

Employed Barristers' Committee
Response to Bar Council's 'Clementi' Consultation

April 2004

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Response to Bar Council's 'Clementi' Consultation

1. Summary

1.1 This Response is from the Employed Barristers Committee ('the Committee') to the Bar Council's consultation on Clementi. The Committee represents formally the almost 3,000 employed barristers registered with the Bar Council.

1.2 In relation to Clementi:-

the core objective of any regulatory framework for legal services is the protection, and retention of the confidence, of the public;

- there should be absolute clarity on what is to be regulated. The core position of the Committee is that there should be a generic descriptor of 'legal services', and all engaged in the provision of such services should fall within the scope of the regulatory framework;
- The strong preference of the Committee is for a Model B+ type Regulator but with a variant -in that only four of the five core regulatory functions would be retained directly by the profession. Responsibility for service complaints would be retained by the Regulator as there is a strong public interest and public confidence argument in favour of complaints being managed outside the profession's own structures;
- all Government exercised regulatory control of legal services and the legal professions should be transferred to the Regulator, together with power to the Regulator to delegate to a Relevant Professional Body such of the functions as it thought appropriate (other than complaints);
- The Bar Council would be eligible as a Relevant Professional Body;
- The split of Bar Council functions between regulatory and representational would be complex, but could be resolved within the executive of the Bar Council. We suggest that this split should not be a matter of regulation, but a matter for agreement to be set out in the delegation framework to be agreed between the Bar Council and the Regulator.
- We envisage a core set of professional rules and standards applicable to all Providers, with power to individual professional bodies to recommend or require adherence to additional rules and standards, subject to the approval of the Regulator;
- The Committee's firm view, certainly at this stage, is that multi-disciplinary practices ('MDPs') should not be permitted. Legal-disciplinary practices ('LDPs') should be permitted -even if not wholly owned by professional lawyers. If permitted, LDPs may well have a downstream impact on some of the provisions of the Code of Conduct, and one action point for the Bar Council may be to consider now what changes would be required to the Code of Conduct in this event.

1.3 The Committee would be happy to participate in any further work that the Bar Council considers appropriate following its meeting on 15 May.

2. Introduction

This Response

2.1 This Response is from the Employed Barristers Committee ('the Committee') to the Bar Council's consultation¹ on Clementi². It is therefore written from the standpoint of employed barristers. However, the Response is not just about employed barristers, or even about just barristers. This Response looks widely at the principles which should underpin the actions of providers of legal services ('Providers') -particularly those providing legal services to the public. The Response proceeds by establishing in respect of each area of its scope the broad principles applicable, and then focussing on the specific implications of this for the bar -both employed and self-employed.

2.2 The format of the Response is to outline the scope of the employed bar, and then to move through a consideration of the objectives of a regulatory framework for Providers (section 4); the need for more certainty about which particular 'legal services' might be covered by such a system (section 5); the appropriate regulatory model (section 6); the interfaces between professional standards, discipline and complaints (section 7); governance and structural issues (section 8); regulatory gaps (section 9); the issues arising from LDPs and MDPs (section 10); and finally a conclusion (section 11).

The Bar Council's Consultation

2.3 Detailed responses to the specific questions raised in the Bar Council's own Consultation Paper are set out in Annex 1 to this Response. The logic underpinning these responses is however contained in the body of this Response.

The Environment

2.4 The Committee's assessment is that for reasons more connected with the other branch of the profession, there is a developing consensus within Government that the current status quo in relation to the self-regulation of the legal profession will not continue. The appointment of Sir David Clementi is but one indicator of that viewpoint -previous Government interventions in the systems of dealing with complaints against solicitors have not been successful and a more radical approach may well be thought to be the answer.

2.5 The difficulty for the Bar is that, irrespective of its relatively good record on self-regulation, it stands to be caught up in the wider cross currents of legal regulatory change -albeit for some of the wrong reasons.

3. The Employed Bar

¹ Undated, but sent under cover of the letter from Stephen Irwin QC, dated 19 March 2004.

² Legal Services Review, March 2004, Sir David Clementi

3.1 The Committee represents formally the almost 3,000 employed barristers subscribing to the Bar Council. It also tries to take account of the interests of all qualified barristers providing legal and related service, provided that in so doing it does not act in a way that is inimical to the interests of subscribing (or registered) employed barristers. There is no available survey data on the numbers of unregistered barristers providing legal services, (or non-legal services) in an employment context. Estimates vary, with BACFI suggesting that there may be 7,500 such individuals and the extrapolation of the Shapland and Sorsby³ survey suggesting that the number could be very significantly higher.

