Chancery Bar Association response to "The development of a risk-based approach to supervision" consultation paper

Introduction

1. 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 recognized 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.

2. 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.

3. 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.

4. This response is the official response of the Association to the BSB's Consultation Paper "The development of a risk-based approach to supervision" on 31st May 2013. It has been written by Timothy Morshead, QC and Caroline Waterworth.

Introduction to the ChBA response

5. Lord Woolf MR said in *Coughlan's* case [2001] QB 213 at ¶108:

> "To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken".

6. We are grateful to the BSB for the dialogue on which it has embarked

with the profession and others at a time of potential change and uncertainty for the future provision of legal services in this country; we recognize the large effort on the part of the BSB evidenced by the consultation paper; and we trust that the consultation will be undertaken consistently with the *Coughlan* principles.

Summary.

7. First, we do not think that the BSB has differentiated effectively, or at all, between chambers operating on the traditional model on the one hand and "entities" on the other: we refer for example to page 23 of the BSB's paper, under the heading "Scope". To equiparate ordinary sets of chambers with "entities" is mere wishful thinking. It is absolutely critical for the BSB to work out how to differentiate between systems errors in the administration of chambers from default by individual barristers. Chambers cannot be fixed with bad risk assessments because of the presence in chambers of one or two mavericks who get into trouble from time to time; and neither can the reputations of individual practitioners be tarnished because of systems errors in the administration of chambers.

8. Secondly, using the suggested Bar Business Standard as a proxy for regulation is wrong in principle since the Bar Business Standard is not a proper proxy. It is unlikely to come into existence in anything like its current draft form. Furthermore, it is of no use (indeed positively harmful) to the interests of independent barristers in specialist sets. To punish such sets for not having the Bar Business Standard would be quite wrong.

9. Thirdly, the BSB has made no attempt to assess the costs of its proposals, or address how the costs will be borne, as was the case with entity regulation. The cost is either going to fall most heavily on those most disadvantaged and unable to afford it, or it is going to fall quite unfairly on those whose own arrangements are at an optimum level that warrants no further expenditure on their regulation. Both are equally unsatisfactory.

10. Fourthly, the proposal to make more use of "administrative" sanctions gives us cause for concern. The minimum requirement of fairness, as with a police caution, is that a barrister who is offered an administrative should always have the option to insist instead on a proper hearing.

11. Fifthly and fundamentally, we do not think that the BSB has made out a

case for risk-based supervision for the independent Bar. The consultation paper provides no answers to the following basic questions:

(1) what are the perceived shortcomings in the existing system (including in particular in what respects does the current system fail to provide the best protection for customers and the public interest)?

(2) what objective yardstick is appropriate for judging the scale of those shortcomings?

(3) applying that yardstick, how big are those shortcomings?

(4) why is it considered that the proposed system would address those perceived shortcomings?

(5) judged by some appropriate objective yardstick, what is the level of confidence that the proposed system would cure the perceived ills of the existing system?

(6) what does the existing system cost?

(7) on a like-for-like basis, what would the proposed system cost?

(8) what objective yardstick is appropriate for judging whether those costs are proportionate to any likely benefits?

(9) applying that yardstick, would the benefits of reform exceed the costs?

(10) how in principle would the proposed system avoid systemic redundancy, except by entrenching disproportionate costs?

(11) apart from costs, what are the risks of abandoning the tried-and-tested system now in place?

(12) are those risks objectively proportionate to the likely benefits?

(13) in detail, how would the proposed system work in practice?

(14) are the proposed changes objectively proportionate to the practical and reputational implications for the profession?

Consultation Question 7 — Do you have any general comments on the supervision strategy or the consultation paper?

12. It is appropriate to start first with Consultation Question 7. Our answers to the other consultation questions will follow.

(1) The BSB's approach.

13. We note that in its current consultation paper the BSB has dropped any explicit reference to the contrast between "proactive" and "reactive" regulation. Nevertheless, it is evident from the BSB's work as a whole that it regards a focus on supervision as achieving what it would call "proactive" rather than "reactive" regulation. For example, in ¶6 of Part II of its consultation paper on the *New Handbook and Entity Regulation*, the BSB said of itself:

> "6. Historically the BSB has been a reactive regulator and the level of proactive supervision and monitoring over individual barristers and chambers has been minimal. This means that most of the BSB"s regulatory effort has been focused on reacting to past events and taking appropriate disciplinary action where necessary."

