RESPONSE OF THE CHANCERY BAR ASSOCIATION

AND OF THE TECHNOLOGY AND CONSTRUCTION COURT BAR ASSOCIATION

TO THE BSB CONSULTATION ON THE NEW BSB HANDBOOK

The **Chancery Bar Association** is one of the longest established Bar Associations and represents the interests of over 1,100 members handling the full breadth of Chancery work at all levels of seniority, both in London and throughout England and Wales. It is recognised by the Bar Council as a Specialist Bar Association. Full membership of the Association is restricted to those barristers whose practice consists primarily of Chancery work, but there are also academic and overseas members whose teaching, research or practice consists primarily of Chancery work.

Chancery work is that which is traditionally dealt with by the Chancery Division of the High Court of Justice, which sits in London and in regional centres outside London. The Chancery Division attracts high profile, complex and, increasingly, international disputes. In London alone it has a workload of some 4,000 issued claims a year, in addition to the workload of the Bankruptcy Court and the Companies Court. The Companies Court itself deals with some 12,000 cases each year and the Bankruptcy Court some 17,000.

Our members offer specialist expertise in advocacy, mediation and advisory work across the whole spectrum of finance, property, and business law. As advocates they litigate in all courts in England and Wales, as well as abroad.

The **Technology and Construction Court Bar Association** (TECBAR) was founded in 1983 and now has over 350 members. It is the specialist bar association for barristers, whether employed or self-employed, who practise in the Technology and Construction Court or before arbitrators, adjudicators, or other tribunals. Claims tried in the Technology and Construction Court involve construction and engineering projects both here and abroad, information technology, environmental disputes, professional negligence and property dilapidation disputes and adjudication enforcement. An important element of the membership's work relates to international disputes, including both disputes which are heard in the UK and those heard overseas.

This response is the official response of the Chancery Bar Association and of the Technology and Construction Court Bar Association to the BSB Consultation on the new Handbook and Entity Regulation and Supervision and Enforcement.

PART 1

1. Before responding to the specific questions we have a number of general observations.

2. **Cost:** The first is the cost of regulation. Traditionally the Bar has had low overheads, which advances the following regulatory objectives enshrined in section 1 of the Legal Services Act 2007:

   (c) improving access to justice;

   (d) protecting and promoting the interests of consumers;

   (e) promoting competition in the provision of services within subsection (2);

   (f) encouraging an independent, strong, diverse and effective legal profession.

3. We suggest that the BSB should consider carefully both the cost implications for barristers of complying with regulations and the cost of the BSB to those it regulates.

4. A further concern is that the cost of entity regulation or the regulation of those who want to conduct litigation (with involvement in client money) should fall exclusively on those who wish to do so. Those who prefer not to practise in either of those ways should not have to subsidise those who do. Those who choose to do so, do so out of what they believe is their self-interest. They should bear the attendant costs.

5. Finally, we consider that it is regulation and reporting requirements which need to be justified, rather than their absence.

6. **One size fits all:** Much of the present consultation is concerned with entity regulation. This is a new venture for the Bar and for the BSB. We are concerned that entity regulation is often the driving force behind new provisions in the Handbook and that the desire to provide a single code for both individuals and entities has resulted in some of the unsatisfactory elements of the draft Handbook to which we draw attention below.

7. Moreover, it is not appropriate for those who practise as self-employed barristers to be subject to rules and reporting requirements which are needed for entities or those conducting litigation any more than they should be required to bear the increased insurance risks involved.

8. A further, unintended consequence of imposing regulations which are appropriate for entities but not individuals, is to introduce high-cost regulation on self-employed barristers with inevitable consequences for the cost and efficiency of self-employed practice at the Bar. This is contrary to the four regulatory objectives set out in paragraph 2 above.

9. Sets of chambers are not entities, but groups of independent, self-employed barristers. There needs to be fuller recognition of this in the Handbook and, in particular, of the fact that one member of chambers has little, if any, control over how others conduct their practices.

10. At present, members of chambers are able to act against each other on the same case. This improves consumer choice and so is consistent with the regulatory objectives in section 1(1)(c), (d) and (e) of the Legal Services Act 2007. The imposition on chambers of self-employed barristers in independent practice of rules which are designed for entities of a very different kind threatens the independence of self-employed practitioners in sets of chambers.

11. **Clarity:** In paragraph A7 of the New Handbook and Entity Regulation Consultation: Part 1 the BSB state:

"Barristers need clarity about the conduct required of them, so that decisions can be made in tight timeframes, and clients need to be clear about what they can and cannot expect of their barrister."

12. We endorse this view. We would add the following further considerations which we consider should inform the new BSB Handbook:

12.1 the regulatory objectives set out in the Legal Services Act 2007;

12.2 the potential impact on a barrister of a finding of breach of the Code of Conduct (not least in relation to applications for silk and judicial appointment);

12.3 the fact that barristers often/usually appear in an adversarial hearings where feelings can run high and there will often be a losing party; and

12.4 the impact in terms of time and cost of having to respond to allegations of breach of the Code of Conduct; and

12.5 the cost of paying for regulation.

13. We therefore approach the consultation on the basis that the BSB Handbook should achieve clarity and only provide that truly culpable conduct constitutes a breach. A code based upon widely framed core duties and outcomes is unlikely to do so. No doubt that is why the draft code has to fall back upon detailed rules, supplemented (or amended) by "guidance".

14. **Drafting**: We are concerned that the Consultation concentrates on specific questions when, as indicated below, there are serious issues as to the drafting of the Handbook which go beyond the questions. We suggest that the Handbook should be reviewed very thoroughly before it is promulgated.

QUESTION 1: Do you have any comments on the presentation of the new Handbook?

ANSWER 1: Yes, we do:

(1) The draftsmen of the draft BSB Handbook appear to have taken the Financial Services Authority Handbook as their model, an unhappy choice. It may be that it will be more user-friendly when viewed on line, but at present it is not at all easy to use.

(2) The hierarchy between core duties, rules and guidance is confusing and unhelpful:

(a) Outcomes appear to be given higher status than rules, but are, in fact, not mandatory, unlike the rules.

(b) However, the outcomes are matters which barristers "<u>should</u> have in mind when considering how the Core Duties should be applied in particular circumstances" and the BSB "<u>will</u> take into account whether or not an outcome has, or might

have been adversely affected when considering how to respond to alleged breaches of the Code of Conduct".

(c) The result is lack of clarity: while the outcomes are not mandatory, it seems that a barrister who does not have them in mind when considering whether or not a particular course of action will result in a breach of the core duties will be acting at his peril and that the BSB will attach weight to whether or not an outcome was or was not affected and as to whether an outcome might have been affected.

(3) While it may have been thought helpful to set out the 10 Core Duties on one page, the outcomes, rules and guidance for each of them follows Duty by Duty over the following 44 pages. It is not easy to find your way to the outcomes, rules and guidance for a particular Core Duty and it would certainly assist if the relevant Core Duty were restated at the beginning of the section containing the outcomes, rules and guidance which are specific to it.

(4) It would also be helpful if, rather than telling the reader at page 16 that there are 4 rules which relate to the order of precedence of the core duties, those 4 rules were set out at page 16. Otherwise the reader has to try to find the 4 rules, which appear at two different places.

(5) The outcomes for each core duty are numbered from 1 for each core duty. But the rules are numbered in one sequence throughout pages 17 to 61. Guidance under various rules is numbered from 1 on each occasion. The result is not user-friendly. A more sensible system of numbering should be used.

(6) The status of guidance is not always clear. While we are told that "Failure to comply with the guidance will not of itself be proof of failure to comply with a Core Duty or rule", some of the guidance is expressly in mandatory terms (a clear example is the guidance on rule 7: "Thus you must not wait to raise a procedural irregularity on appeal." If the "guidance" is in fact mandatory, it should be made clear by elevating it to the status of a rule. If not, it should not be expressed in mandatory terms.

(7) It may be that at least one reason for the lack of clarity is that the draft BSB Handbook is that, as explained in paragraph A3 of the New Handbook and Entity

Regulation Consultation: Part 1, the aim is to "enable consumers to better understand what to expect from barristers within the full range of business structures that will be possible" and to achieve "greater clarity for barristers about the regulatory regime with which they must comply". We doubt whether consumers (at least, unsophisticated consumers) will be able to follow the draft Handbook and the introduction of widely-framed core duties and non-mandatory outcomes serves to reduce clarity.

(8) The lack of clarity and the fact that it is hard to use may well result in inadvertent failure to comply because barristers will not have identified all relevant provisions. It may also lead to an increase in complaints because consumers may misunderstand the true effect of and intention behind various provisions.

(9) In general, we wonder whether the existing Code of Conduct is not clearer and better in some respects.