3.2 It is clear from studies⁴ (and anecdotally) that a very large number of individuals is engaged in providing legal services, (or legal-related services) in an employment context. Of these only a proportion both (a) fall within the definition of 'employed barrister' adopted by the Bar Council and (b) have registered with the Bar Council. On any analysis there must be a material number of individuals who have qualified as barristers (and, presumably, other individuals) providing legal or related services to employers -such individuals not being registered with any entity, albeit that those who are barristers will be bound by certain parts of the Code of Conduct).

3.3 Employed barristers undertake a variety of roles with varying levels of legal content -from those engaged wholly in the provision of legal services, whether advisory or advocacy, to those whose advice is primarily commercial or financial, yet based firmly on their legal insight and understanding. The types of practise area undertaken by those who are employed barristers varies from purely criminal work to purely civil and commercial, with everything in between, and from the provision of services to the state and government, to public, publicly owned, and private, voluntary and charitable entities⁵ -whether in the UK or elsewhere.

3.4 What is however typical of the employed bar is its independence of thought and action, and its forensic ability to apply the law to complex and sensitive factual situations.

3.5 The employed bar, like its self-employed counterpart, is well aware of the professional and ethical environment in which it operates and the responsibilities and duties that it owes to the courts, and to the wider interests of fairness and justice.

³ 'The Junior Bar in 2002', Joanna Shapland and Angela Sorsby, published by the Institute for the Study of the Legal Profession, Faculty of Law, University of Sheffield.

⁴ For example, Chapter 2 of the survey referenced in footnote 2 above is titled 'The 1998 call year: where are they now?' and concludes that, of that year, a significant number who were not registered with the Bar Council were in fact employed in a legal context.

⁵ The last Survey of the Employed Bar was undertaken in 2001. Some 3,000 employed barristers were surveyed, of whom 30% responded. Employment breakdown of the respondents was as follows: GLS, 20%; CPS, 20%; Other Govt, 10%; Solicitors firms, 7%; Justices Clerks, 14%; Commerce generally, 26%; NGOs and Law Centres, 3%.

3.6 Within the Code of Conduct, an employed barrister is defined⁶ as:-

*“A practising barrister ...who is employed either under a contract of service...
and who supplies legal services as a barrister.. “*

3.7 Those individuals registered with the Bar Council as employed barristers operate in an environment where they are regulated as to the services that they may provide, and to whom such services may be provided. In summary, the restrictions are that they must comply with the fundamental provisions relating to all practising barristers. The Employed Barristers' rules in Part V of the Code require, in short, that legal services of an employed barrister may be provided only to that barrister's employer or, as appropriate, the public authority or trade association by which that individual is contracted. Employed barristers are also required to comply with the relevant annexes to the Code of Conduct, for example the Conduct of Litigation Rules, which sets out the level of experience required before an employed barrister is able to conduct litigation.

3.8 It is important to emphasise that all employed barristers are subject to a control mechanism additional to those contemplated by both Clementi and the Bar Council's own paper, and that is the one exercisable by the individual barrister's own employer. In reality, this can be an important control factor and should not be underestimated.

3.9 Based on paragraphs 3.1 -3.3 the Committee's thesis is that there is a significant number of individuals who have qualified as barristers and who are providing legal and legal-related services outside a chambers environment. Only a proportion of these are registered with Bar Council as employed barristers or Non-Practising Barristers. If this thesis is correct, there is a material, potentially non-regulated, cohort of legal and related service providers. As a general proposition, the Committee would prefer a situation where all such individuals were subject to some form of external scrutiny, and possibly regulation.

3.10 The current position is probably not in anyone's interest, especially if there are problems or standards deficiencies with such individuals, whether they are providing services direct to the general public, to an employer, or to any other entity or person. The Committee therefore starts from the point that closer links are needed with all such individuals, even if they are not to be formally regulated they should at the least be registered. The Committee appreciated recent overtures that the Bar Council has begun to make to establish links with such individuals, and the Committee would wish to support these and additional initiatives.

3.11 There is a further point that needs to be made. The employed bar has developed as something of an afterthought. However it now comprises some 20%+ (or, according to Shapland and Sorsby, a significantly higher proportion) of barristers providing legal and related services.