14. We think that this involves under-stating the proactive elements of BSB's functions within the regulatory regime. In particular, we respectfully suggest that the single most important proactive function discharged by the BSB is as guardian of the Bar's Code of Conduct. The Code of Conduct (howsoever re-branded) is intrinsically proactive: it is the formal stimulant of high standards in the professional life of individual barristers as well as sets of chambers, as well as the yardstick against which shortcomings may be measured. In its function as guardian of the Code of Conduct the BSB does not appear to "do something" every day. But that it merely because there is no need for it to do so: this does not mean that as <u>regulator</u> it is passive or reactive.

15. Therefore, the question which arises is not whether the BSB should move from being passive or reactive to being "proactive" — as if this were some new dawn. The proper question is: how much <u>more</u> "proactive" must the BSB become, in order properly to discharge its regulatory functions?

16. In answering that question, we take it as axiomatic that the regulator can have no self interest. The answer must never be tainted by irrelevant considerations such as whether the appropriate regulatory burden is large enough to keep all those employed by the regulator fully occupied. We trust that the BSB would agree that it would be improper, and an abuse of power, for any regulator to have regard to its own interests as a body, or to the careers or other interests of its own employees and officers, including by proposing measures which increase the level of regulatory activity beyond the minimum required commensurately with the risks actually involved.

17. It follows that any regulator proposing an increase in regulatory activity

must scrupulously demonstrate the necessity of its proposals.

18. In order to be confident that this fundamental principle has been respected, we regard it as essential and not merely desirable that the BSB must justify its proposals by evidence, without reliance on un-tested supposition, speculation or mere hope. This is a point of substance, not form.

(2) The "increased focus on supervision" for the independent Bar compared with entities.

19. The Bar's complacency and conservatism: It is trite to describe the Bar as traditional, reactionary, complacent and conservative. We suggest that no responsible regulator can allow itself to indulge that parody. The English Bar's reputation is undeniable and rests upon the standards and traditions observed by its members literally over centuries. The independent Bar's high standards are evidenced by the small number of sustainable complaints brought against chambers and individual barristers. Any objective, dispassionate appreciation of the evidence points to the same conclusion. Indeed, we note with interest that the BSB has now itself acknowledged that even "high risk" in the context of the Bar in fact connotes, objectively, a very low level of risk compared with most regulated activities: ¶14 at p66 of the BSB's December 2012 *Consultation Report*. .

20. We therefore think it is helpful to reflect on the evidence on which the BSB relies in support of its proposals for what it calls "an increased focus on supervision" (eg ¶2 of the Executive Summary).

21. In September 2010 the BSB published its consultation on *Regulating Entities*. At this stage, the BSB did not apparently envisage — or at least make clear a commitment to the idea — that a large part of the array of its proposals for risk-based assessment would extend to the independent Bar, with only relatively small adjustments. Even in the BSB's consultation paper on the *New Handbook and Entity Regulation* in March 2012, for example, at ¶B57(d) the BSB assured the profession that:

> "d. Chambers monitoring: Following this consultation there will be a separate consultation on the development of the BSB's wider risk-based monitoring strategy, focusing on how that will apply to barristers' chambers."

22. The BSB's proposals in its 2012 consultation included elaborate measures including for supervision of entities, reflecting the fact that (as the BSB acknowledged) in relation to entities "the data the BSB currently holds

on the regulated community is limited" (¶E30).

23. In response to that consultation paper, the BSB received a number of representations which in substance largely pointed out the difference in this respect between entities and the independent bar. Accordingly, in its report on the consultation responses, the BSB acknowledged at ¶332 of its report on Part I (p60):

> "332. The BSB appreciates that the information provided in the consultation does not provide a full picture of the approach that will be taken to risk. However the BSB has taken respondent's views on board and will be launching a further consultation with more detail at the beginning of 2013."

24. Additionally, even in relation to entities — for which there is at present no evidence base — the BSB acknowledged in ¶14 of its report on Part II (p66):

> "14. … It must be remembered that 'high risk' in the BSB sense still represents a considerably smaller risk than that represented by other similarly classified entities operating under different Approved Regulators".

25. Thus, even in relation to entities about which it has no evidence, the BSB itself acknowledges that the whole spectrum of risk covered between the designation of "low" at one end and "high" at the other, occupies the low end of hazard levels.