QUESTION 2: Is the relationship between outcomes, core duties, rules and guidance sufficiently clear?

ANSWER 2: No: See ANSWER 1 above.

QUESTION 3: Is the balance between rules and guidance about right?

ANSWER 3: No:

(1) See ANSWER 1 above.

(2) The relationship between the rules and guidance is confused:

(a) Example 1: Rule 1.1 imposes a specific, and unqualified duty on barristers "not knowingly [to] mislead or attempt to mislead the court". Paragraph 1 of the guidance to rules 1-4 provides that "For the purpose of rule 1.1.... you will be treated as knowing any matter which, according to your instructions, is true". Thus a barrister is deemed to know everything that is in his brief. In practice, instructions can run to many thousands of pages containing vast amounts of fact and it is inevitable that from time to time barristers will get points of detail wrong. Is that professional misconduct? Apparently it will be, because the effect of the guidance is to deem the barrister to know every point of detail at every moment when he is making submissions to a court. Or, if rule 1.1 is to be read literally and without the guidance, it will not be because the barrister will be

making an innocent mistake. Thus the guidance both appears to change the meaning of the rule and to turn innocent conduct into professional misconduct. (See also rule 11. 1 and paragraph 2 of the guidance on rule 11.)

(b) Example 2: We also note that paragraph 1 of the guidance to rule 1.1 states that "knowingly" includes "where you are reckless as to the truth". This is not guidance, but goes to the meaning of the rule itself. It would be preferable for rule 1.1 to state that "you must not make any statement to the court which you know is false or misleading or as to the truth or accuracy of which you are reckless". (See also rule 11.1 and paragraph 1 of the guidance on rule 11.)

(c) Example 3: Rule 1.3 imposes an unqualified duty to "avoid wasting the court's time". Unhelpfully, this rule is expanded by rules 6 and 7, where it is described in a heading as "Taking reasonable steps to avoid wasting the court's time" (which is not what rule 1.3 says). Rule 6 then states that a barrister's "duty to take reasonable steps to avoid wasting the court's time includes not making any submission (either in writing or whilst you are acting as an advocate) which you do not consider to be properly arguable" (our emphasis). Which is it?

(d) Example 4: The guidance to rule 6 informs a barrister that "if you fail to attend court on time you are likely to be in breach of the obligation to take reasonable steps to avoid wasting the court's time". Apart from the fact that this is not what rule 1.3 says, there may well be a good reason why a barrister does not attend court in time (including, in our experience, being stuck in a broken lift in the court building). What is the position? We would not expect a barrister who failed to attend court in time for good reason to be guilty of professional misconduct. But we are not sure that this is what the draft Code of Conduct provides.

(e) Example 5: Rule 11.5 precludes a barrister from communicating with any witness (including his client) while that witness is giving evidence unless he has the permission of the representative of the other side or the court. That mis-states the position: it is permissible to communicate with a witness (particularly a client), but not to discuss the substance of their evidence. Where, for example, the court omits to warn a witness not to discuss his evidence with anyone during an adjournment, it is the duty of the barrister to warn the witness not to do so.

(f) Example 6: An important qualification to rule 9 is in paragraphs 6 and 7 of the guidance to rule 11. That is an odd place for it to be.

(g) Example 7: Rule 16.5 is an unqualified duty to protect the confidentiality of each client's affairs. However, paragraph 8 of the guidance to rules 16-18 states that it will not be a breach of this rule if disclosure is "permitted or required by law",

with compliance with the Proceeds of Crime Act 2002 being given as an example. The guidance contains a qualification to the rule; it is not just guidance as to how the BSB will interpret it. It would be better to qualify rule 16.5 itself.

(h) Example 8: Rule 23.9 provides that a barrister "must not accept instructions to act on a particular matter if... you do not have enough time to deal with the particular matter". But paragraph 3 of the guidance to rules 22, 23, 24, 25 and 26 provides that, notwithstanding rule 23.9, "there may be exceptional circumstances when instructions are delivered so late that no suitable, competent advocate would have adequate time to prepare, in those cases you are not required to refuse instructions". Again, the guidance appears to qualify the rule.

(i) Example 9: Rule 25 provides that there is no need to re-issue to a client the terms on which you accept instructions if and when the scope of instructions which have already been accepted is varied. That seems clear and unqualified. But paragraph 7 of the guidance to rules 22, 23, 24, 25 and 26 provides that, when accepting such further instructions, a barrister "should consider whether it is appropriate in the circumstances to communicate your acceptance to the client in writing". This suggests that rule 25 is not unqualified (as it appears to be on its face) and, unhelpfully, provides no guidance as to when it might be thought appropriate to provide further written confirmation.

N.B. These are just examples of the problem. This is by no means an exhaustive list.

QUESTION 4: Are any of the rules unnecessarily prescriptive (please give details)?

ANSWER 4: We consider that, if anything, the draft BSB Handbook is insufficiently prescriptive. Rules should provide clarity. Vague statements of general principle and non-mandatory outcomes do not.

QUESTION 5: **Do you agree with the addition and purposes of the two new Core Duties?**

ANSWER 5: Not entirely.

Core Duty 9: There is no objection in principle to a duty to be open and co-operative with regulators. However, it must be made clear that this duty is subject to Core Duty 5 and the duty to maintain client confidentiality and privilege (cf. section 147(6) of the Legal Services Act 2007). (See also rules 32.2, 37.2.)

Core Duty 10: This may well be appropriate for entities regulated by the BSB. But it is hard to apply it to a barrister in private practice in a large set of chambers where individual barristers may well play little if any party in the day to day management (essential if there is to be efficient and effective management).

Contrary to good practice in well-run sets of chambers rule 56 sets out a large number of matters which each barrister in a set of chambers is under a duty to take reasonable steps to ensure, including such matters the competence of all employees to carry out their respective duties and that they do so in a correct and efficient manner. Self-evidently, all members of a set of chambers cannot interview everyone who applies for employment by that set. Nor can they all be involved in monitoring the performance of each employee.

Rule 57 explains that what rule 56 requires of an individual barrister will depend upon "all the circumstances" which include the arrangements in that barrister's chambers for the management of chambers and that barrister's role within those arrangements. It seems as though rule 57 is getting close to saying that a barrister can discharge his duty under rule 56 if there is a management structure in place, he is not part of it and he has no particular reason to doubt that that management structure complies with rule 56. But, driven by a desire to impose an overall, uniform core duty, the draft Handbook does not actually go so far, at least explicity. It is wrong to impose a duty which is neither necessary nor practical

QUESTION 6: Do you agree that all Core Duties should be applied to unregistered barristers?

ANSWER 6: We consider that there is a difference between unregistered barristers who are providing legal services and those who are not.

In the case of the former we agree that all the Core Duties should be applied. In the case of the latter we do not agree.

We are not clear as to how unregistered barristers who are not providing legal services and who are, by definition, not practising as barristers can engage in activities which would involve compliance with a duty to the court or necessarily require them to maintain their independence. Nor, if they are not acting as lawyers, would they necessarily be bound by duties to act in the best interests of clients or to keep the affairs of their clients confidential. So we wonder whether CD3, CD5 and CD6 should apply to unregistered barristers. And, when it comes to the standard of work carried out by an unregistered barrister (CD7) and how he manages his business (CD10), we wonder what concern it is of the BSB whether an unregistered barrister who is not practising as a barrister or otherwise providing legal services is providing a good service in whatever he is doing or how he manages his business.

In the circumstances we suggest that only Core Duties 2, 4, 8 and 9 should apply to non-registered barristers who are not providing legal services.

QUESTION 7: Do you agree with replacing the current prohibitions on sharing premises and associations with a more outcome focused rule and guidance?

ANSWER 7: Yes. The outcomes focused rule is more practical and flexible and is based more on common sense.

QUESTION 8: Do you think that the rules and guidance on sharing premises, associations and outsourcing will provide adequate protection for clients and users of legal services?

ANSWER 8: In general the rules and guidance on sharing premises, associations and outsourcing appear to provide adequate protection. However, we have a number of concerns and comments:

(1) Rule 46, which prohibits barristers from allowing any third party who is not authorised or licensed to provide reserved legal activities on a barrister's behalf, appears to enable self-employed barristers to allow an authorised or licensed third party to provide reserved legal activities on their behalf. We do not understand how that would work in practice. It appears to be an example of a rule directed at entities being applied to self-employed barristers as well, when it is not appropriate for them.

(2) It would be preferable if "material commercial interest" were defined (or there were a specific exception for a shareholding in a limited liability company whose shares were listed on a recognised exchange and the shareholding did not exceed a stated percentage of the issued shares) in rules 48, 49 and 51.

