – for the LSB to use its own powers; and *no* requirement – not a minimum requirement – for duplication.

46. Despite this, the LSB's Chief Executive says in his draft Overview to the Draft Strategic Plan for 2012-15:

> "Going forward our work will increasingly be focused upon overseeing the regulators' performance: that is what the Act envisages and that is what the LSB will deliver."

Here too, it is plain that, despite the prodigious regulation activity by the ARs under the LSA, the LSB envisages an *increase* in the use of its powers – because the LSB assumes the role of micro-manager rather than oversight regulator, to the detriment of the professions and ultimately the consumer interest.

(2) The role of the LSB in education and training

47. Section 4 of the LSA obliges the LSB to *assist* in the maintenance and development of standards in relation to the education and training of persons authorised by the ARs to carry on activities which are reserved legal activities. In the context of the Bar, therefore, the LSB is obliged to give its assistance (where proportionate, and so forth) in relation to the maintenance and development of standards for the education and training of barristers.

48. In this field, too, it is a matter of concern that the LSB has gone and is going well beyond its brief, and, worse, duplicating work that is being carried on perfectly competently by those who have considerable experience in the field. Five areas call for particular comment:

(a) The Legal Education and Training Review;
(b) Quality Assurance;
(c) Continuing Professional Development;
(d) Research;
(e) Equality and Diversity.

The first three areas are considered in this section. Research and Equality and Diversity are considered separately below.

(a) The Legal Education and Training Review

49. In 2011, essentially at the behest of the LSB (which had indicated that it would act itself if the ARs did not), the ARs instigated a fundamental review of legal education and training (LETR), involving universities, law schools, the professions and consumers as well as the ARs themselves. The scope of the review was required to be wide ranging. It brings together those with expertise and experience in the provision of legal education.

50. The LSB has become increasingly involved in this process, despite the fact that the ARs are able to bring a wealth of experience to bear, and need no assistance in their task. The LSB's comments upon the ongoing review display a depth of ignorance of the state of legal education and training, and an uninformed presumption in favour of wide-ranging change that is a matter for considerable concern. Thus, in its draft Strategic and Business Plans 2012-2015, the LSB states that lawyers are being recruited and trained *"for practice in a bygone age"* and that *"there is a significant risk that England and Wales will fail to keep up with the changes in global markets for both legal education and legal services"*. The LSB (to whom its Chair has referred as "gifted amateurs" in this field) recently described the current system of legal education and

training as *"unfit for purpose"*. No evidence beyond the anecdotal is offered to support such surprising and uninformed assertions. They are, unfortunately, examples of the confrontational attitude adopted towards the profession which unnecessarily antagonises its members, and takes no account of the United Kingdom's international standing in the study and practice of law.

51. Here too the LSB is seeking to extend its remit beyond the limits of the statutory objective set by the LSA. It is not confining its attentions to the provision of *assistance* in the maintenance and development of standards in relation to the education and training of persons authorised by the ARs. Rather, it is seeking a front line role for itself. That role has no foundation in the LSA. At best, it will duplicate the valuable work carried on by the ARs. At worst, it will complicate, lengthen and increase the cost of the LETR, to the detriment of the professions and the public.

(b) Quality Assurance

52. The criminal justice system depends for its effectiveness and efficiency on good quality advocacy to deliver fair results. As Lord Carter made clear in his 2006 report "Legal Aid: A market-based approach to reforms", in order to sustain public confidence in the criminal justice system, good quality advocacy is vital.

53. The BC has long recognised the need both to reassure the public regarding the excellence of its practitioners, and to improve or remove the few who are not up to the mark.

54. Recently, the BC has become involved in developing the Quality Assurance Scheme for Advocates (QASA), which covers all advocates practising in the criminal courts. This has required close coordination and agreement between the BSB, SRA and ILEX. There were many details to be worked through (including for example whether there should be an exemption for solicitor advocates on plea-only briefs). The details are important, and the scheme was unworkable until they were settled.