26. Moreover, by contrast with the case of entities, there is an abundance of data about the professional standards achieved by the independent Bar. The BSB has full access to the records of complaints made about individuals and sets of chambers over the years. These show that the standards achieved are uniformly high: that is precisely what makes aberrations so remarkable and sometimes shocking. We note that in seeking to justify its decision, in its own words, to "press ahead" with some of the controversial changes to the handbook which had attracted opposition from the profession, the BSB was able to cite just one single un-particularised allegation — apparently not even a proven case — about a single practitioner, at p76 ¶90 of the BSB's December 2012 Report. We would hope that the BSB will in all honesty recognize that this is a wholly inadequate evidence base (i) for consultation (ii) for making proposals for reform and (iii) above all, for enacting reform.

27. Indeed, the BSB has acknowledged in its current consultation paper at ¶13 that it is only "a few times each year" that the PCC launches an investigation into chambers or individuals or heads of chambers for

potential breaches of the code. Additionally, the BSB expects that its own proposals would, over time, lead to a uniformly "low risk" environment. Further, the BSB's prior experience of chambers monitoring indicates that there are "very few" chambers in what it calls the "higher risk" category: ¶7, p4.

28. These considerations, properly viewed, amount to an acknowledgment by the BSB that the self-employed Bar is in a completely different position from entities. There is already a lot of evidence about the self-employed Bar. None of it points in favour of the proposed changes.

29. It is therefore surprising to find much of the elaborate system proposed for entity regulation being put forward as if it were appropriate for adoption — even as a model — in relation to the independent Bar. In the first case, the BSB is entering uncharted waters, where the need for initial caution is self-evident. In the second case, the BSB is doing a much smaller thing. It is merely continuing the regulation of a profession made up of self-employed individuals, which has already won a well-established, highly-prized, jealously-guarded and world-wide reputation for high standards.

(3) Supposed benefits of a risk-based approach to supervision.

30. The BSB now indicates that it expects three "benefits" to accrue from what it calls "a risk-based approach to supervision" in the case of the independent Bar.

31. First, at ¶23 the BSB says that

> "overall it is hoped that the proposed approach to supervision will reduce the incidence of non-compliance and the negative impacts that this can have on consumers and the regulatory objectives."

32. That statement is unsupported by any reasons or particulars or evidence. This benefit is therefore speculative. Nevertheless, we make these three brief points:

(1) The BSB has provided no evidence to suggest that the existing levels of non-compliance are higher than is objectively acceptable, or that they are even material in regulatory terms, or even how one might objectively judge such matters — let alone that they justify further regulatory activity. Therefore, this element of the BSB's aspirations for supervision-based regulation is, with respect, completely meaningless.

(2) The BSB has provided no evidence that there exists an as-yet un-detected element of unprofessionalism at the Bar, which might be un-earthed by further regulatory activity — let alone evidence that any such un-detected problem is sufficient in scale to justify the further regulatory activity which is now proposed.

(3) The BSB has not offered any evidence, or even any example, of how its proposals might in practice deliver any improvement over the current regulatory arrangement. Looking back over the BSB's earlier papers, we have found only one example of alleged misconduct singled-out by the BSB for comment, in its response to the earlier consultation (which we have noted at ¶25 above). This was a case of alleged fraud by an individual barrister. Yet, manifestly, the proposed changes could not have prevented such a case from arising.

33. Secondly, at ¶24 the BSB says that it will

> "allow for greater targeting of resources so that those who are operating at a low risk are able to continue to do so with minimum involvement from their regulator, whilst resources are concentrated on those who pose most risk to consumers or the public interest and who could benefit from involvement."

34. Like the first, this supposed benefit is also unsupported by any reasons or particulars or evidence and is likewise speculative. Nevertheless, we make these two brief points:

(1) Alarmingly, this suggests that the BSB aspires to step outside its proper role as regulator and into the role of educator. This is profoundly misconceived in principle. We also doubt whether it will prove to be sustainable in practice, without disproportionate expense.

(2) There is no evidence that the large differences in perception and treatment which will result from being placed in one category of risk rather than another (see further ¶¶41–47 below), are proportionate to the issues at stake. Given the small risk which the BSB has acknowledged is under consideration (see ¶¶24–25 above), there is no evidence that more than "minimum involvement" of the regulator is required, or proportionate, <u>even</u> in so-called "high risk" cases.

35. Thirdly, at ¶25 the BSB says that

> "Supervision will also help to identify those chambers, entities or

individuals who are consistently not complying with their regulatory requirements and are not attempting to address this. This should allow for more effective deployment of enforcement tools where it is necessary."