(3) Rule 51.1 prohibits barristers from having a material commercial interest in any organisation (a term which is not defined) "which gives the impression of being or may otherwise be perceived as being subject to the regulation of the Bar Standards Board or another Approved Regulator in circumstances where it is not so regulated". We understand the rationale for this insofar as the organisation might itself give a misleading impression. We are not clear as to why the prohibition should extend to organisations which are perceived (without themselves having given the impression) as being regulated. Must the perception be based upon reasonable grounds and/or objectively justified? We are concerned that barristers could be guilty of professional misconduct when they (and organisations in which they have material interests) have done nothing which should attract such censure.

(4) Rule 51.2 prohibits barristers from having material commercial interests in any organisation "which may otherwise be seen to bring the Bar into disrepute". Again, we consider that the Rule should be worded so that it is only if there is a reasonable basis for the organisation to be seen to bring the Bar into disrepute.

(5) Rule 52 prohibits barristers from practising "in association with any person where that person's conduct is such that, if undertaken by a BSB authorised person, it would reasonably be considered to undermine the professional principles". Practising in association includes being a member of chambers. It would seem that if another member of chambers acted so as to undermine the professional principles, a barrister would be in breach of rule 52 even if he had no knowledge (and no reason to know) of that person's conduct. Paragraph 6 of the Guidance states that the association should be terminated once you are aware of the other person's conduct, but that is not what the rule says. Moreover, breaking up a set of chambers because one member has been acting so as to undermine professional principles would be a disproportionate response to, say, a failure by one member to maintain proper standards of work (which would be a failure to maintain "professional principles" as defined).

(6) Paragraph 1 of the Guidance on rules 47-52 seems to be a rule, rather than guidance.

(7) The same goes for paragraph 4 of the Guidance, the first sentence of which is clearly a rule and should form part of rule 49.

(8) Rule 53 appears to require devilling to be the subject of a contract with express terms such as that the devil is subject to confidentiality, complies with "any other obligations set out in this Code of Conduct which may be relevant to or affected by such outsourcing", processes any personal data (undefined) in accordance with the barrister's instructions "as though it were a data controller under the Data Protection Act" and is required to allow the BSB or its agent to obtain information from, inspect the records (including electronic records) of and enter the premises of the devil. We suspect that this is another example of a rule directed at entities being applied, inappropriately, to self-employed barristers. (We also note that the requirement to allow the BSB to obtain information should be subject to client confidentiality/privilege.)

QUESTION 9: Do you think we need to include a separate business rule in the Handbook?

ANSWER 9: We are not persuaded that a separate business rule is needed. If time showed that a rule was needed, then it could be introduced in due course. However, we suggest that rule 48 should be amended to add a requirement to notify a client if an organisation to which the client is being referred is not regulated by the BSB or another Approved Regulator.

QUESTION 10: (1) Do you agree that the current prohibition on managing clients' affairs should be retained? (2) If not, how do you think the risks could be mitigated?

ANSWER 10: We agree that the current prohibition should be retained.

QUESTION 11: Are there any situations in which you think it would be in clients' best interests to allow referral fees?

ANSWER 11: No.

QUESTION 12: Do you think that a barrister should be obliged to report his own failure to comply with applicable rules?

ANSWER 12: Paragraph 905 b of the current Code of Conduct obliges barristers to report themselves to the BSB if (i) he is a manager of a Recognised Body which is the subject of intervention by the Approved Regulator; (ii) he is charged with an indictable offence; (iii) he is convicted of any relevant criminal offence; (iv) he is charged with a disciplinary offence by another Approved Regulator or professional body; or (v) he is convicted of a disciplinary offence by another Approved Regulator or professional body. Paragraph 905 c requires barristers to report promptly to the BSB if they are subject to bankruptcy proceedings, directors disqualification proceedings or an IVA. There is no obligation on barristers to report other barristers.

The proposed new regime goes much further.

First, there is to be a new obligation on barristers to report other barristers (rule 35). This is limited to cases of "serious misconduct". Paragraph 2 of the guidance gives examples of what constitutes "serious misconduct", although it does not define it. While we can see the value of a rule requiring disclosure of the type of misconduct set out in paragraph 2 of the guidance, it would be preferable if a full definition of "serious misconduct" were provided: barristers need to know when they are and are not obliged to report each other and should not have to make subjective judgments. This is particularly necessary given that the barrister whose alleged misconduct is reported may well seek to invoke rule 36 and complain that the barrister who reported him was not justified because the alleged misconduct was not "serious".

Second, rule 39 goes far beyond the current paragraphs 905 b and c. It extends to any non-compliance, including non-material breaches. We can see no useful purpose in a requirement that barristers should report non-material breaches either to their Head of Chambers or the BSB. We are not persuaded that there is any case for expanding the scope of a barrister's duty to report his own misconduct beyond the present requirements. The proposal appears to be onerous and unjustified.

Rule 39 also gives rise to serious questions of client confidentiality and legal privilege. Paragraph 1 of the guidance on rules 39 and 40 explains that a barrister should not report himself to his Head of Chambers if that would require disclosure of confidential or privileged information and that in such cases the barrister should report himself to the BSB. We do not understand how a barrister's obligation of confidence and privilege can be overridden by the Code of Conduct. (In this regard, we draw attention to the closing words of paragraph 905 of the current Code of Conduct: "provided for the avoidance of doubt that nothing in this paragraph shall require a barrister to disclose or produce any document or information protected by law or in circumstances to which paragraph 702, or the equivalent rule of another Approved Regulator to which he is subject, applies".)

This leads on to the problem with rule 40. At present barristers can consult other barristers (and, in particular, their Head of Chambers) in confidence about a problem which has arisen. Rule 40 would, in effect, mean that barristers could not discuss problems which did or might involve breach of some provision in the Code of Conduct in confidence. That would undermine one of the greatest protections that exists at the self-employed Bar for preventing misconduct or remedying it without delay. We do not consider that to be consistent with the regulatory objectives of "protecting and promoting the interests of consumers" or "encouraging an independent, strong, diverse and effective legal profession".

Again, while these rules may be appropriate for entities, they are not appropriate for self-employed barristers in private practice.

A more minor point is that rule 34.6(h) requires barristers to report themselves to the BSB if they become aware that they are in serious financial difficulty. Apart from the fact that this may be a matter of subjective judgment, we are not aware of any justification for this rule. Many practitioners suffer from relatively low income, either in their early years of practice (with the additional burden, now, of ever-increasing levels of debt from time spent as a student) and/or because of relatively low levels of pay for some areas of work and/or poor cash flow. We can see no justification for a rule requiring barristers in such circumstances to report themselves or for the BSB to incur the costs (passed back to the profession) of responding to such reports.

Finally, we note that there is no requirement to report a solicitor to the SRA (or, we believe on solicitors to report barristers to the BSB). We suggest that the BSB reconsider the supposed justification for the proposed rules.

QUESTION 13: Do you agree that failure to comply with rules should be reported to the Head of Legal Practice or Head of Chambers in the first instance with an obligation on them to report material breaches to the BSB (with the exception that barristers employed other than in BSB authorised bodies and sole practitioners should report any failure to comply to the Board)?

ANSWER 13 : We do not agree: see Answer 12 above.

We add that the distinction between material and non-material breaches is left vague. Paragraph 2 of the guidance to rules 39 and 40 is inadequate in this regard and, in any event, is only guidance. In effect, it will come down to the exercise of judgment by individual Heads of Chambers. A Head of Chambers who decided in good faith that a reported breach was not material should not be in breach of professional conduct. This should be made clear in rule 40 (and not in any guidance).

QUESTION 14: Do you agree that the prohibition on dual authorisation should be removed?

ANSWER 14: We consider that the prohibition could be removed as long as the result would not be confusion as to the capacity in which a lawyer was acting at a particular time. If an individual wishes to work as a solicitor from office A on Mondays to Wednesdays and as a barrister from chambers B on Thursdays and Fridays, there could be no objection. But we are not convinced that it would be workable for one person to be a barrister and a solicitor at the same time in respect of the same matter.

To take a simple example, barristers are subject to the cab rank rule, but solicitors are not. If a barrister/solicitor were in sole practice and a potential client walked through his door, would the cab rank rule apply? And would that individual be entitled to manage his clients' affairs (as solicitors are allowed to do) or not (being prohibited from doing so as a barrister)? Which regulator's code would have priority in such a case? While the Legal Services Act 2007 makes provision for the situation where a barrister is a manager or employee of an entity regulated by a regulator other than the BSB, it does not deal with the situation where he is also a solicitor regulated by the SRA

QUESTION 15: Do you think that the removal of the prohibition is likely to pose any risk to clients?

ANSWER 15: There is an obvious risk of confusion as to whether an individual is wearing both hats at any one time or only one, and, if only one, which. Lay clients would almost inevitably find this bewildering.