55. The LSB has intervened repeatedly in this important process. In December 2010, it threatened enforcement action if the BSB did not introduce the scheme by July 2011, then December 2011, and it is only recently that agreement has been reached between the ARs in respect of a practical implementation process. The LSB repeatedly pushed very hard for unrealistic deadlines, was not receptive to the BSB in relation to operational issues.

56. It is difficult to understand how the LSB can consider the attitude it struck in this regard was compatible with the regulatory objectives or with sections 3(3) and 49 of

the LSA. Its oversight on this project was counter-productive (in that it antagonised those whom it is seeking to regulate), unnecessary (in that the ARs are perfectly capable of reaching a reasonable decision without LSB direction), and costly (in that the BSB and other ARs spent staff time dealing with the LSB instead of meeting their own regulatory objectives.)

57. It would not be right to leave this issue without mentioning the LSB's further proposal that quality assurance should extend to practitioners' advisory work. This proposal reveals a complete ignorance of the way in which the profession works, overlooking the following fundamental points:

(a) all instructions are legally privileged;
(b) many instructions are given in conference, orally;
(c) the very basis on which advisory work might be assessed is therefore inaccessible;
(d) even if access could be gained to advice given, who is to access it? Presumably the LSB had some form of peer review in mind?
(e) the notion that specialist advice should be reviewed by another specialist is utterly impractical;
(f) who would pay for the review, especially if the advice given represented a lengthy and detailed consideration of a body of written material?

58. The fact that this proposal was made, in ignorance of the laws regarding legal professional privilege and the duties regarding confidence, illustrates the perils of a non-expert lay regulator attempting to devise rules for the conduct of practice by members of the legal profession. The BSB at least has the track record and access to specialist advice that enables it to avoid pitfalls of this nature.

(3) The role of the LSB in research

59. The LSB's reports and papers over the three years of its existence have consistently stressed the need for the LSB to build up an evidence database with which to supplement its relative lack of experience in the field of legal education and training. By contrast, the BC has a wealth of experience and information on which to draw. The same can no doubt be said of the other ARs. The BC's recently published materials include:

(i) "Bar Barometer", a statistical report which details trends in the demographic profile of the Bar between 2005 and 2010.

(ii) The Biennial Survey, published for the first time in January 2012, which provides barristers with the opportunity to describe their current work situation and future career plans, and to give their views about their life at work and their profession.

60. Notwithstanding the depth and breadth of research material that has been produced and garnered by the legal profession during the course of its long history, the LSB apparently feels it necessary to conduct its own research to build its own database, at the legal profession's expense. Even in the field of education and training, where the research carried out has been prodigious, the LSB has been reluctant to accept that it will be unnecessary for it to commit further resources.

61. This point emerged most recently in the LSB's Final Business Plan 2011/12. In paragraph 92, the LSB states, in relation to the ongoing Legal Education and Training Review:

> "Once the scope of the review of education and training to be conducted by the SRA, BSB and IPS is clear, *we will consider whether there is any requirement for us to conduct complementary research to assist the review.*" (emphasis supplied)

62. The Ministry of Justice will no doubt consider it appropriate to require answers to the following questions in this context:

(a) Why does the LSB consider that there might be a deficiency that the providers have not themselves found, with their experience and expertise of such matters?
(b) What regulatory objective or public good would such further research serve?
(c) In what way is such research compatible with sections 3(3) and 49 of the Act?
(d) Does the LSB consider that it has a body of knowledge and experience in the field of legal education which enables it to make better judgments about future education and training needs than the academic and practising legal community itself? If so, what is it?

(4) The role of the LSB in Equality and Diversity

63. The regulatory objectives include a general duty to encourage an independent, strong, diverse and effective legal profession (s.1(1)(f) LSA). The BC's commitment to the active prosecution of this objective cannot be underestimated, as the summary of the endeavours of it, the Inns of Court and its members in Appendix IV to this Response show.