36. Again, that statement is unsupported by any reasons or particulars or evidence. Therefore, this benefit, like the others, is speculative. Nevertheless, we make these five brief points:

(1) Put shortly, there is no reason to distrust the making of complaints as an adequate indicator of the need for regulatory intervention. Any material non-compliance will, almost by definition, produce adverse consequences or a perception of adverse consequences for individual clients or "consumers" (whether corporate or private individuals). In cases of any substance, it is a practical certainty that a complaint will be made, or that a claim in negligence will be brought. Thus, any problems which cross the threshold of materiality may be expected to come to light anyway in the normal course of events. This is nothing to do with increased monitoring and supervision: it is to do with self-interest — an intrinsically far more sensitive indicator of potential harm.

(2) Therefore, it is foreseeable that the BSB will become focused on those matters which do not come to light in the ordinary course of events: in other words, overwhelmingly, cases of immaterial non-compliance. This implies a new level of attention to matters of form and box-ticking. That is not a beneficial refocusing of resources. Quite the reverse: it creates a very high risk that the BSB's role will be devalued, as it comes to be perceived as undertaking a widened, pernickety and unproductive remit, which does not serve the interests of consumers or the profession or indeed anybody else (assuming, consistently with the principle in ¶18 above, that the regulator has no interest in regulatory activity for its own sake).

(3) In other words, there is no reason to suppose that increased supervision will have the intended beneficial effect; and every reason to suppose that it will have ill effects.

(4) The BSB thinks that there are degrees of "vulnerability" in the client base (eg ¶45). There seems to be a belief that "vulnerable" clients are less able to complain, or less willing to do so, or less well-equipped to judge whether they have suffered a wrong, than others. Again, the BSB has provided no evidence in support of any such belief; and the language of "vulnerability" carries

unfortunate undertones of a political or ideological agenda, which we trust is absent, rather than any evidence-based assessment of the likely needs of the Bar's clients. In our experience, the Bar's clients are (i) sophisticated themselves (or, in the cases of those lacking capacity, possess sophistication though their litigation friends etc) — and certainly capable of operating a complaints procedure; (ii) represented by solicitors (or, increasingly, other professionals); or usually (iii) both. As a referral profession, the Bar thus already offers a systemically protective environment for even the most "vulnerable" of litigants. Yet the BSB has given no weight in its proposals to the layers of protection for vulnerable individuals which are already built-into the independent Bar's business model.

(5) Even in relation to what the BSB call's "vulnerable" clients, it is patronising to suppose that anyone (including the litigation friends of persons who lack capacity) is in so "vulnerable" a position that he is incapable of detecting a possible ground of grievance, or that having done so he is incapable of doing anything so simple as operating a complaints procedure. There is no evidence that anyone with any good reason (or indeed any reason, good or bad) to feel aggrieved about a barrister or set of chambers has been unable to ventilate his complaint because of unfamiliarity with what needs to be done, or from any other cause. Indeed, with respect, it is intrinsically absurd to suggest that a person who has actually demonstrated the skills involved in <u>using</u> the services of the Bar, lacks the ability either to sense or to articulate a grievance. The evidence is to the opposite effect: the large number of complaints, compared with the small number upheld, indicates that clients are well able to make complaints, with or without good reason.

(4) Experimentalism.

37. We note with concern that in its December 2012 Consultation Report on the *New Handbook and Entity Regulation & Supervision and Enforcement* at paragraph 324 the BSB acknowledged that:

> "… until it begins to regulate entities the information it has available to it in order to make a fully informed risk assessment is limited. When the BSB does start regulating entities it will be in a better position to build up information on risks posed to the regulatory objectives, through effective monitoring. **So the approach to risk assessment will evolve**." [emphasis added]

38. This is an admission by the BSB that a system of what it calls risk-based assessment is experimental.

39. The BSB has provided no evidence of any system failure in the existing arrangements. We infer that no such failure can be demonstrated. The necessary corollary is that the existing system works well.

40. To adopt the BSB's proposals in place of a system which has served the public and the profession well for many years, in the absence of any evidence (let alone any compelling evidence) of a need for reform, would be highly irresponsible.

(5) Conceptual and reputational problems with appraising risk meaningfully in a profession consisting of individuals.

41. We find the BSB's proposals for allocating chambers and potentially individuals to grades of risk perplexing and, ultimately, gravely concerning.

42. Any individual barrister or set of chambers is likely to provide services to a range of different clients, varying in their degrees of sophistication, wealth, intelligence, litigiousness and attitude to risk. It follows that a high degree of subjectivity will be involved in allocating any individual or set of chambers to any category of risk. Yet the BSB appears to have no clear idea about how to approach this task on a consistent basis.

43. It is no answer for the BSB to provide lists of factors to which it will have regard as "increasing" or "decreasing" risk. This scheme provides no certainty for individuals or sets of chambers and is incapable of objective assessment.