⁶ See Part X of the Code of Conduct

3.12 The current Code of Conduct ('the Code') still treats the employed bar as an afterthought. The provisions directly applicable to employed barristers are to be found in a variety of locations within the Code. It is only in the last few months that any form of compendium⁷ of these provisions has been developed and more targeted work needs to be done in this area. The view of the Committee is that, over time, the Bar Council needs to consider those activities and functions undertaken by some employed barristers which differ from the self employed bar in Chambers. There may be a possible opportunity here for the Bar Council to borrow some of the best of the regulatory framework of other professions.

4. The Objectives and Principles of a Regulatory Framework for Legal Services

4.1 The Committee's firm view is that the core objective of any regulatory framework for legal services⁸ is the protection, and retention of the confidence⁹, of the public (rather than of the profession).

4.2 Four pillars underpin that objective:

- first, the provision of relevant ¹⁰quality and cost-effective services by Providers to consumers;
- second, such services being offered within a clear regulatory framework that minimises barriers to entry; promotes access to services; and provides rapid and effective client redress for service failure;
- third, the application of (and adherence by Providers to) objectively set norms of professional conduct, reflective of the wider public interest;
- fourth, the maximum achievable independence of Providers from the state.

4.3 In the Committee's view, the core norms of professional conduct should be set out within a regulatory code applicable to Providers and which has statutory force.

5. Legal Services

5.1 Throughout Clementi the focus is on how the provision of legal services should be regulated. Yet 'legal services' are neither described nor defined in any detail.

5.2 It is fundamental to any consideration of the structure of legal regulation that there should be absolute clarity on what is to be regulated.

⁷ Guidance for Employed Barristers, Professional Standards Committee, December 2003.

⁸ On 'legal services', see section 5 below.

⁹ In broad terms, consistent with the duty in paragraph 30 I of the Code of Practice to avoid undermining public confidence in the legal profession.

¹⁰ I.e. not necessarily the highest quality in some cases - a 'cost versus quality' issue.

5.3 The Committee believes that the current system, under which regulation follows as a result of the *qualification* of the potential service provider, adopts the wrong approach. In other words, simply to regulate individuals because they have a specific professional qualification is not enough -as it leaves open the possibility that other, unqualified, individuals could provide similar services in an unregulated environment. Not only does this fly in the face of a risk based approach to regulation, it is also likely to be anti-competitive. The Committee's strong preference is for there to be regulation as a consequence of the services provided: that is, that regulation applies as a result of service provision.

5.4 Whilst the Committee is not in a position to put forward a definition or description of 'legal services', it would offer the following observations:-
definition should be:

Any

- descriptive in nature;
- broad in scope;
- contain specific and illustrative inclusions;
- leave open the scope to the Regulator to nominate specific services as falling within the definition;
- focussed on the service provided, and not the identity, background or qualification of the provider entity.

5.5 The core position of the Committee is that there should be a generic descriptor of 'legal services', and all engaged in the provision of such services (who by definition fall to be treated as 'Providers' in relation to that provision (but not necessarily in relation to other services they may provide)) should fall within the scope of the regulatory framework.

6. Regulatory Models

Model A, B or B+

6.1 Given the generally positive experience of the imposition of regulators in other fields, the Committee regards the arguments in favour of some form of Legal Services Regulator ('the Regulator') as being highly persuasive. Additionally, for the reasons summarised above¹¹, the status quo is unlikely to be a realistic option for the future.

6.2 The strong preference of the Committee is for a Model B type regulatory model; that is, one where a degree of regulatory responsibility remains with the relevant professional body. The preference is for the option described in the Consultation Paper as Model B+, but with a variant -in that only four of the five core regulatory functions would be retained directly by the profession. This variant is returned to in paragraphs 6.8 and 7.1 below.

¹¹ In spite of the general success of the bar and the Bar Council in exercising regulatory control over the barristers' profession -adverse occurrences within the self-regulated regime of solicitors will probably force parallel changes on the bar. See paragraph 2.5 above.

6.3 Compliance with the competition norms of the EU and the WTO should be assured in the design of the Regulator and the delegation by it of specific regulatory functions to individual professional bodies.

Relevant Professional Bodies

6.4 As to the structure of the formal relationships between the various entities, the Committee envisages that by statute all Government exercised regulatory control of legal services and the legal professions should be transferred to the Regulator, together with power to the Regulator to delegate such of the functions as it thought appropriate to a Relevant Professional Body. We envisage that Government would retain a residual power to require the regulator to investigate or review specific issues or matters, but not to determine the outcome of such investigations or reviews.