There is a further risk (which arises where solicitors employ barristers or others with rights of audience) that solicitor-barristers will advise their clients that they should act as advocates in a case when it is not appropriate or not in their client's interests to do so.

Moreover, while clients could complain to the Legal Ombudsman without having to worry whether their lawyer was acting as (i) just a barrister, (ii) just a solicitor or (iii) a barrister and a solicitor, in terms of professional conduct and complaints to Regulators, clients may well be confused.

QUESTION 16: Do you agree that rules on insurance for employed barristers should be replaced by guidance as historically no requirements have been set in relation to this?

ANSWER 16: We have wider concerns about rule 44 than the position of employed barristers. It is wholly inadequate.

In *Swain v. The Law Society* [1983] 1 A.C. 598 when considering the scheme for professional indemnity insurance introduced by the Law Society pursuant to powers given to it by section 37 of the Solicitors' Act 1974, Lord Brightman, with whom all members of the House of Lords agreed, said:

> "In exercising its power under section 37 The Law Society is performing a public duty, a duty which is designed to benefit, not only solicitor-principals and their staff, but also solicitors' clients. The scheme is not only for the protection of the premium paying solicitor against the financial consequences of his own mistakes, the mistakes of his partners and the mistakes of his staff, but also, and far more importantly, to secure that the solicitor is financially able to compensate his client. Indeed, I think it is clear that the principal purpose of section 37 was to confer on The Law Society the power to safeguard the lay public and not professional practitioners, since the latter can look after themselves. This is underlined by the position of section 37, which is one of a group of three sections, the other two of which are plainly enacted in the interests of the lay public. So, there is no doubt at all in my mind that the power given to The Law Society by section 37 is a power to be exercised not only in the interests of the solicitors' profession but also, and more importantly, in the interests of those members of the public who resort to solicitors for legal advice."

We consider that similar considerations should apply to barristers, including employed barristers who provide legal services to persons other than their employers (with a definition of employer to cover companies in the same group as their employers). To leave it to them whether to have professional indemnity insurance or not would be a dereliction of duty on the part of the BSB. Either they or their employers should have such insurance.

Rule 44 is not adequately drafted in respect of all barristers who provide legal services and regulated entities. Given that the primary purpose of professional indemnity insurance is to protect clients (or, for the purposes of the Legal Service Act 2007, consumers), minimum levels and minimum terms of insurance should be specified. In this regard make the following points:

(1) Self-employed barristers should be required to obtain professional indemnity insurance from BMIF (in other words, paragraphs 402.1 and 402.2 of the current Code of Conduct should be retained as they are). There are very significant

advantages in a mutual insurer such as BMIF (as solicitors are finding to their cost, having moved on from a mutual insurer).

(2) Entities should be required to have a level of professional indemnity insurance on terms which provide equal cover to that required by the SRA for equivalent entities (i.e. with a higher level of cover for limited liability companies and limited liability partnerships), including, crucially, the terms on which such insurance is to be obtained. The need for the terms to be at least as favourable to the insured (and so to clients/consumers) is vital if there is to be proper protection for clients/consumers. It is not just a question of the amount of cover, but issues such as restrictions on insurers' rights to avoid for non-disclosure and misrepresentation, attribution of fraud or dishonesty to a body corporate and aggregation of claims for the purposes of the limit of cover. It may also be necessary to have provisions dealing with "successor practices" (as defined in the Solicitors' Minimum Terms) and run-off cover. And what is to happen to regulated entities which cannot obtain professional indemnity insurance cover on the market? Is there to be an equivalent of the assigned risks pool for solicitors?

(3) In this regard, we draw the BSB's attention to the fact that professions such as accountants and surveyors have specified minimum terms, as well as solicitors and self-employed barristers.

(4) Finally, the current draft of rule 45 includes the word "member" which is defined in Part VI: Definitions as "a member of a limited liability partnership as determined by section 4 of the Limited Liability Partnership Act 2000". This is obviously a mistake and results from partial replication and partial amendment of the existing paragraph 402.2.

Rule 44 is, we suggest, woefully inadequate. In this regard we refer the BSB to the regime under the SRA, which consists of the SRA Indemnity Rules 2011 and the SRA Minimum Terms and Conditions of Professional Indemnity Insurance, among other things. We appreciate that there is pressure to introduce entity regulation by the BSB as soon as possible, but the present rule 44 suggests that the BSB has not thought through the implications of entity regulation properly. Had it done so, the BSB would have produced a regime for professional indemnity insurance which was properly thought through and which provided adequate protection for consumers. Rule 44 looks as though it was written on the back of an envelope by someone with no knowledge of professional indemnity insurance.

QUESTION 17: Do you agree that the public access rules should apply to foreign as well as domestic work?

ANSWER 17: We do not agree. We have not seen any evidence which would justify the proposed extension. The International Practice Rules have been in force for some time and, if there were a problem, we would expect it to have arisen by now. We adopt and endorse the response of the International Committee of the Bar Council to this Question and to Questions 18 and 19.

QUESTION 18: If so, do you agree that the impact of this proposal would be minimal?

ANSWER 18: We do not consider that the impact would be minimal for the reasons stated by the International Committee of the Bar Council.

QUESTION 19: Do you agree that the cab rank rule should be extended to apply only to instructions relating to work in England and Wales from professional clients in Scotland, Northern Ireland and countries in the European Economic Area, and not from other foreign lawyers?

ANSWER 19: Again, we agree with the International Committee of the Bar Council and with the points raised as "Other Matters" under their response to Question 19.

QUESTION 20: Do you agree with our proposals for the application of the cab rank rule to entities?

ANSWER 20: We agree with Lord Hobhouse in *Hall v. Arthur JS Hall & Co* [2002] 1 A.C. 615 at 739-740 that the cab rank rule is "a fundamental and essential part of a liberal legal system" and that it "is also vital to the independence of the advocate". The cab rank rule is consistent with and promotes the regulatory objectives in section 1(1)(a), (c), (d) and (f) of the Legal Services Act 2007. The BSB should therefore be doing all it can to maintain and uphold the cab rank rule.

We therefore agree that the cab rank rule should apply to entities.

We have some sympathy for the view that it should only apply to instructions to entities to work on a referral basis, although we would suggest that, if the application is restricted in this way, the BSB should monitor the position.

We have less sympathy for the view that it should only apply to instructions to work on a referral basis where the instructions name the individual within the entity. We do not see why the application of the cab rank rule should depend upon whether the professional client has named an individual or not in the instructions: that might depend upon whether the professional client has discussed the choice of barrister with the entity's equivalent to the clerks in a set of chambers before sending written instructions or not. If he has, the instructions might well name an individual. But the professional client might send down

instructions stating that he wants to discuss which individual will carry them out. Then the instructions, as such, will not name the individual. The application of the cab rank rule should not depend upon chance.

The authorised individuals who have chosen to practise through an entity have still chosen to be regulated by the BSB and so should accept the cab rank rule in respect of all referral work.

Finally, there is a scope for uncertainty. What if the instructions state "we understand that Ms Snooks is free to do this"? Do those instructions "seek the services of Ms Snooks" so that the cab rank rule applies or do they merely express a hope that the instructions will be referred to Ms Snooks, so that it does not? It is particularly important that the application of the cab rank rule is clear.

QUESTION 21: Do you agree that there should be a waiver process?

ANSWER 21: We do not see why entities should have greater protection against abuse than sole practitioners. Indeed, in theory an entity could have only one authorised person working within it.

The Bar has survived for centuries with the cab rank rule. We are not aware of any evidence to justify a waiver process. We repeat what we said about the importance of the cab rank rule in Answer 20 above.

The real restrictions on entities accepting instructions will not be abuse of the cab rank rule, but the various sub-rules in rule 23.

Those restrictions are the downside of practising from within an entity. No doubt those who choose to do so will consider that there are advantages which more than compensate for this.

In any event, we have doubts as to whether the proposed waiver process would work in practice. First, to show abuse, the entity applying for a waiver would have to show more than that it had received instructions in relation to a relatively minor aspect of a large matter. It would, we suggest, have to show a pattern of instructing other entities by the same client in the same way. Given the obligations of client confidentiality, this will usually be very hard to show because the entity receiving instructions should not know that other entities had received similar instructions. Second, how long would the process of granting a waiver take? And could the entity accept instructions from another client in relation to the matter which formed the subject of its application for a waiver while the application were pending?

An entity could always set up an information barrier so that only one or a small number of identified individuals received confidential information so that others were later able to act

for a different client in the same matter. The Courts have taken a robust approach to allegations that major firms of solicitors cannot act because one or more solicitor at the firm previously acted on a related matter. We suggest that this is a more appropriate solution to any perceived abuse of the cab rank rule.