44. Moreover, it is inevitable that the BSB's allocation of individuals and chambers to categories of risk will enter the public domain. This is so, whether or not the BSB intends formally to publish those allocations. The allocations might even be used by "low risk" chambers or individuals as part of their marketing material, by way of implied contrast with "medium" or "high risk" individuals or chambers. It would be difficult for the BSB to prevent this by rules, because presumably it will be said to be in the public interest for "consumers" to know to which category of risk his potential barrister belongs.

45. There is no easy way to explain to a client that his case is safe in the hands of a barrister designated by the BSB as "high risk" — even if the only good reason for that designation is that most of the barrister's clients

are what the BSB calls "vulnerable". Indeed, the likelihood is that potential clients simply will not approach barristers outside the "low risk" category.

46. Manifestly, therefore, the BSB's proposals are potentially extremely harmful; they will work in an arbitrary way; and we would expect that the allocation of individuals or sets of chambers to "medium" and "high" categories of risk may even be libellous in some cases.

47. The BSB's proposals simply do not translate from regulatory theory into real-world practice in the case of a profession consisting of individual practitioners.

(6) Logic and the long term.

48. The BSB's stated ambition is that supervision should achieve a continual improvement in professional standards. Logically, therefore, the BSB expects there to come a time when all barristers and sets of chambers are in the "low" category of risk requiring the least supervision. Even if some hard core of "medium" or "high" risk cases remains, it will be vanishingly small in number.

49. It follows that a system established to deal with the initial phase, when the proportion of "high" risk cases may be high compared with "medium" and "low" risk cases, will be <u>too big</u> for the long term.

50. Yet the BSB has not indicated how it will "wind itself down" or otherwise adjust downwards the scale of its own activities to reflect what it expects will be a diminishing need for "proactive" regulation.

51. Costings and resourcing are clearly problem areas for the BSB. At ¶¶60–62 the BSB says:

> "When non-compliance at the chambers or entity level is identified, the Supervision Department's priority will be to ensure that the chambers or entity addresses the non-compliance, including dealing appropriately with any adverse consequences for clients and take adequate measures to ensure that it does not occur again.
>
> Therefore, where appropriate, the Supervision Department will inform the chambers or entity of the identified non-compliance and provide them with a period of time in which to address it.
>
> It is important that resources are available to assist chambers or entities in this position. To this end the BSB is seeking to work with representative bodies to establish what resources they can make available to assist."

52. Yet there is no explanation of what this would look like in practice.

53. Moreover, contrary to the stated objective that the new regulatory approach should "with minimum involvement from their regulator" for those who operate at low risk [¶24], there is a proposal at ¶84 in the following terms:

> "The Supervision Department will decide which areas require specific evidence gathering through analysis of all of the evidence that is received through supervision as well as any relevant information from other BSB Departments. It will also take the BSB's Risk Assessment Framework into account in deciding which areas to focus on."

54. Once all chambers and entities are successfully rated as "low-level", there is an obvious risk that the Supervision Department will find itself over staffed, with the result that those chambers and entities which could otherwise expect to have minimal involvement with the BSB will find themselves answering requests for specific evidence on as-yet unspecified subjects for unidentified reasons for the indefinite future. This would go far beyond the stated remit of the BSB in its aims for proactive regulation — yet, again, no detail is set out. We would prefer to provide a full response, but we cannot do so given the limited nature of the information provided. Any future regulatory project would need to be objectively justified in terms of necessity, cost, benefit and proportionality, not systemically sanctioned at the outset in the way apparently envisaged.

55. The Association is concerned that the BSB has not addressed these resourcing/staffing issues in any detail. It is manifestly wrong in principle to set up a larger permanent system than is necessary for the long term, or to set "expectations" as to infrastructure or staffing levels at an artificial level at the outset. One solution might be to make use of part-time workers and short-term rented office accommodation in the initial phase. But whichever solution is adopted, if the BSB is determined to go down the route of its new proposals, it needs at the lowest to demonstrate that it will trim its own activities over time in keeping with its hoped-for successes; and it needs to provide objective yardsticks in advance, so that its compliance with this principle can be measured demonstrably. The validity of the consultation on this radical change in regulation is of little practical use when such important points remain unspecified. It is impossible to evaluate the full impact and judge the proportionality and fairness of the changes on these points.

56. There appears to be a real risk that the BSB will put in place an elaborate and costly system to implement the new system which will not be necessary, cost effective or proportionate upon any objective appreciation.