6.5 For these purposes, a Relevant Professional Body would be a body able to exercise one or more of the regulatory functions in relation to specific Providers. Functions would be delegated by the Regulator to a Relevant Professional Body, but with the potential for those functions to be re-vested in the Regulator should it so elect. For practical purposes, the Bar Council, the Law Society, and the Institute of Legal Executives would each be eligible to be Relevant Professional Bodies.

6.6 The Committee believes that for each Provider, there should be the option of moving between Relevant Professional Bodies to ensure that the Provider could select the most appropriate, but subject to proper notice of any change and an overriding requirement that no Provider could, at anyone time, fall under the jurisdiction of more than one Relevant Professional Body.

6.7 It is expected that there would be agreed guidelines on the types of Provider that each Relevant Professional Body would accept so that, for example, the Council for Licensed Conveyancers would not end up as regulator for large City law firms undertaking complex multi-national commercial transactions.

Complaints

6.8 The Committee's view is that -as a matter of principle and notwithstanding the bar's own positive record in this area -complaints about members of a professional body should not be investigated by that body. There is, we believe, a strong public interest and public confidence argument in favour of complaints being directed to the Regulator.

Other Regulatory Functions

6.9 The activities which would be delegated to each of the Relevant Professional Bodies would be:-

- Entry standards and training¹²;
- Rule Making (although this may be a function shared with the Regulator);
- Monitoring and enforcement; and
- Discipline.

6.10 In each case there would also be an over-arching power in the Regulator to call-in any particular function, or implement specific rules or standards -ideally after consultation with the Relevant Professional Body.

6.11 The retained regulatory functions would also need to be dealt with by the Relevant Professional Body separately from its representational function. Lay involvement would be helpful in removing any appearance of bias, although is unlikely to be completely persuasive to the more sceptical parts of the public.

In favour of separation

6.12 Some separation of professional regulatory from representational functions is also in the interests of the bar. The Committee strongly believes that the Bar Council's recent record on negotiation of fees with public bodies reflects the difficulty of combining in one entity, and in one executive, the dual functions of representation and professional regulation. Had the Bar Council's only objective in recent years been the negotiation of appropriate and fair fee levels from Government agencies, we believe that it would have had significantly more success.

Implications for the Bar

6.13 The particular strength of the proposed approach, Model B+, is to allow the bar a continued participation in and ownership of its professional standards, and the public the benefit of the cost efficiencies of a combination of functions. The weakness is that it may be seen as something of a compromise, falling short of the simple (and, we strongly suggest, wrong) conclusion, that removal of all regulatory functions from professional bodies is the most logical way forward given the problems experienced when self regulation has been permitted in other functional areas.

6.14 The split of functions would be complex, but could we believe be resolved within the executive of the Bar Council. The Committee's suggestion would be that this should not be a matter of regulation, but a matter for agreement to

¹² Although not directly part of this Response, the Committee is of the view that there may be merit in some form of common training for legal professionals, potentially during what for barristers is their BVC year.

be set out in the delegation framework to be agreed between the Bar Council and the Regulator.

Implications for Providers

6.15 There would be a statutory requirement for registration as a Legal Service Provider with the Regulator, (for which a fee would be payable). In addition, individual professional bodies (as Relevant Professional Bodies) would have power to levy their own fees for professional and the representative functions. It should not be open to individuals to access the professional -but not the representative -functions of the relevant professional body.

6.16 It would be open to individual Providers to opt for professional membership of an alternative professional body from that with which they qualified, IF their practice was such as to justify it. Thus solicitor advocates working substantially as advocates in the higher courts could apply to be regulated by the Bar Council, and submit to its jurisdiction and additional¹³ rules and standards.

6.17 In practice this would probably mean that the Bar Council would remain the relevant professional body for:-

- individuals qualifying as barristers and whose practise was either self employed in Chambers or in the higher courts;
- individuals qualifying as barristers and whose practise was in an employed setting, and who had not opted to be regulated by the Law Society;
- individuals qualifying as solicitors and whose practise was substantially based on advocacy in the higher courts.

6.18 Individuals could elect to opt for service specific regulation by an alternative Relevant Professional Body as their practices changed, but probably no more frequently than every three years. A certificate of good standing would be required from the Relevant Professional Body the jurisdiction of which the individual was seeking to leave.