64. Despite the evidence of prodigious equality and diversity initiatives on the part of the professions, the LSB consulted in early 2011 on its own proposals for gathering a diversity evidence base and on increasing transparency at entity level. The BC, the BSB and other Bar groups responded with strong criticisms of the methods the LSB proposed for collecting a diversity evidence base and achieving transparency, and pointed to the burden on small chambers. These criticisms and alternative solutions for achieving the LSB's aims were not heeded by the LSB, despite the different working methods across the legal profession and the different circumstances of the ARs.

65. In July 2011, the LSB published a decision document setting out a timescale and method for taking forward its own proposals for accomplishing the regulatory objective of encouraging a diverse legal profession. The document included statutory guidance issued under s.162 of the LSA - meaning that when exercising its functions, the LSB may have regard to the extent to which the ARs have complied with the guidance.

66. The Chairman's foreword to the LSB's report in December 2011 on proposed equality objectives states: "There is such a disappointing lack of progress in certain parts of the profession that work on transparency and data collection is essential". The BC agrees that significant challenges remain, particularly in relation to progression and retention, but this critical tone is unhelpful and unbalanced in its failure to acknowledge either what has been achieved, or the BC's priorities and plans. The legal profession compares well to many other professions in achieving and monitoring diversity, and the BC has invested heavily in improving its data collection and storage and in its research capacity.

67. The BC is and will remain fully committed to maintaining and improving the Bar's record in equality and diversity. While the BC accepts that the LSB shares with it a statutory objective concerning equality and diversity, the LSB is neither justified nor qualified in terms of its role, resources and expertise to instruct the BC how to achieve equality goals. The LSB's approach to engaging with the BC on this issue has been bureaucratic and overreaching in character, rather than complementary to the work of the Deputy Prime Minister and the Independent Reviewer on Social Mobility. It has taken a lot of BC and BSB staff time to respond, without a satisfactory outcome. The LSB consistently demonstrates a lack of understanding or interest in the workings of the Bar and the specific barriers to access that prospective barristers face. Further, the BC questions whether it is appropriate for the LSB to prescribe to ARs the methods for achieving the perceived equality and diversity aims.

(5) The costs of regulation

68. The legal profession bears the cost of regulation not merely by its own ARs, but also all the costs of the LSB.

69. A Regulatory Impact Assessment (RIA) was published alongside the draft Legal Services Bill in 2006. The RIA examined the economic and social cost of different regulatory options, based upon costings drawn from a PricewaterhouseCoopers report "Financial Analysis to support the draft Legal Services Bill", commissioned by the Department for Constitutional Affairs.

70. The RIA estimated that the LSB model would have annual recurring costs of £67.3 million (comprising £3.6m LSB running costs, plus £63.7m regulation costs remaining with approved regulators), and one-off transition costs of £2.3 million. The RIA stated that this estimate assumed "that the underlying nature and volume of regulatory activities under the new LSB would not be substantially different from those performed under the current regulatory framework".

71. As this paper has shown, the scale of duplication and micro-management by the LSB has led to a considerable inflation of the cost of regulation. Although the LSB makes much in its Reports of the extent to which it has kept its budget under control, its staffing costs have increased (from £2.175m to £2.819m between 2010 and 2011), and its running costs have never come close to the RIA figure of £3.6m (2009/10 - £5.049m; 2010/11 - £4.734m; 2011/12 - £4.931m (budgeted figure).

72. Between 2006 and 2012, overall expenditure by the BC has risen by some 70% - from £7.6m to £12.9m. The only substantive change in structure or mission has been regulatory driven. The amount raised from the Bar on a mandatory basis to cover this has risen over the same period by some 64.5%, from £4.8m to £7.9m.[2]

73. In the first place, the cost of this increased regulation has been borne by the legal profession, most of whose members are ill-equipped to cope, particularly given the freeze and reduction in legal aid fees over recent years. Ultimately, however, it is the consumer that will suffer, either because the costs increases will be passed on in part to it, or because the increased cost of regulation will lead to fewer practitioners able to serve those in whose name the LSB's reforms are being promulgated.