QUESTION 22: Do you have any comments on the proposed arrangements for the management of Chambers and entities?

ANSWER 22: Yes, we do.

Rules 56 and 57 are an attempt to impose broadly similar rules on sets of chambers, which are associations of self-employed barristers, and entities (entities being subject to rules 58-61). Members of a set of chambers can act for parties with different interests because they are independent of each other. That independence is consistent with and promotes the regulatory objectives set out in section 1(1)(c), (d) and (e).

Attempts to introduce collective responsibility within a set of chambers threaten that independence.

And, if it is to be run efficiently, a set of chambers needs to have a relatively tight management structure. For example, if every member of chambers had to be reasonably satisfied that all persons working in that set were "competent to carry out their duties" and carried "out their duties in a correct and efficient manner" (rule 56.6(a) and (b)), the result could be multiple supervision and endless debate as to staff performance.

While rule 57 tries to mitigate the impact of rule 56, the overall thrust of the rules is still to treat every member of chambers responsible to an extent. Thus, for example, rule 56.4 requires each member of chambers to take reasonable steps to ensure that pupillage vacancies are advertised in a specified way. Is it enough that a member knows that there is a pupillage committee? Or does each member have to at least be told by the pupillage committee that it does advertise in the prescribed manner? The opening words of rule 56 ("You must take reasonable steps to ensure...") suggest strongly that passive reliance on management is not enough. But it should be enough, at least unless there are reasonably grounds to doubt that management is running chambers as required.

We therefore suggest that the existing provisions, which place responsibility for management on those who manage, be retained in preference to rules 56 and 57.

Subject to that we have a number of specific points about rule 56:

(1) Rule 56.2 requires there to be a single head of chambers. Many sets of chambers have joint heads of chambers. We suggest that this should not be outlawed.

(2) How it is proposed that existing contracts of employment can be varied to require compliance with the new Code as required by rule 56.6(d)? It may be that employees will agree, but what if they will not?

(3) Rule 56.6(e) requires each member of a set of chambers to take reasonable steps to ensure that employees of the set of chambers "do nothing which causes or substantially contributes to a breach of this Handbook by any BSB authorised individual within Chambers". This cuts across the independence of each member of chambers and the confidentiality which each member of chambers is required to maintain in respect of his own client's affairs.

QUESTION 23: Do you consider that the Public and Licensed Access rules could in principle be made less detailed without detriment to clients?

ANSWER 23: In principle, yes, although the question lacks context because, obviously, it all depends on what changes are proposed in practice. Moreover, we consider that Licensed Access works extremely well and is well understood by practitioners. Licensed access is extremely important to the Bar, particularly in a world of increased competition with solicitors firms and nothing should be done which undermines licensed access. Detailed guidance in this area is helpful to practitioners, because barristers are more used to working on the instruction of solicitors.

QUESTION 24: Do you consider that the BSB should review whether the category of Licensed Access client should be retained?

ANSWER 24: No, we do not. Licensed access works well. There is a fundamental difference between licensed access and public access and the two will never be able to be equated owing to the presence of the referring professional person in the case of licensed access. The public access training which would be required is almost wholly irrelevant to licensed access. If there is to be a review, it should be based on evidence of problems with the existing regime (if any).

QUESTION 25: Do you agree that this revised guidance is appropriate, in order to ensure that the court is not misled?

ANSWER 25: We consider that this is a matter for those who practise in the criminal courts and the Bar Council.

QUESTION 26: Are the proposals for when and how acceptance of instructions are to be confirmed and for informing clients of terms appropriate and proportionate or are there changes you would suggest?

ANSWER 26: In general the proposals are appropriate and proportionate and were recently considered by the BSB in great detail.

Rule 24.1 assumes that the barrister will specify the terms on which he will be acting. In practice most barristers do not specify terms and do not enter contracts with their clients. And, where terms are specified by the barrister, they may not be the terms that are contractually binding. We consider that rule 24.1 should be amended to require written acceptance and "the terms, if any, on which you propose you will be acting".

QUESTION 27: Do you have any other comments on the draft Code of Conduct?

ANSWER 27: Please see paragraphs 1 to 14 above. We also suggest that it be read through very carefully: we have identified a number of drafting issues, but do not pretend to have produced an exhaustive list, not least because the consultation is focused on specific questions as to particular parts of the draft Code.

In relation to the Equality and Diversity Rules, we have the following comments:

(1) The rules have recently been the subject of change ("the new rules").

(2) We can see no justification for a further change as proposed.

(3) Indeed, to change again is bad regulation.

(4) Moreover, the version in the draft Handbook is less well drafted and less clear than the new rules.

(5) This is particularly the case insofar as changes are proposed to the data to be collected. It is obviously sensible to try to achieve consistency of data rather than changing what is obtained from time to time. Indeed, if there is no consistency, the whole purpose of the requirement that data is provided is undermined.

(6) At present an important programme of systems and support is being built up around the new rules. For example, the redesign of the Pupillage Portal is being put out to tender and it is intended that the new Portal will be designed to capture the data required by the new rules and to export them in usable form to chambers which use the Portal. And the Bar Council is piloting a spreadsheet for chambers to use to implement the new rules with drop-down boxes in each cell ensuring that only valid data is collected. All this is important in helping barristers get a grip on difficult issues of data collection but may be rendered obsolete if the new Handbook requires something different.

(7) Sub-rules (i) to (t) of the new rules provide for the appointment of a Diversity Data Officer ("DDO") and set out the responsibilities of the DDO. There is no equivalent in the new Handbook, although paragraph 3 of the Guidance to Rule 12 in section E2 says that "it is anticipated that the Equality and Diversity Officer will compile and retain data about the relevant protected characteristics of all applicants". The role

of the DDO in the new rules is much wider. We cannot think of any good reason for the disappearance of the DDO from the draft handbook.

(8) A specific concern is that sub-rule (q) of the new rules provides that the published data excludes sexual orientation, religion and belief unless the relevant person consents. The exclusion of sexual orientation, religion and belief is not excluded by the draft handbook. There is however a new proviso in 12.3.h::

> "the requirement to publish the information referred to in rule 12.3.f above shall not apply where it would result in the Chambers of (sic) BSB authorised body publishing data relating to groups of fewer than 10 people per relevant characteristic"

This is not clearly drafted and it removes the ability of an individual to provide information but not consent to its publication. Of course one can always refuse to provide such data (see 12.3.g.i). After some consideration we have concluded that the rule means that, for example, if you had a chambers of 20 people 2 of whom were women and 18 of whom were men you would have to say that 90% of your chambers were men, but you would not have to say that 10% of you were women because fewer than 10 people had the relevant characteristic of being a woman. This is perhaps reasonable where there are many different relevant characteristics which a person might have. A statistic that 90% of Chambers is Anglican is going to give little away about the religion or belief of the other 10%. This is not so in respect of sexual orientation. We therefore doubt whether rule 12.3h provides adequate protection.

QUESTION 28: Do you have any comments on the proposed self-certification procedure?

ANSWER 28: We do.

The proposed procedure is essentially subjective and requires confirmation of only a bare minimum standard of qualification or experience. Given the potential risks to clients, there should be a more objective and rigorous assessment of suitability before barristers are authorised to conduct litigation. Without this there is an obvious risk that those applying for authorisation will simply confirm that they are suitable when the reality may be different.

As is clear from paragraph C22 of the Consultation Paper, the conduct of litigation will require barristers to undertake tasks and to have in place procedures and systems which they do not do or have at present. The conduct of litigation requires a different approach to diary management, arranging cover during periods of holiday and other absence, case management and recording systems, filing systems and financial systems which, at present, self-employed barristers do not have.

While it may be fairly easy for an employed barrister to conduct litigation within a firm of solicitors (which will have appropriate experience and the necessary systems), for a self-employed barrister to start conducting litigation, something more than self-certification is required in order to protect and promote the interests of consumers (regulatory objective (c) in section 1(1) of the Legal Services Act 2007).

The conduct of litigation does not just involve knowledge of civil and criminal procedure (contrary to what appears to be suggested in paragraph C11 of the Consultation Paper). In this regard we note with some alarm that paragraph C21 provides that the BSB "would normally expect" barristers to have undertaken Public Access training. This suggests that the BSB has a discretion to waive such a requirement. At the very least there should be a mandatory obligation on the barrister seeking authorisation to have undertaken the Public Access training or an equivalent.

As for the requirement that barristers should self-certify that they have "appropriate insurance", we repeat Answer 16 above.