7. Complaints and Discipline

7.1 At its core, the Committee's view is that complaints should always be directed to the Regulator. Matters of professional discipline would by statute be the responsibility of the Regulator, but the Regulator would have power to delegate (and would in practice be expected to delegate) that task in most cases to a Relevant Professional Body, such as the Bar Council.

¹³ See the comments in section 6 below as to 'core' and 'additional' rules and standards.

7.2 The Committee is not persuaded that the effect of the Regulator retaining all complaints activities would be to '...allow the [profession] to wash [its] hands of ownership of, or the ability to learn from complaints'¹⁴. Neither is the analogy of complaints management within a hospital particularly helpful, in that whilst in the NHS consultants are employees of the hospital, that relationship would typically not exist in a chambers environment. That said, we acknowledge that there are some successful examples of chambers based complaints management systems.

7.3 The fact that service complaints were dealt with at the level of the Regulator would ensure that the profession remained focussed on them. Where a complaint raised issues of competency or professional ethical issues, there would be power for the Regulator to require that these be reviewed by the Relevant Professional Body.

7.4 In practice this would mean that there would be an over-arching power exercisable by the Regulator in disciplinary and complaints cases, but that disciplinary aspects would be delegated to the profession, although with power in the Regulator to call in the more serious or controversial cases.

7.5 We also envisage a core set of professional rules and standards applicable to all Providers, with power to individual professional bodies to recommend or require adherence to additional rules and standards, subject to the approval of the Regulator. A good example of the core rules and standards is to be found in the Australian Legal Profession Act 1987 (NSW), and of the supplementary, service specific, standards applicable (in that case to advocates) is to be found in the New South Wales Barristers' Rules (2001 consolidation).

7.6 We should however make clear that we are not arguing for the adoption of either the specific rules, or their allocation between core and additional; we say simply that this appears to be a sensible and workable approach. It may also, over time, come to reflect a line between the disciplinary cases which are reviewed in the first instance by the Regulator (core) and those reviewed initially by the professional body (service specific).

7.7 A right of appeal would lie from decisions of the professional body to the Regulator, and from decisions of the Regulator (including the Regulator's own adjudication on appeals) to Legal Services Appeal Tribunal.

8. Governance, Accountability and Related Issues

8.1 The Committee concludes that the Regulator should be a statutory entity rather than an individual. That entity should have a small Board (seven to eleven in number) comprising up to five legal professional members, up to five lay members, a Chief Executive, and a Chairman -the latter probably a recently retired higher court judge.

¹⁴ Clementi, Chapter C, para 20

8.2 The Chief Executive would head the secretariat of the Regulator and be responsible for its day to day operations and activities. The Chief Executive would be appointed by the Board for fixed terms of three years, with a maximum of two such terms (i.e. six years in total).

8.3 Appointments to the Board would be made by the Department for Constitutional Affairs (*DeCAf*), normally for a five year term and renewable for one further term. There would be a process enabling the relevant professional bodies to put forward nominees as the professional members. There should be informal consultation on possible nominees with the heads of the professional bodies, although DeCAf would not be bound by their views. Directors could be removed on fitness or age grounds (subject to prevailing legislation).

9. Regulatory Gaps

9.1 To a large extent this issue is addressed by having an inclusionary definition or description¹⁵ of legal services. Certainly the intention is that all of the current regulatory gaps referred to in Clementi would be covered by the new Regulator.

10. Alternative Business Structures

Multi Disciplinary Practices

10.1 The Committee's firm view, certainly at this stage, is that multi-disciplinary practices ('MDPs') should not be permitted, given the issues of conflict that they raise -not only as between the competing aspirations of their potential members, but also because the regulatory framework presents issues which are presently highly complex, and to which there are presently no realistically achievable solutions.

Legal Disciplinary Practices

10.2 Legal-disciplinary practices ('LDPs') should however be permitted. We see significant advantages in the potential provision of a range of legal services by an entity composed of individuals with differing career paths, experiences and legal qualifications. We also see the scope for these to be successfully regulated in a situation where one over-arching Regulator has -in any event -unified responsibility for all Providers. The previous jurisdictional issues are resolved, and there is no realistic objection to such entities.