[2] This levy/charge first arose in 2010. The figures given exclude sums raised by the Member Services Fee and by the pensions levy. These figures relate to the income raised by means of the PCF and the total expenditure incurred in funding the core activities of the BC. In addition, there is a mandatory levy on the profession to meet both the establishment and running costs of the LSB/OLC. In 2012, this figure is £1m.

(6) The Consumer Panel

74. The BC adopts the views of the BSB on this matter.

(7) The OLC

75. There are two important points to make about complaints concerning members of the Bar. In 2004-05, the number of complaints made by members of the public about barristers was 455, compared with 17,299 complaints about solicitors and other lawyers: see the Annual Report of the Legal Services Ombudsman for 2004-05, p 14. This low number of complaints is consistent only with (a) the good quality of the services provided by the Bar, and (b) effective regulation in the first place.

76. Secondly, as with the many other aspects of its governance detailed above, and as shown by its high satisfaction ratings from the Legal Services Ombudsman, the handling by the BC of complaints against barristers was exemplary prior to the changes introduced by the LSA, characterised by the BC's placing of the public interest at the forefront of its approach to regulation.

77. These two factors point to the lack of any likely significant role for an oversight regulator such as the LSB, so far as complaints are concerned. Save for its residual role in appointing the chair of the OLC, and other such peripheral matters, the LSB has, or should have, little involvement with the OLC, which could function perfectly well without the LSB.

(8) Conclusions and Recommendations

78. The LSB is a relatively large organisation which has largely outlived its original purpose, and that is plainly seeking to find an additional role for itself. Much of the undesirable activity of the LSB that this Response has highlighted flows as much from this as it does from mission creep. Indeed, the very existence of this undesirable activity serves to prove the BC's point that the LSB has served its purpose.

79. This Response has demonstrated that the BC is (and, even before the establishment of the LSB, had been) well regulated, and that further regulation by the LSB is costly, wasteful, unnecessary, and therefore contrary to the public interest.

80. Although the LSB has a continuing role to play in relation to the initial supervision and regulation of ABSs, it has no demonstrably useful role to play in relation either to the ARs, or the CP, or the OLC. It has a statutory responsibility as an oversight regulator, but it was never intended to be a professional regulator as such nor a

market regulator. It is inconsistent with the supervisory role entrusted to it by Parliament that the LSB should concern itself with the micro-management of the affairs of front-line regulators.

81. On 15 December 2011, announcing his updated list of proposals for the reform of public bodies and guidance to support the programme of orders that would follow Royal Assent of the Public Bodies Act 2011, the Minister for the Cabinet Office and Paymaster General said:

> "The coalition Government made a commitment to review public bodies, with the aim of increasing accountability for actions carried out on behalf of the state. The landscape will be smaller, more efficient and will cost less, offering better value for money to the public. Our reforms will also help to realise a power shift away from Whitehall, placing control of the delivery of public services in the hands of people who use them, and contributing to important reforms in health, education and economic growth. Unlike previous attempts to reform the public bodies landscape, our reforms will ensure that public bodies will no longer operate long after their job is complete or continue in a form that is outdated or inefficient. I believe that these reforms will lead to a permanent, and long overdue, shift in the role of public bodies and much clearer lines of accountability."

82. This Triennial Review of the LSB, CP and OLC offers a golden opportunity for the Government, in tune with this statement, to respond to this paper by restoring balance in the regulatory framework of the legal profession, ensuring that regulation is carried out by the profession's own independent ARs, freed from the overreach, rather than oversight that has been practised by the LSB, with costs consequences that damage, rather than advance, the public interest. This is exactly the sort of redundancy in a public body that the Government is looking to identify and root out.

83. The BC therefore recommends that the Ministry of Justice bring home to the LSB the limits of its regulatory remit. In particular, the LSB:

(a) should be required not to interfere in proposals by the ARs to alter their regulatory arrangements unless it is able to demonstrate *Wednesbury* unreasonableness;
(b) should cease to play any role in the LETR unless expressly requested so to do by the ARs; and
(c) should exercise its oversight powers only in cases where it is able to show, again on *Wednesbury* grounds, that the ARs are acting unreasonably.