We also note the concerns expressed by the Bar Council in its response as to whether self-employed barristers should be permitted to conduct litigation at all. These concerns are based upon the very different obligations and role of a lawyer who has conduct of litigation. We consider that there is substance in the Bar Council's concerns and that this goes both to whether it is in the interests of consumers for self-employed barristers to conduct litigation and, if they are to be permitted to do so, as to what requirements a self-employed barrister would have to satisfy in order to be allowed to do so.

In general, we fear that the BSB is proceeding without proper consideration and/or understanding of what is involved. We remind the BSB that the regulatory objectives under section 1(1) of the Legal Services Act 2007 are not limited to promoting competition in the provision of legal services. We suspect that in the context of the conduct of litigation too much weight is being applied to that objective, to the neglect and detriment of others.

In short, if self-employed barristers are to be allowed to conduct litigation, greater prescription in terms of training and insurance is a minimum requirement. But the BSB would be well-advised to reconsider the more fundamental question.

QUESTION 29: Do you agree with the proposed requirements for qualified persons to supervise barristers under three years' standing?

ANSWER 29: No. The suggestion in paragraph C23 that "experienced barristers... will anyway have considerable experience of litigation related matters" is based upon the misconception that knowledge of civil and criminal procedure is all that is required to conduct litigation. As we explained in Answer 28, such knowledge is not sufficient. This comes back to the wholly inadequate requirements for established practitioners to self-certify so as to be able to conduct litigation.

Nor will one self-employed member of a set of chambers be able to supervise the work of another. Indeed, we note that the draft rule (C2 5.1) refers to the provision of "guidance" which is not the same as supervision: there is a world of difference between the provision of guidance on request and supervision. The BSB needs to explain the basis upon which it considers that the availability of guidance is sufficient to justify allowing new practitioners to conduct litigation without supervision. Put simply, either new practitioners will have been adequately trained and tested when qualifying to conduct litigation or they will not have been.

At present, no self-employed barrister has been sufficiently trained and tested in the actual conduct of litigation and we do not understand how the BSB can possibly have formed the view expressed in paragraph C26 of the Consultation Paper that every barrister who has practised for at least 6 of the last 8 years would have a sufficiently high level of understanding of how litigation is conducted to be able to provide guidance.

None of us feel qualified to advise a new practitioner as to such matters as diary management (to avoid missing deadlines), the provision of cover for periods of holiday and other absence, filing systems, available software and IT systems, financial systems, litigation costs and client money. Yet these are the matters specified in paragraph C22 of the Consultation Paper.

We repeat that the BSB appears to be placing undue weight on one regulatory objective without having sufficient regard to the others.

QUESTION 30: Do you agree that a period of supervision prior to authorisation is not necessary given the other proposed safeguards?

ANSWER 30: We do not agree. To date barristers have conducted litigation from within the offices of solicitors who are likely to have relevant experience and to have appropriate systems in place. What is now proposed is very different.

And we note no waiver has been given in 25% of applications. That suggests that there were good reasons for the requirement in 1 application in 4. We do not see how the new "safeguard" of self-certification could possibly justify what would be, in effect, a waiver in those 25% of applications.

QUESTION 31: Do you agree that pupils in the second six months should be able to apply to be authorised to conduct litigation provided that their pupil supervisor is also authorised to conduct litigation?

ANSWER 31: No. Pupil barristers should remain exactly that. Pupillage is only for twelve months and within the first six months is unlikely to involve much if any experience of conduct of litigation. Further, pupillage remains a period of training for pupils during which they have to satisfy the requirements of the relevant checklists. It would stretch the ambit

of pupillage and the supervisory resources of the pupil supervisor too far to allow pupils to conduct litigation. In contrast, trainee solicitors undergo a two year training contract during which they have wider experience of conducting litigation and are supervised by more than just one individual.

Moreover, what would happen if a pupil were not taken on and he had agreed to conduct litigation (as opposed to appearing in court at a specific hearing)? The pupil might not have a chambers from which he could continue to conduct the litigation. Conduct of litigation is very different from accepting a brief.

QUESTION 32: Do you think that the BSB should authorise barristers to conduct litigation and introduce other elements of the new handbook for individual barristers prior to the regulation of entities?

ANSWER 32: As a matter of principle, we agree that there is no need for the authorisation by the BSB of individual barristers to conduct litigation to await the authorisation of the BSB to regulate entities. However, we would urge the BSB to review its proposals for the regulation of individual barristers for the reasons set out above.

QUESTION 33: Would it be appropriate to charge an additional fee for the litigation extension to the Practising Certificate fee to take account of (a) the additional administrative costs and (b) the additional risks associated with regulating litigation?

ANSWER 33: Yes. Indeed it would be wrong not to. It is only fair that those who wish to take on the conduct of litigation and therefore give rise to such risks should bear the costs of regulating such activity.

QUESTION 34: Should there be an ongoing annual fee for those authorised to undertake litigation?

ANSWER 34: Yes, for the reasons given in Answer 33.

QUESTION 35: Do you agree that the BSB should continue to prevent all barristers (except those who are practising in authorised bodies regulated by other approved regulators) from holding client money?

ANSWER 35: Yes. And it should not just be a matter of handling client money, but also of having control over it. This avoids the risk of dishonest or incompetent handling of client monies by individual barristers. It also avoids another tier of regulation and regulatory expense.

QUESTION 36: Would you find a payment service useful?

ANSWER 36: For those barristers and entities involving barristers who conduct litigation, a payment service would be useful in order to protect client monies and avoid further regulation of barristers.

QUESTION 37: Are there any risks associated with such a service that we have not identified?

ANSWER 37: We are not sure what risks the BSB has identified in connection with the proposed payment service. We note that it is proposed in paragraph C42 of the Consultation Paper that:

> "the monies might only be permitted to be moved out on receipt of joint instructions from those interested... or the payment account holder might pay out on evidence that a pre-agreed condition had been satisfied. The detail of how unauthorised access to the funds would be prevented will be for the designer of the scheme to come up with."

This is all rather vague. Yet the detail is crucial. We note that it is not proposed that there should be an equivalent of the SRA Accounts Rules because barristers will not themselves hold client money. If the consent of the client is needed for money to be released, we do not see why the client should not just pay directly from his own account. If the consent of the client is not needed, we see potential for abuse: experience of misapplication of client money by solicitors suggests that lawyers are not all immune to temptation when they have control over their clients' money.

Given the regulatory objective of protecting and promoting the interests of consumers, the BSB has a clear duty to satisfy itself as to the detail of any payment service, because it will be relying upon that detail to protect consumers and not upon annual audits and clear account rules which are prominent features of the SRA Accounts Rules.

We would add that barristers who want to avail themselves of such a service should be required to fund any additional cost of regulation and supervision.

QUESTION 38: Should there be just one payment service or should the BSB be prepared to approve a number of schemes?

ANSWER 38: In principle, the BSB should be prepared to approve any scheme which satisfied very strict criteria as to the safeguarding of client money (if such criteria can be devised). Monopolies are not usually healthy. However, it may be that as a matter of practicality – and, in particular, the costs of establishing such a scheme – there will only be one scheme. The BSB should certainly not commit itself to approving only one scheme.

It would almost certainly be appropriate to require any organisation which sought BSB approval to pay the cost of approval and, if as would appear to be appropriate to have ongoing supervision, of that supervision.

QUESTION 39: Do you have any comments about the criteria for approval of the payment service provider?

ANSWER 39: We have no comments save that the likely costs of the proposed measures will be substantial and should be borne exclusively by those who wish to avail themselves of the proposed payment service.

QUESTION 40: What further criteria for approval should the BSB consider including?

ANSWER 40: We have no specific suggestions. We repeat that very great care will be needed in prescribing the systems and checks to verify instructions to make payments.

QUESTION 41: Do you have any views as to how interest should be treated within the payment scheme?

ANSWER 41: We consider that option c is the best. Hidden fees are best avoided.

QUESTION 42: Are there any risks not addressed by the arrangements described above that would require us to establish a compensation fund?

ANSWER 42: There is an obvious risk that a dishonest barrister will procure a payment out of client money in circumstances in which (i) his own professional indemnity insurance will not respond (you cannot insure against your own dishonesty) and (ii) the provider is not liable to the client in either negligence or fraud so that it will have no liability to the client and its insurance (as envisaged by paragraph C46 e of the Consultation Paper, unless the proposed insurance will cover payment out of money at the direction of a dishonest barrister where the provider has no liability itself) will not respond. There is also the risk of collusion between an employee or agent of the client and a barrister to procure the payment away of the client's money. Again, the barrister would not be insured and the provider might well have no liability.

Were this to happen with any degree of regularity, there would certainly be pressure on the BSB to establish a compensation fund.

QUESTION 43: Is this definition of legal activities sufficiently broad to encompass all the main activities that a BSB-regulated entity is likely to undertake?