10.3 The committee does not have a completely unanimous view on whether it is right that such LDPs could be owned by individuals or entities that were not themselves subject to the rules of a professional body. On balance, we

¹⁵ See Section 5, notably paragraph 5.5, above.

conclude that it probably would be acceptable for reputable organisations to own and operate LDPs, provided:-

- the owning entity or organisation was, and remained, a fit and proper person to undertake this task -a matter of fact for assessment by the Regulator;
- the LDP itself was properly registered and regulated for all its activities with the Regulator, and a Relevant Professional Body.

10.4 Regulation would therefore be undertaken by the Regulator (in relation to core rules and standards), and by a Relevant Professional Body (or bodies) in relation to specific services provided by the LDP.

10.5 In reality, it is likely that the Law Society would be the most appropriate body to regulate such bodies. However, it is not beyond our contemplation that barristers might see advantages in some form of LDP or barrister owned entity¹⁶ providing services from a chambers. We envisage that this would create a tension with the current rules within the Code, which prohibit such arrangements and also the sharing of facilities with other than barristers. Again, we do not have an absolutely consensus view here, but on balance we would incline to permitting such arrangements and structures at the bar, should groups of practitioners so wish.

10.6 We would, again on balance, not resist initiatives for well capitalised service providers to develop advocacy-only units, seeing this as simply an extension of the current strategy of the CPS and other Government Legal Service bodies.

11. Conclusion

- The committee regards the introduction of some form of Regulator as almost inevitable. That said, the bar has a generally good record on self-regulation and is in a strong position to argue for the maximum level of delegation to it of regulatory functions.
- The Committee's preference is for a Model B+ framework, albeit with the service complaints function remaining at the level of the Regulator.
- The Committee does not support the introduction of MDPs, but offers a cautious welcome to LDPs, even if not wholly owned by professional lawyers. If permitted, LDPs may however have a downstream impact on some of the provisions of the Code of Conduct, and one action point for the Bar Council may be to consider now what changes would be required to the Code of Conduct in this event.
- The Committee would be happy to participate in any further work that the Bar Council considers appropriate following its meeting on 15 May.

¹⁶ Such as, for example, a chambers operating partnership; limited liability partnership, or corporation.

EMPLOYED BARRISTERS' COMMITTEE

THE REVIEW OF THE REGULATORY FRAMEWORK FOR
LEGAL SERVICES

RESPONSE TO BAR COUNCIL CONSULTATION PAPER

NOTE -References in parentheses are to the relevant paragraph of the narrative, to which this is an Annex

Part A: The Objectives of Regulation

Question A1: There are a number of important possible objectives for a regulatory system covering the provision of legal services. What objectives do you believe should form the cornerstone of a regulatory system for legal services?

A1.1 The core objective is the protection, and retention of the confidence, of the public as consumers.

A1.2 Four pillars underpin that objective:

- the provision of relevant ¹⁷quality and cost-effective services by Providers to consumers;
- such services being offered within a clear regulatory framework that minimises barriers to entry; promotes access to services; and provides rapid and effective client redress for service failure;
- the application of (and adherence by Providers to) objectively set norms of professional conduct, reflective of the wider public interest;
- the maximum independence achievable of Providers from the state.

Question A2: What aspects of professional ethics, or legal precepts, do you feel are essential to a properly functioning legal services industry and in what way should they be reflected in the regulatory system?

A2.1 We envisage a core set of professional rules and standards applicable to all Providers, with power to individual professional bodies to recommend additional rules and standards, subject to the approval of the Regulator (7.5).

A2.2 A good example of the core rules and standards is to be found in the Australian Legal Profession Act 1987 (NSW), and of the supplementary, service specific, standards applicable (in that case to advocates) is to be found in the New South Wales Barristers' Rules (2001 consolidation).

¹⁷ I.e. not necessarily the highest quality in some cases -a 'cost versus quality' issue

Question A 3: Do you consider that risks to the regulatory objectives should be a central consideration in determining how regulatory powers and resources should be used?

A3.1 In general terms, yes -provided that lower impact issues are not ignored.

Part B: Regulatory Models

Question B1: What do you see as the broad advantages and disadvantages of Model A in comparison with Model B? In particular, what do you see as the strengths and weaknesses of (i) combination and (ii) separation of regulatory from representative functions?

B1.1 The overall balance of advantage -and reputation -lies with a Model B approach (6.2).

Question B2: Which model best meets the criteria of the terms of reference?

B2.1 Model B+ (6.2).