84. The BC would be pleased to elaborate on any of the matters covered in this response.

The General Council of the Bar

30th March 2012

Appendices:

I: Extracts from Hansard illustrating the concerns expressed during the passage through Parliament of the Legal Services Bill.

II: Historic measures adopted by the BSB and the BC to effect the regulatory objectives.

III: The BSB's application to the LSB to alter its regulatory arrangements to facilitate the introduction of new Contractual Terms of Work.

IV: The role of the LSB in Equality and Diversity.

Appendix I

Extracts from Hansard illustrating the concerns that were expressed and reassurances that were given during the passage through Parliament of the Legal Services Bill

See paragraph 14 of the text of this Report above.

1. During the course of the evidence to the Joint Committee on the draft Legal Services Bill on 24 June 2006, Bridget Prentice MP (the Parliamentary Under Secretary of State, Department for Constitutional Affairs) was asked the following question:

> "Q455 Baroness Henig: A number of witnesses were concerned that, rather than being light touch, the LSB might be heavy handed. There were a lot of concerns about that and, in the end, one or two witnesses felt the important thing was that the LSB should act in a proportionate way. I wonder how you see the provisions in the draft Bill ensuring that that does in fact happen."

2. The answer was as follows:

> "It is important that it is proportionate. Where the approved bodies are operating effectively, *the LSB will leave them to get on with that job properly*. Equally - and this is important for consumers - where a body is falling down on their operation, the LSB has the ability to deal with that in an appropriate fashion. That gives good flexibility. It may be, for example, that the LSB simply has to remind a regulatory body of what they should be doing right through to taking a much more serious response if they are very negligently falling down in their duties." (emphasis supplied.)

3. During the HC consideration of clause 3 of the LS Bill on 13 June 2007, Ms Prentice, explained:

> "The Government did not want to put an absolute requirement on the board and on the regulator to act in such a way as to be fully compatible with all the regulatory objectives all the time, because that could result in greater cost and bureaucracy, and probably in greater intervention by the board in the regulatory activities of the approved regulators—not least because there would then be a risk of judicial review if they did not so act.
>
> The flexible and risk-based approach that Sir David Clementi advocated was the reason for drafting the clause as it is, such that the right way forward is to deal with matters on a case-by-case basis. The wording of clauses 3 and 28 therefore tries to recognise that the objectives might apply to a greater or lesser extent in the carrying out of functions, or even, sometimes, not at all."

4. Again on 13 June 2007, Mr Djanogly sought to move a further amendment to clause 3 that would constrain the LSB to act in a proportionate way. He said at col 92:

> "The LSB should respect the principle that primary responsibility for regulation rests with the professional bodies and accept that its role is merely to ensure that the approved regulators' actions comply with the regulatory objectives. The amendment addresses concerns about whether regulation by the board will be light touch."

5. Ms Prentice responded:

> "I appreciate the sentiment behind [the amendment]. We have consistently made it clear that we embrace the B-plus model of oversight regulation. ...
> It is important that the oversight regulator does not micro-manage and second-guess the actions of the approved regulators, as Members on both sides of the Committee will agree. ...
> I remind the Committee that the Government tabled amendment No. 6, which puts the board under a statutory duty to publish a policy statement setting out how it intends to have regard to the principle that its principal role is the oversight of approved regulators when formulating its policy statements."

6. In the same theme, the Joint Committee noted at paragraph 167 of its report that the Minister had told them:

> "Where the approved bodies are operating effectively, the LSB will leave them to get on with that job properly."

7. Sir David Clementi informed the Joint Committee that there should be minimal interference by the LSB in the work of the approved regulators, and that the LSB should not need to use its reserved powers (see para 574 of the extract from the First Report of the Joint Committee dated 25 July 2006).

Appendix II

Measures adopted by the BSB and the BC to put the regulatory objectives in place before the enactment of the LSA and the creation of the LSB

See paragraph 15 of the text of this Report above.

1. The BC had acted to separate internally its regulatory and representative functions well before publication of the "Review of the Regulatory Framework for Legal Services in England and Wales – Final Report" by Sir David Clementi in December 2004.