ANSWER 43: The definition of legal activities should include drafting or settling documents. The definition of legal services covers "drafting or settling any statement of case witness statement affidavit or other legal document". If the *ejusdem generis* rule were applied to that definition, it would result in an undue restriction on what entities could do.

It should also be possible for entities to provide expert evidence in English law.

QUESTION 44: Do you agree that the proposed authorisation criteria are appropriate?

ANSWER 44: We note with concern that in paragraph D11 of the Consultation Paper it is stated:

> "Complex ownership arrangements which lack transparency impose greater demands on the regulator and therefore impose greater cost on the regulated community as a whole."

We consider that the cost of regulating entities should fall exclusively on entities.

Otherwise we have no views on the proposed criteria.

QUESTION 45: Do you agree with these principles and Section E of Part 3 of the Handbook?

ANSWER 45: See our response to the Questions about Section E of Part 3 below.

QUESTION 46: Do you have any concerns about the proposed route of appeal?

ANSWER 46: No.

QUESTION 47: Do you think that any requirement in our draft rules is inappropriate for special bodies? If so, what type of modification do you think would be appropriate?

ANSWER 47: We do not think that the BSB should be regulating special bodies if they do not meet the requirements for authorisation by the BSB.

QUESTION 48: Do you agree with the general principles outlined above?

ANSWER 48: Yes. It is essential that the cost of regulating entities is borne entirely by entities, that the additional cost of regulating those barristers who choose to conduct litigation be borne entirely by them and that the cost of regulating the proposed payment service is borne entirely by those who choose to avail themselves of it. It would be entirely wrong to place any of those costs on barristers who prefer not to become employees of an entity, conduct litigation or get involved with client money even through a payment service. We assume that is what is meant by general principle a ("be fair to fee payers").

We are astonished that the BSB estimates that its set-up costs for entity regulation are £400,000. But whatever they are, not a single penny should come from anyone other than entities.

QUESTION 49: Do you agree that there should be a standard application fee for entities subject to the right to charge more if more in depth investigations are needed? If you disagree, please specify what different basis should be adopted?

ANSWER 49: Yes.

QUESTION 50: Do you agree that the annual fee for entities should be based on turnover? If you disagree, please specify what different basis should be used.

ANSWER 50: Yes.

QUESTION 51: Do you agree that these factors are appropriate for assessing potential impact on the regulatory objectives?

ANSWER 51: See our answer to Question 1 in Part 2 below.

QUESTION 52: Do you agree that these factors are appropriate for assessing the probability of an adverse regulatory impact occurring?

ANSWER 52: Yes.

QUESTION 53: Do you have any comments on the issues raised above?

ANSWER 53: Only that the BSB should be slow to burden entities or self-employed barristers/sets of chambers with the burden of providing vast amounts of information to the BSB so that it can spend large sums of money analysing that data.

QUESTION 54: Do you have any views on the applicability of the principles outlined above to individual barristers and the chambers model?

ANSWER 54: The BSB needs to justify any increase in the regulatory burden on individual barristers and sets of chambers by evidence.

QUESTION 55: Do you have any comments on the issues raised in the attached interim equality analysis?

ANSWER 55: See answer to question 27 above.

QUESTION 56: Are there any other potential impacts on Equality and Diversity from the new Code as a whole which you wish to draw to our attention at this stage? (As noted above, further work is being done in this area.)

ANSWER 56: No.

PART 2 (SUPERVISION AND ENFORCEMENT)

We are concerned that the BSB appears to be developing a new supervision and enforcement framework and regime suitable for entities, which will then be applied consistently to individual practitioners, but without yet having considered and consulted on the appropriateness of the supervisory regime for individuals. Apparently the BSB intends to consult on this in the autumn.

This seems to us to be the wrong approach. Individual barristers, whether self-employed or employed by non-BSB regulated bodies, will remain – in the medium term if not forever – the significant majority of those whom the BSB will regulate. We also deprecate the idea that a regime developed for (inevitably) higher risk entities conducting litigation and running a large business can be applied to sets of chambers made up of individual practitioners. There seems to be an underlying assumption that a set of chambers can be equated, broadly speaking, with a business carried on by an incorporated entity or a firm. (This is the rationale given for the BSB moving to regulate only the kind of entities that effectively replicate what sets of chambers of barristers do. Cf. para 25 of the Paper: "The BSB will be acting as a specialist regulator of entities *posing similar regulatory risks to those posed by the self-employed Bar*"). But it is the very absence of any real comparison between larger business entities and self-employed barristers practising from chambers that has given the Bar of England and Wales its huge competitive advantage and the ability to deliver a level of expertise and service at a price that a business entity cannot hope to match.

In short, a regulatory low-risk and low-cost profession is being brought unnecessarily into a higher cost, higher profile regulatory regime, with increased regulatory burdens.

We are also concerned that in the case of self-employed barristers a transition to regulation by risk assessment (including self-assessment), monitoring and inspection, with a view to helping those regulated to comply, backed by a set of administrative requirements and penalties, with disciplinary measures only taken as a last resort, is not justified by any evidence about shortcomings of the existing regulatory regime. This regime has resulted in a very low rate of complaints against barristers alongside generous testimonials from the Ombudsman about the approach of the BSB to complaints handling (prior to that function being transferred to the OLC). Where is the evidence that a change of approach is required? And where is the assessment of the cost of bringing in what is described in the Paper as a "proactive supervision regime"? Although the BSB says that in most cases an "intensive supervision regime" will not be needed, it concedes that in the case of some higher-risk entities such a regime will be appropriate. This means that the apparatus of such a regime will have to be created and funded. Who will pay for it?

Q1. Without knowing how the risk assessment regime will work, we are not sure what kinds of entities are being described as "low and medium risk entities", other than that the BSB envisages that these will be the "vast majority" of entities that it regulates (para 23). However, the BSB proposes that in the case of medium risk entities there will be a monitoring visit within the first 12 months, a regular annual or biennial return, and certification of compliance by the entity. In the case of low risk entities there will be a regular annual or biennial return and certification of compliance by the entity, with the

possibility of a monitoring visit but only for the purpose of gathering information. We would have thought that, in the case of (normally) barrister-majority entities conducting business in a new structure under a new Code for the first time, a monitoring visit for each such entity within the first few months of its authorisation would be essential, if the purpose (as stated) is to assist the entity to understand how to comply with its regulatory obligations. The level of supervision recommended seems far too low for new business ventures, and more appropriate to well-established, low risk businesses.

Q2. We are not sure why the BSB would see itself as regulating high risk entities at all, but if it does then clearly frequent monitoring visits, inspections and agreed plans of action will be needed. We would suggest that personal interviews on a regular basis with the HOLP and HOFA, and communication between the BSB and each manager/employee about any failings and plans of action would be required.

Q3. We do not agree that the BSB should conduct random short-notice inspections of entities that are rated low-risk. Such inspections are intrusive, disruptive, expensive and unnecessary. The need to adopt such measures in the case of low-risk entities would amount to an acknowledgment of the inadequacy of the risk assessment and monitoring/return system for such entities. Either the BSB believes that an outcomes-based, risk-focussed monitoring system is appropriate for barrister entities, in which random dawn raids are wholly inappropriate, or that system is inappropriate.

Q4. We assume that this question relates to the factors identified in para 33, rather than the "hallmarks" identified in para 34, though this is not clear. For what it is worth, we consider that the "hallmarks" of the new enforcement policy place too much emphasis on avoiding disciplinary charges. That may be as a result of the Code of Conduct being partly outcomes-based rather than prescriptive, in which case identifying a breach of the Code may be more difficult. (That is, we suggest, a reason why an outcomes-based Code is unsatisfactory.) But where the Code is prescriptive (and despite being supposedly outcomes-based it is to a large extent prescriptive), and has been broken, the right course is usually disciplinary action, unless the particular circumstances of the breach make it clearly inappropriate to bring a charge. The good reputation of the Bar for the conduct of its members has in large part been built on its clear, prescriptive Code and rigorous enforcement of its terms. We would be unhappy to see those benefits lost.

As for the paragraph 33 factors, if disciplinary charges are to be regarded as a last resort, as the BSB suggests then we disagree that factors (a), (f), (h) and (k) are necessary or relevant. (a) is irrelevant if a rule has been broken: the outcomes are not themselves rules and if breach of a rule does not negatively affect an outcome then there should be no such rule. (f) should be irrelevant to culpability and charge though relevant to means of disposal and sentence. (h) should be irrelevant in the case of disciplinary proceedings as opposed to a service complaint. (k) is too general and broad to be of any assistance (it might be regarded as a convenient summary of all the other factors).