Question B3: If it were felt appropriate to separate regulatory and representative functions within professional bodies as is envisaged under Model B+, how might it best be achieved?

B3.1 In the Committee's view, only four of the five core regulatory functions would be delegated back to the Bar Council. The fifth, service complaints, would be retained by and dealt with by the Regulator (6.2, 6.8, 7.1).

B3.2 The separation of the Bar Council's regulatory from its representational functions would be for agreement between the Bar council and the Regulator, but we envisage that subject to the introduction of more apparent Chinese walls between these two areas, a solution could be found (6.14).

Question B4: What powers would you wish to see delegated from the Government to the Regulator?

B4.1 All current governmental functions in relation to the regulation of legal services should be delegated (6.4).

Question B5: What powers to instruct the Regulator would you wish to see Government retain?

B5.1 These should be limited, and should focus on being able to require the regulator to investigate matters. Beyond that, actual decisions in particular cases should be for the Regulator (6.4).

Question B6: What international considerations should influence the design of appropriate regulatory arrangement of legal services within England and Wales?

B6.1 Compliance with the competition norms of the EU and the WTO should be assured in the design of the Regulator and the delegation by it of specific regulatory functions to individual professional bodies (6.3).

Part C: Complaints and Discipline

Question C1: Should service complaints (which are consumer centred) be operationally split from professional conduct and disciplinary issues (which are centred on the practitioners and their professional bodies)?

C1.1 Yes, and service complaints should be left for the regulator to address (6.8, 7.1).

Question C2: In connection with complaints, what are the advantages and disadvantages of a) having a uniform complaints organisation, independent of the bodies, similar to the FOS or b) each body remaining responsible for its own complaints? Is the New South Wales example a useful model?

C2.1 We believe that a uniform complaints system should be developed by the Regulator looking across all Providers (6.8).

Question C3: If you believe that each body should remain responsible for its own complaints, what form of regulatory oversight would you wish to see?

C3.1 Not applicable.

Question C4: How do you think that disciplinary arrangements should relate to the underlying practitioner bodies? Is there a case for one single uniform disciplinary body for all lawyers?

C4.1 We conclude that the better way forward is for there to be a core set of minimum standards to which all Providers had to work, with additional rules and standards set by reference to either the particular area or practice function, implemented by, or at any rate in consultation with, the Relevant Professional Body (7.5). The Regulator would probably have power to take primary jurisdiction in relation to the core area, (although the Regulator could ask the Relevant Professional Body to take on that role in most cases). In Service Specific standards, the primary jurisdiction would probably be that of the Relevant Professional Body (7.6).

Question C5: What should be the mechanism for funding the handling of complaints?

C5.1 The Regulator's levy on all Providers should cover the basic fixed costs of the complaints structure, but there would be power to the Regulator in individual cases to require a Provider which had had a complaint against it upheld, to make an additional contribution to the costs of the investigation and any hearing or other determination.

Question C6: What should be the mechanism for funding the handling of disciplinary processes?

C6.1 The Relevant Professional Body should have power to make an order for costs, although in the case of the Bar Council this need only be used sparingly given the low costs incurred in the current (and potentially any future) arrangements.

Part D: Detailed Governance Questions

Question D1: Should the Regulator be a board or an individual?

D1.1 A Board (8.1).

Question D2: What sort of Board should the Regulator have and how should it be constituted? What would be an appropriate split between practitioner involvement and lay content in the Board? As regards the practitioner content, would you favour the inclusion of individuals on their merits, or formal representatives from different parts of the industry?

D2.1 The Board should comprise seven to eleven members, comprising up to five legal professional members, up to five lay members, a Chief Executive, and a Chairman -the latter probably a recently retired higher court judge (8.1).

D2.2 Appointments to the Board would be made by the Department for Constitutional Affairs ('DeCAf), normally for a five year term. There would be a process enabling the relevant professional bodies to put forward nominees as the professional members. There should be informal consultation on possible nominees with the heads of the professional bodies, although DeCAf would not be bound by their views. The Chief Executive would be appointed for fixed terms of three years, with a maximum of three such terms (i.e. nine years in total) (8.3, 8.2).

Question D3: Who should appoint the leadership of the Regulator? With whom should that person consult? How should the appointments of the other directors of the Board be made?

D3.1 The Board of the Regulator should have the responsibility to appoint the Chief Executive (8.2).

Question D4: What period should the appointments be for? .In what circumstances and by whom could directors be removed?