2. Following publication of the Clementi Report, the BC took swift action to carry out one of Clementi's central recommendations: that there should be a split between the regulatory and representative elements of the Council's work.

3. The BC established the BSB to undertake its regulatory work in January 2006, with members with extensive experience of regulation and corporate governance being appointed on Nolan principles, and with a lay chair.

4. The BC delegated all of its regulatory functions to the BSB including, without limitation, responsibility for: (1) qualifications and conditions for entry to the profession; (2) all aspects of training; (3) the setting of standards for those practising at the Bar; (4) the determination, amendment, monitoring and enforcement of rules of professional conduct; and (5) investigation and prosecution of complaints against barristers and students.

5. The BC agreed that, although entitled to be consulted, it would not have the right to review the decisions and regulatory arrangements made by the BSB.

6. The BSB proceeded to adopt a number of key principles reflecting good governance arrangements:
   - It developed an evidence-based approach to its work;
   - It focused upon the consumer interest and the public interest;
   - It established a risk-based way of assessing the profession's work with consumers;
   - It took major steps to establish a consumer panel to advise the regulator on access to justice issues;
   - It also established a tracking, benchmarking survey to test public and professional attitudes with the aim of arming itself with information with which to prioritise future work.

Appendix III

Details of the BSB's application to the LSB to alter its regulatory arrangements to facilitate the introduction of new Contractual Terms of Work

See paragraph 31 of the text of this Response above.

1. The BSB's application to the LSB was made, as one might expect, after extensive consideration had been given. It sought permission to:
   (a) replace its existing Terms of Work with new contractual terms;
   (b) remove the Withdrawal of Credit scheme and replace it by an advisory List of Defaulting Solicitors (naming those solicitors who had failed to meet a judgment for fees, a joint tribunal award, or failed to deal with publicly funded matters appropriately, thereby denying counsel payment from the LSC).
   (c) amend the "Cab Rank Rule" (which prohibits barristers from refusing to accept unwelcome briefs) in two respects:
      (i) by removing the prohibition on barristers accepting instructions on credit from solicitors against whom a direction has been made under the Withdrawal of Credit Scheme;
      (ii) by amending the Code of Conduct so that, unless one of the exemptions of the Cab Rank Rule apply, a barrister is obligated to accept the instructions if the solicitors offer the instructions on the basis of the new contractual terms or on the barrister's own published standard terms of work.

2. On 18 November 2011, the LSB emailed 9 questions to the BSB, querying the role of the Cab Rank Rule, questioning how the change would benefit the consumer, asking whether the change was necessary, and whether the proposed contractual terms were "legal". A reply was sent on 2 December 2011, and a meeting was scheduled to discuss this and the application more generally on 8 December 2011. The day before the meeting, the LSB emailed 49 further queries on the contractual terms.

3. It became apparent at the meeting on 8 December, in summary, that the LSB had fundamental objections not merely to the contractual terms and their purpose, but also to the very existence of the Cab Rank Rule.

4. Following the meeting, the issues which had not been addressed were dealt with, and revised contractual terms together with a response to all the queries raised by the LSB were sent on the 18 January 2012 to the LSB. Regrettably, the Response was received too late for the extraordinary board meeting of the LSB on the 18 January

which determined that a Warning Notice be issued indicating that the LSB was considering refusing the application.

5. The LSB's Warning Notice stated that the LSB "*remains concerned with important aspects of the proposed changes including, but not limited to, the proportionality of the proposed change, the impact of potentially restricting the availability of the Cab Rank Rule and/or the terms on which solicitors instruct barristers, and the process by which the proposals have been developed.*"

6. The issues of proportionality, restraint of trade and the contractual terms themselves had been raised by the LSB previously and addressed. Other than reiterating its known dislike of the Cab Rank Rule, the LSB had not queried before the impact of potentially restricting the Cab Rank Rule. Neither had the LSB given any indication before that it had concerns about the process by which the proposals had developed, nor indicated that the consultation carried out by the BC in preparation for the application by the BSB was inadequate. More detail on the LSB's questions and concerns has been published on their website together with a summary of advice given to the Board of the LSB by Hogan Lovells, solicitors.