(7) ***Overall.***

57. The BSB has proposed wide-ranging reform, without any supporting evidence, and without even the most cursory impact assessment of cost and regulatory burden. The questions we have posed at paragraph 11 above need to be answered, consistently with *Coughlan* and in order to vindicate the principle mentioned in ¶18 above.

58. We regret that we therefore regard the current proposals as highly unsatisfactory. There is no evidence whatsoever that a system which relies on complaints as the main trigger for regulatory activity is defective in the case of the independent Bar. Quite the reverse: all the evidence points towards such a system being the most appropriate, given the particular conditions under which the Bar operates. What is proposed is a wholesale change of approach from a known, quantifiable, proportionate and cost effective system for the regulation of the very few barristers who contravene the rules of professional conduct, in favour of a regulatory approach which the BSB admits to be unknown, untried and without comparables, and which will have to "evolve" as information on the operation of entities is gathered.

59. It appears to us that the BSB has proposed a course which is contrary to all the available evidence and wrong in principle; and we respectfully urge the BSB, consistently with the *Coughlan* principles as well as with the principle mentioned in ¶18 above, to revisit the thesis on which its current proposals are based.

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60. The answers to the other questions below should be read against the background of the above general comments in answer to Question 7 which invited general comments on the supervision strategy or the consultation paper.

Consultation Question 1 — Do you have comments on the proposed factors that will increase or decrease the likelihood of non-compliance

61. There is an inherent difficulty with commenting on the proposed factors with any validity when the approach to the proactive system of regulation is expressed to be one of "evolution" and the statement at ¶43 that "The BSB will keep the factors under review so that they remain relevant as evidence is gathered through the operation of supervision".

62. As we have already indicated, the Association considers that it is the new "entities" that are introducing uncertainty into the regulation process.

63. In the circumstances it may be more appropriate to monitor entities separately until sufficient evidence is gathered on their operation. The BSB would then be better placed to provide answers to the questions we posted at the outset of this response (¶11 above), including details of a system which would fairly and transparently accommodate all relevant factors without risking the serious harm that we foresee under the present proposals (¶45–47 above).

64. On the specific factors advanced, the Association comments as follows subject to the general points identified above.

65. Factors that increase likelihood

(1) Disciplinary findings against the Head of Chambers/entity or against members of chambers/entity.

The structure and operation of individual barristers working through the collective of a chambers makes them unsuitable for this factor to have any significant weight. The BSB is apparently aware of the value that the independence of the Bar as a whole brings to the market place as it says in the Executive Summary of this consultation that "The professionalism of individuals, working within policies and the procedure designed to reinforce that professionalism, provides the best protection for customers and for the public interest."

All chambers operate on the principle of collective responsibility for matters such as renting rooms and hiring staff. Some may extend the remit with marketing or similar enterprises. But it is difficult to see how that concept could be stretched to include the possibility that the rating of an entire set (and all those working from it) could be affected under the new regulations by the failings of one individual. It is difficult to envisage that a culture of policing one's colleagues against a context of doubt, suspicion and blame could engender a positive working environment within a set. It is also difficult to judge the full impact of such a proposal when it is not understood what the public consequences (if any) of the proposed BSB rating would be. Would the BSB propose to remove an accreditation award (a public measure of a set) in certain circumstances in addition to increasing the regulatory involvement of a set; could an individual breach by one member

result in manifold and disproportionate consequences? The Association considers that further thought needs to be given to this factor and any weighting it receives should it be retained.

(2) Complaints against entity or members of chambers/entity which are deemed by the LeO to have merit.

The Association raises the same points as set out in the paragraph above. It is also recommends that "merit" is carefully defined as it is possible to have a finding on a technical/minor point which causes no substantial impact on a client. It would inappropriate for the BSB simply to adopt a finding without considering the substantive impact and how that affects the regulatory aims pursued by the BSB. The LeO is there to meet one set of requirements and it is unfair to burden and/or "punish" a set twice over which appears to be what is suggested.

(3) Involvement in high risk business models and practices.

This factor would appear to be limited to entities as it is not envisaged how or why a set of chambers would be involved in such models or practices.

66. Factors that decrease likelihood

(1) Evidence of relevant voluntary accreditation such as the Bar Business Standard or other "Quality Marks".

From a box-ticking perspective, this would appear to be an uncontroversial suggestion.

However, how do the different "quality marks" weigh up against each other? Is one to carry equal weight with all the others?