D4.1 Five years in the first instance, renewable for one further term making the maximum period ten years. Directors could be removed on fitness or age grounds (subject to prevailing legislation) (8.3).

Question D5: Having regard to the need for independence both from Government and providers of legal services, what qualities and background would you wish the leadership of the Regulator to possess? Is there anything you believe it would be important for the leadership of the Regulator not to be?

D5.1 The Chairman could and probably should be a former judge. The Chief Executive could not be, or have been a qualified lawyer (8.1).

Question D6: What mechanisms would you propose to ensure the accountability of the Regulator: (1) to Parliament; (2) to Ministers; (3) to public interest groups? Is there anyone else to whom a Regulator for legal services should be accountable and how?

D6.1 Open meetings; an Annual Report; and a Code of Practice.

Question D7: What consultation arrangements would you wish to see the Regulator follow before exercising its powers?

D7.1 No firm view on the detail but consultation would be important.

Question D 8: To where should the right of appeal against decisions made by the Regulator lie? On what matters should appeal be permitted?

D8.1 Legal Services Appeal tribunal (7.7).

Question D9: This section refers to the funding issues arising from different models. What would be your suggested mechanism for dealing with these issues?

Question D10: What relationship should there be between the Law Officers, the Regulator and professional bodies with advocacy rights?

D10.1 There should be no formal link.

Part E: Regulatory Gaps

Question E1: Should the Government have power to determine which legal services should be included in, or removed from, the regulatory framework? What consultation with the Regulator, with the providers of legal services, and with public interest groups, should there be in reaching these, decisions?

E1.1 We prefer a wide description/definition (5.4).

Question E2: What are the main factors one should consider in determining whether a service requires regulation?

E2.1 Whether the service is provided to the public -although we believe also that those who are employed and providing services to an employer should also be professionally regulated.

Question E3: What characteristics of the regulatory framework would facilitate the inclusion of new services within the regulatory net, or the exclusion of a service presently included?

E3.1 All legal services as described/defined should be within the net.

Part F: Alternative Business Structures

Question F1: Is there potential demand, from users and providers, for Legal Disciplinary Practices (LDPs)?

F1.1 There may be, but we do not think that it is at a material level.

Question F2: How do you see the advantages and disadvantages of LDPs? Can the current restrictions (by professional bodies) preventing the development of these practices still be justified?

F2.1 On balance, we see an overall disadvantage in the introduction of LDPs. Whether or not the current restrictions of the Bar Council can be justified is in our view largely irrelevant. If the Regulator concludes -as we anticipate -that these are not required in the public interest, the issue does not arise.

Question F3: What restrictions, if any, would you wish to see imposed on LDPs in the area of management? What restrictions, if any would you wish to see imposed on LDPs in the area of ownership (i.e. moving from the top left hand box of the matrix in paragraph 9 to the top right)?

F3.1 Not applicable.

Question F4: Is there any reason why the regulatory system should distinguish between practices in the commercial and the not-for-profit sector?

F4.1 Not applicable.

Question F5: What body would you expect to regulate LDPs? What, if any, additional safeguards do you believe need to be put in place to protect the consumer?

F5.1 These should be regulated by the Regulator, but in addition by a Relevant Professional Body.

Question F6: Is there potential demand, from users and providers, for MDPs?

F6.1 We believe that there is not a material demand.

Question F7: How do you see the advantages and disadvantages of MDPs? Can the current restrictions (by professional bodies) preventing the development of these practices still be justified?

F7.1 We believe not.

Question F8: What restrictions, if any, would you wish to see imposed on MDPs in the area of management? What restrictions, if any, would you wish to see imposed on MDPs in the area of ownership (i. e. moving from the bottom left hand box of the matrix in paragraph 9 to the bottom right)?

F8.1 Not applicable.

Question F9: What body would you expect to regulate MDPs? Would your answer be different if lawyers were not in a majority? What, if any, additional safeguards do you believe need to be put in place to protect the consumer, and to ensure respect of independence and integrity in the exercise of professional judgment?

F9.1 Not applicable.

Question F10: What are the international implications for the legal professions in England and Wales if legal services were allowed to be delivered through alternative business structures?

F10.1 We think that they are positive. Overseas clients are generally flummoxed at the inability to purchase legal services from one source on an end-to-end service basis, and the need to instruct directly those that they see as the various 'sub-contractor' parties.