Q5. No. We find the approach to be confused and confusing. It is suggested that breaches of the Handbook that are "capable of being dealt with administratively" do not constitute professional misconduct (para 46); and the decision whether or not to deal with the matter administratively is to be for a member of the PCD staff, not for the PCC. Breaches of rules of

the Code should be professional misconduct. We do not understand how or why a breach of a rule can be a breach such as to attract a sanction but as a matter of discretion not be misconduct. What is most odd is the suggestion that a breach of a rule of the Code will not be professional misconduct but an administrative matter, yet failure to pay the fine (an administrative matter if ever there was one) will be treated as professional misconduct and referred to a disciplinary tribunal (para 45). We consider that the determination by consent procedure can and should be used to deal summarily with more venial matters that are appropriately dealt with by way of a warning, admonishment or small fine. Otherwise, the matter should be referred to a disciplinary tribunal as currently.

Q6. If, contrary to the above views, the BSB implements its proposals for administrative disposal, then a fine of £5000 is appropriate for an entity but £3000 is much too high for an individual. £1500 would be more appropriate, bearing in mind that, if the BSB's analysis prevails, the barrister has not been convicted of professional misconduct.

Q7. No. Any finding of breach of the Code other than a purely administrative matter, such as those matters currently falling within rule 901.1 of the Code, should require to be proved to the criminal standard if the breach is capable of resulting in a fine. This is particularly so as we do not agree that a breach of the Code dealt with administratively and attracting a fine of up to £3000 is something that a barrister would not have to disclose on a silk or judicial application. The BSB does not have jurisdiction, as we understand it, to exempt administrative sanctions from the disclosure rules of the QCA and the JAC.

Q8. If a system of administrative warnings and fines is to be introduced, we agree that the findings and sanction should not be published; but that still does not mean that an application for a judicial post or for silk would not have to disclose the existence of the finding and the sanction.

Q9. We agree that the determination by consent procedure should be extended to include entities and their managers and employees and allow the PCC to impose conditions on a practising certificate, licence or authorisation, but not that the PCC should be able by this means to disqualify someone from working for a BSB regulated entity. The effect of such disqualification could be as severe for a non-authorised person as disbarment or suspension is for an authorised person, and so only a disciplinary tribunal should be able to impose such a sentence. In this regard, we note that at para 60 it is suggested that even a 3-person disciplinary tribunal should not have the power to disqualify, so we assume that the power to do so on a determination by consent procedure is a mistake?

Q10. We agree the disciplinary tribunal approach and agree that 5-person panels should be retained for the more serious cases.

Q11. If there is to be a public register of authorised persons and entities, with the terms of their licences, authorisations or practising certificates available, then we consider that it is inevitable that any condition imposed on a licence, authorisation or certificate must be published since a condition might preclude a person from doing certain work or acting in specified circumstances.

Q12. We do not agree that any widening of the existing powers for interim suspension is necessary in the case of self-employed or employed barristers. There is no evidence of any real regulatory risk caused by the existing powers, nor any evidence of any past problem caused by the powers being too narrow. This is in reality just an opportunity being taken to confer greater powers on a regulator without a good reason. For example, the ability to refer was previously limited to indictable criminal offences, now it is proposed that any criminal offence other than a minor offence, whatever that means, is to be a trigger, and that the interim panel and the PCC will have power to interim suspend in such a case. This is unjustified and wrong.

We agree that equivalent powers of interim action are required for entities.

Q13. Immediate interim suspensions should certainly be time limited because the matter should be fully considered by an interim panel at the earliest possible opportunity. An interim panel should always be capable of being convened for a hearing within 4 weeks in the case of a serious matter, which this would inevitably be. Even 4 weeks is generous. If someone has been suspended from practice by the PCC without a hearing he or she should be entitled to have the matter considered by a panel at the earliest possible time. On interim suspensions by panels, on the other hand, where there has been a hearing, we consider that to impose a time limit is unrealistic, but that the person suspended should be entitled to apply back to the panel if there is a substantial change of circumstances or other good reason for doing so.

Q14. We are unsure whether, in paragraph 87, the proposal that all non-authorised employees be employed under a contract of employment will apply in the case of persons engaged by self-employed barristers to do (e.g.) research work or devilling. Clearly, they will not be employed in the full sense, but we are aware that the BSB sometimes uses the term “employee” in the Paper in contradistinction to “manager”. May we therefore suggest that the proposal should apply only to employees of entities in the full sense? Subject to that, we agree with the essence of the BSB’s proposed approach to non-authorised employees and disqualification.

Q15. We find it a little difficult to see why there should be no need for intervention powers in the case of BSB-regulated LDPs conducting litigation and otherwise behaving in a similar way to a law firm. The SRA has intervention powers in equivalent cases, and the BSB and other regulators will have equivalent powers in the case of licensed bodies, which may differ from an LDP only in having one lay owner (and manager in the case of BSB-licensed bodies). We make this observation not because we think that the BSB should be seeking intervention powers and spending large sums of money acquiring them and then establishing an intervention regime, but as a matter of logic, comparing other circumstances in which intervention powers are thought appropriate. It would be our preference for the BSB not to regulate any entities for which intervention powers were appropriate. The same controls could generally be obtained, in the case of non-client money handling entities, by imposing a personal requirement on all BSB-regulated persons in relation to documents and computer records.

We agree that intervention powers are likely to be inappropriate in the case of BoEs, as with sets of chambers.

All costs in relation to acquiring, preparing and deploying intervention powers should be borne by those entities whose authorisation or licence makes them subject to intervention.
Q16 – we have nothing further to suggest in answer to this question.

Q17 – these powers may clearly be needed in rare cases and the BSB should have them if it is intending to regulate licensed bodies.

Q18 – we agree that any intervention agency work should be outsourced by the BSB, though the BSB would be wise to have some contractual arrangement in place, rather than attempt to deal with matters on a purely ad hoc basis. All such costs should be borne by licensed bodies (or LDPs, if intervention powers are obtained) regulated by the BSB.

Q19 – the costs of setting up an intervention regime should be shared by all entities whose authorisation or licence terms make them liable to the exercise of intervention powers, not by BoEs if no such powers are acquired in relation to BoEs, and certainly not by the entire profession. It is simply part of the price of practising in the shape of a particular kind of entity. We think that a polluter-pays approach, while attractive in principle, is likely to be a wholly ineffective means of recouping initial expenditure on the intervention regime, and may be ineffective in terms of recouping the costs of individual interventions.

Q20 – We have no view on this question.

Q21 – we agree.

Q22 – what evidence is there that a maximum fine of £15,000 for individual barristers is proving inadequate? If there is none, then there is no reason to increase the current maximum. We do not think it is realistic for a fine exceeding £15,000, as opposed to a more onerous sanction of a different type, to be imposed on an individual barrister. We disagree with the proposal that the maximum fine should be raised to £1,000,000. Setting a maximum at such an absurdly high level is only likely to impact unfairly on the level of fines being imposed. It is all very well to say that historical sentencing guidance will still be relevant, but in the brave new regulatory world with new rules and new limits, it is not going to act as a brake on increased fines.

In this regard, we note that the regulators of doctors, dentists and teachers have no right to fine those whom they regulate and that the maximum fine payable by architects is £5,000. The SRA's present power to fine "traditional law firms and those involved in such firms" is limited to £2,000. Fines should have a limited role in professional regulation.

We understand that the BSB has no choice as to the level of maximum fine for entities and for individuals within them: that is a matter for the Legal Services Board under section 95(3) of the Legal Services Act 2007. But that is no reason to increase the limit applicable to individual barristers 66.66-fold.

Q23 – we agree the factors with the exception of (b)(ii) – the amount of the fine should not be calculated to remove any financial gain or other benefit obtained; rather, the amount of gain or benefit should be taken into account as one of the factors at (c). Fines are not imposed by criminal courts to remove the amount of gain resulting from a crime, but as a

measure of the culpability of the offender and the seriousness of the offence. The proposed (b)(ii) confuses fines with confiscation proceedings.

Q24 – we agree that disciplinary cases involving entities should follow so far as possible the same procedure as for regulated individuals.

Q25 – we agree the proposed changes, with the exception of:

(i) the proposal that the findings of fact on which a conviction was based are admissible as conclusive proof of the facts: this is an area fraught with difficulty in terms of proving the facts on which the conviction was based – the certificate of conviction will not contain this information; since it is the conviction itself that causes the disciplinary proceedings, the tribunal is likely to have a sufficient indication of the seriousness with which the offence was regarded by referring to the sentence imposed; in other cases in which a particular fact is of significance it should have to be proved in the usual way at the tribunal;

(ii) amending the rules so that the BSB can appeal a decision of a tribunal dismissing all charges: we cannot see why there should be a chance in this rule.

Q26 – we agree that entity appeals should be heard before the Visitors, if the Judges are able and willing to perform this role.