The Association would have particular concern if, for example (and in particular), the Bar Business Standard were judged to be a suitable accreditation scheme in its present form, because it is regarded by many in the Association as completely unsuitable for adoption by many highly-regarded commercial and chancery chambers (and, indeed, others). Indeed, it is unlikely to be carried forward in its current form.

What system will BSB adopt to audit whether any given scheme is sufficiently robust to justify being treated as a positive factor in the assessment? We envisage that there would be difficulties in reconciling the appropriate level of regulation with any particular

accreditation scheme, given the likelihood of overlap and possibly conflict of criteria.

(2) Evidence of regular consumer engagement/satisfaction surveys and evidence that appropriate action is taken as a result of consumer engagement/satisfaction surveys.

The more "commercial" nature of entities may lend itself to the provision of such surveys although this is merely speculation. What the Association does predict with some confidence, is that the operation of self-employed barristers through chambers (which is a business model that is actively encouraged and supported by the BSB) does not lend itself well to the provision and/or completion of such surveys by lay or professional clients given the independent nature of the barristers within a set of chambers. In those circumstances, it is doubted if the number of entities or chambers which produce such surveys would be significant enough number to justify its relevance as a factor to be weighed in the round.

(3) The appointment of a trained compliance or risk manager.

This factor runs the risk of being a box-ticking exercise. The Association considers that such an appointment would have to have some genuine content for it to be worthy of ranking as a factor. The ChBA also considers that as with the survey point, such an appointment is more in keeping with the operation of an entity and is not likely to be appropriate on a cost or risk basis for a specialist and/or mid-sized set of chambers. It is likely that an additional salaried position would be beyond the reach of many chambers.

Consultation Question 2 — Do you have any comments on the proposed factors that the BSB would take into account when undertaking an impact review?

67. It is noted that at E4 of the consultation on the *New Handbook and Entity Regulation: Part One*, the BSB said:

> "Entities will be monitored for compliance with the new Handbook. The intensity and level of monitoring activity to which they will be subjected will depend upon the level of risk that they pose. Our general approach to risk assessment consists of two stages. **In the first instance we need to analyse the potential impact of non-compliance with the Handbook on the regulatory objectives and then go on to consider the probability of non-compliance occurring**. That means the level of supervision of an

entity will be directly linked both to the potential impact if something goes wrong and to the likelihood that it will go wrong."

68. However, it now appears that the BSB intends to reverse the process: what is now envisaged is, first, an assessment of "probability" followed, secondly, by an assessment of "impact".

69. The rationale for the first approach was not explained at the time; and the reversal of the proposed order has not been explained either.

70. It would be useful if the respondees to this consultation understood why the process initially envisaged has been altered.

71. The Association notes that the limited factors identified by the BSB could be potentially relevant. However, each one fails to identify the relevance that the type of non-compliance could in turn have on the impact.

72. It is also noted that the size of chambers and client base and the perceived vulnerability of clients could effectively cancel each other out: the paper identifies that non-compliance could have a greater impact on a larger set (presumably on the assumption that whatever the non-compliance issue was would be "across the board") yet goes on to note within vulnerability that large businesses are more likely to know what level of service to expect. A large "corporate" type set of chambers (how would this be defined?) which has only "large business" or "professional" clients (again, how would this be defined?) could score more highly on the size of chambers but negate the potential problem with its client base. This second stage assessment would therefore be redundant in at least a number of cases as it is not thought that the referral model under the third point (services offered) is applicable to chambers.

73. It appears again that the change in regulation has been developed to deal with entities and is not suitable at this time for chambers.

Consultation Question 3 — Do you have any comments on the proposal for impact reviews to be undertaken after the assessment of likelihood of non-compliance? Are there any additional factors that you believe should be considered as part of an impact review

74. Please see answers to Q2 above.

Consultation Question 4 — Do you agree with the proposed approach to supervision of chambers and entities? Can you suggest any improvements?

75. Please refer to the comments set out in answer to Question 7 above.

76. There are a number of key aspects that are unclear to the ChBA:

(1) Will the priority rating be publicly available and if that is not the intention of the regulator a declaration to that effect would be of benefit?

(2) If ratings are made available to the public, will the process by which they are arrived at also be made available?

(3) To what extent will a set of chambers or an entity be able to make representations about the evidence gathering process?

(4) If ratings are to be public information, how will the review/appeal process work? Will there be an appeal to the Regulatory Chamber?

(5) If ratings are merely internal indicators to guide the use of BSB resources, how would the review/appeal process differ from a public process?

(6) What will be the remit of inspectors [paragraph 53] and how would they be recruited, trained and deployed?