7. It seems clear that there were and remain some fundamental misunderstandings by the LSB and/or misreadings of the application made to it. These include:
   (a) Under paragraph 2 of the report to the Board, it is stated that the a barrister can opt out of the full new Contractual Terms (NCT) or their own standard terms by way of a Conditional Fee Agreement. The application by the BSB made it clear that this is only the case *if the solicitor agrees*. The solicitor is always able to insist on the NCT *without variation*. The barrister and solicitor can agree any terms at any time. The ability to not use the NCT or the barrister's own advertised terms is <u>not</u> confined to Conditional Fee Agreements.
   (b) Under paragraph 3, it is stated that insufficient consultation has been undertaken and Annex A to the paper implies that the 2010 Consultation was sent only to the ARs. The BSB application, together with the Consultation Paper and Summary of Responses annexed to that application, made it clear that the Consultation was sent to 44 organisations, besides the Bar. A number of consumer organisations were included in the Consultation.
   (c) Hogan Lovells provided legal advice to the LSB Board. First, as would have been noticed from the Summary of Responses annexed to the BSB's application, Hogan Lovells was one of the respondents to the consultation carried out by the BC. Secondly, in the summary of their advice, Hogan Lovells clearly stated that the NCT would apply by default unless expressly

excluded. This is completely wrong. The BSB application is not seeking to have the new contractual terms treated as default terms.

(d) There is a lack of comprehension by the LSB that the Cab Rank Rule cannot operate without inclusion of terms of work.

(e) The LSB claim the changes will fetter incentives to negotiate on terms and price. The reverse is true.

(f) The LSB reiterate the question several times as to why the terms only apply to work offered to barristers by solicitors and not by other persons or bodies, even though the BSB's application explained that this had been considered and why it had been rejected.

Appendix IV

The role of the LSB in Equality and Diversity

See paragraph 63 of the text of this Response above.

1. The BC led the field with the inclusion some years ago within its Code of Conduct of extensive E&D obligations, and with extensive guidance to the profession on the topic.

2. Following the publication of Lord Neuberger's 'Entry to the Bar' final report concerning diversity for entrants to the Bar, the BC set up a Neuberger Monitoring and Implementation Group with a brief to develop a comprehensive, focused and implementable programme for the Bar to follow, from the point of view of both external and internal related organisations.

3. The BC has also for some years run activities directed primarily at state schools such as its "Speakers for Schools", along with careers events and law fairs attended by its staff and members of the Bar.

4. Currently, the BC is in dialogue with advisers to the Independent Reviewer on Social Mobility and Child Poverty to provide comprehensive information about existing barriers to fair access to the Bar, the structural challenges the Bar has faced in this area and, most importantly, the considered measures the profession is taking to improve access and to further social mobility.

5. The BC is also a signatory to the Deputy Prime Minister's Compact on social mobility, and is represented at steering and working group level on the Gateways to the Professions Collaborative Forum.

6. As a member of Professions for Good the BC contributed, along with the LSB, to the creation of the Social Mobility Toolkit published this year.

7. The BC works closely with the Cabinet Office with regard to the imminent publication of the report of the Independent Reviewer assessing progress made by the professions on improving access since 2009 (as part of which the legal profession will be thoroughly scrutinised).

8. The BC is closely involved in the forthcoming establishment of the Social Mobility and Child Poverty Commission.

9. In 2012, the BC created a dedicated social mobility committee, with diverse representation from key institutions of the Bar that will drive forward carefully considered objectives including specific emphasis on evaluating the impact of outreach initiatives undertaken, and coordinating outreach work undertaken across the Bar as a whole.

10. In 2012, the BC has also committed considerable resources to extend existing initiatives to the regions, and to strengthening relations with all universities and law schools in England and Wales, in recognition of the fact that to be effective, social mobility policy must be genuinely inclusive.