77. The Association is confused by paragraphs 55–58 which draw a distinction between the method for chambers to "enter the regime" and for entities to do the same.

78. Current chambers will be required to undertake a further round of monitoring and newly formed chambers "will be required to undertake a round of monitoring in order to enter the regime". It is unclear from this whether a newly formed set of chambers could not operate at all without a regulatory rating or if a newly formed set of chambers could exist for a period outside the system. It is also difficult to envisage how a newly formed set could undertake any valid monitoring exercise between day 1 and say "six months in", as there would be nothing on which to base an assessment.

79. Potential entities would need to apply for "authorisation" from the BSB. There is no explanation offered for the difference in approach.

80. The Association notes ¶66 which states that "There are other benefits for chambers and entities that develop effective risk management techniques, such as operating more efficiently". The "such as" is one single benefit: the Association would like to know what other benefits are envisaged by the BSB, in order to make a fully informed response. At present, we do

not accept that there is any evidence that operating efficiency will improve; it is not even obvious what this actually means in the case of a set of chambers consisting of individual practitioners; and we cannot identify any other advantages which may flow from the change of approach.

Consultation Question 5 — Do you agree with the proposals for supervision of individuals? Are there any additional instances in which you think supervision of individuals should be triggered? Are there any additional measures that you believe the Supervision Department should be able to undertake?

81. As is no doubt is clear from the opening comments in answer to Q7, the Association considers that the current system is adequate; and the BSB has not produced any evidence to suggest otherwise.

82. The Association cannot support the idea that it would be appropriate "for the BSB to decide whether it is a matter that is best investigated and pursued by PCD with a view to enforcement or whether it is more appropriate to address it through the Supervision Department". Individuals are entitled to know how any complaint or alleged breach will be dealt with in advance and in line with prescribed rules. The Association does not consider that allegations about professional misconduct should be treated in accordance with an ill defined discretion.

83. The Association is also concerned that a minor breach which is not passed to the PCD could result in a disproportionate involvement of the BSB for a period of time which far exceeds any involvement that the PCD may have had in an individual's practice. This is intrusive, costly, and seemingly disproportionate; and it may well be viewed as a greater punishment than a fine from the PCD.

84. We would of course accept that it is desirable for barristers guilty of minor breaches to "learn from their mistakes" and that prevention rather than punishment has its place. But rather than cause a mess by giving overlapping jurisdictions to the BSB and the PCD, the PCD should be given the power to waive fines in circumstances when it is demonstrated that a barrister is unlikely to re-offend.

85. Alternatively, barristers should be given the option (like a police caution) to accept an administrative sanction rather than a disciplinary hearing. But what is absolutely unacceptable is that a barrister should be tried by an administrator against his wishes, apparently without recourse, except possibly judicial review.

Consultation Question 6 — Do you agree with the proposals for evidence gathering targeting specific areas of risk?

86. Please see answers at paragraphs 48–56 above.

Consultation Question 7 — Do you have any general comments on the supervision strategy or the consultation paper?

87. See ¶¶12–59 above.

Consultation Question 8 — Do you have any comments on whether the potential adverse equality impacts identified in the draft Equality Analysis will be mitigated by the measures outlined?

88. Sadly, as with other parts of the consultation paper, the equality analysis is not evidence-based.

89. Nevertheless, it concludes that the new supervision proposals will have a significant and negative effect on ethnic minorities, women, pregnant women, the disabled and older members of the Bar.

90. Those groups and the Chambers in which they predominantly practise are unlikely to be able to fund the measures which the BSB regards as likely to decrease the risk of non-compliance — yet they are likely to be regarded as having a greater impact because of the supposedly vulnerable nature of their client base.

91. The only control or remedial measures identified are, in essence, that guidance will be made available to allow affected Chambers and individuals to "actively manage their risk".

92. With respect, this simply is not a solution. If there is a real "risk", then "managing" it is not the answer: the goal must be to eliminate it. The BSB's approach does not address the lack of resource, both of time, administrative back-up and funds which characterise the groups affected.

93. It follows that the proposed new supervisory regime is likely to affect adversely the diversity of the Bar, without any proper mitigation. The absence of any assessment of the additional financial burden that may be involved makes it impossible to be certain, but we strongly suspect that this effect is likely to be felt most keenly in Chambers and practice areas which are already under greatest pressure from other sources.

Consultation Question 9 — Do you have any comments about any potential adverse impact on equality in relation to the proposals which form part of this consultation paper? Are there any other equality issues that you think that the BSB ought to consider?

94. Our concerns are set out in the preceding answer.