Review of the Regulatory Framework for Legal Services in England and Wales

Response from the Bar Association for Commerce Finance and Industry ("BACFI") (incorporating the Employed and Non-Practising Bar Association ("ENPBA")

1. Introduction

BACFI membership includes practising barristers employed in a wide spectrum of organisations including companies, solicitors' firms, local authorities, the Government Legal Service and the Crown Prosecution Service. It also represents so-called "non-practising barristers" offering legal services, who are generally either employed or self-employed barristers without a practising certificate or barristers who wish to practise outside the Bar's rules (e.g. by offering services direct to clients). As to definitions see below, para 2.1.

The ENPBA was formed in 1997 to represent non-practising barristers whose numbers were growing due to the limited opportunities for pupillage and the restrictions placed on those barristers without a practising certificate. When the new Code of Conduct for the Bar was introduced in July 2000, non-practising barristers were effectively abolished as a separate category of barrister subject to transitional rules which expire in July 2005. At the same time non-practising barristers were disenfranchised, not being allowed to stand for election to the Bar Council, nor even to vote for candidates standing for election.

The ENBPA has recently merged with BACFI in order to unite representation for employed and non-practising barristers under one body. It is hoped that the merged organisation will have a stronger voice in its dealing with the Bar Council.

We should make clear that this paper represents the views of BACFI and should not be taken as representing the views of other organisations which may represent employed barristers (e.g. the FDA)

We propose to comment on several aspects of the Regulatory Review but in order to understand the position of employed and non-practising barristers within the Bar as a whole some background is necessary.

In this paper references to the masculine shall be taken to include the feminine.

We have not had the opportunity to see the Bar Council's final response to the Regulatory Review Consultation Paper. It is not yet on their website although we understand it has been approved and submitted. References are therefore to the Bar Council's draft response as contained in its Consultation Paper published earlier in the year.

2. Background

2.1 Definitions

A person becomes a barrister on call to the Bar, when he receives the degree of "utter barrister". In order to qualify for call he must join an Inn of Court, keep dining terms for a prescribed period and pass the exam known as the Bar Vocational Course ("BVC). In order to enter for the BVC he must either have a law degree or have passed the Common Professional Examination ("CPE"), which is an exam common to the Solicitors' profession and the Bar for graduates who have not gained a law degree. A person is called to the Bar by his Inn of Court.

The difficulty over nomenclature arises because the title "barrister" is also used by the Bar Council to indicate a person who is entitled to practise as a barrister. Thus the same title is has two meanings; the qualification granted on call to the Bar, and the right to practise.

The right **to practise as a barrister** and thus use the title in connection with the provision of legal services is reserved to barristers who meet the Bar Council's Rules as to pupillage and three years supervised practise as set out in the Bar's Code of Conduct.

Practising barristers may be either:

Employed – in, for example, commercial organisations, the Crown Prosecution Service, the Government Legal Service, local authorities solicitors' firms and other professional organisations. Employed barristers may provide services only to their employer subject to certain exceptions, notably for those employed by solicitors and law centres who may provide services to clients of their employer.

Self Employed

These are barristers working in chambers who may supply services only through solicitors or to organisations entitled to instruct the Bar directly under the Bar Direct scheme.

Non-practising

All other barristers are classified by the Bar Council as **non-practising** and, subject to transitional provisions, have no right to hold themselves out as barristers when providing legal services.

The Bar Council includes in the category of non-practising barristers, barristers who are not offering legal services at all (retired, overseas or pursuing other careers) and has ceased to distinguish between these barristers and those non-practising barristers offering legal services.

The practice rules are complex and are summarised in Appendix 1.

2.2 Numbers

The Bar Council's Annual Report lists the number of practising barristers.

However, there is no authoritative record of the numbers of non-practising barristers ("npbs"). The Bar Council only publishes total numbers of npb subscribers and no longer distinguishes between those providing legal services and those not. Subscriptions are voluntary for npbs and the majority do not subscribe. Although the Inns of Court do keep records, they lose touch with a lot of members and may not be informed when a member dies.

Our own estimate of numbers is as follows:

Total number of barristers:		40,000
Self-employed barristers (as per Bar Council)	11,250	
Employed/non-practising barristers providing legal services (of which only 2740 have practising certificates)	13,000	
Others (retired, overseas, in other careers etc)	15,750	

The number of npbs is likely to increase year on year until deferral of call is introduced (probably in 2007). A report prepared for the Bar Council has stated that most of those who cannot get a pupillage do go on to some sort of legal work[1], and given that less than 50% of BVC graduates are able to secure a pupillage then there is a potential pool of up to 400 npbs being added each year (taking account of overseas students who return to practise in their home country). Despite this, the number of npbs paying a voluntary subscription to the Bar Council has dramatically reduced since the new Code was introduced. Many npbs no longer see any point in belonging to an organisation which denies them any professional rights or status. The Bar Council does not keep any record of those who cease to pay a subscription so there is no means of contacting them. There is a concern therefore that there are many barristers doing legal work who are not in touch with their professional body.

2.3 Changes introduced by Access to Justice Act 1999

The background to the present situation in relation to employed and non-practising barristers stems from the Access to Justice Act 1999 ("the Act")[2]. A Revised Code of Conduct was implemented by the Bar Council in July 2000[3] to deal with changes

[1] Report by Professors Shapland and Sorsby, Institute for the Study of the Legal Profession, Sheffield University. 2002. See also Bar Council Press Release 23 December 2003; www.barcouncil.org.uk

[2] Access to Justice Act 1999 – see s. 37,39,40,44

[3] Code of Conduct of the Bar, 7th Edition 2000.

required by the Act as recommended by the Leggatt Report of October 1999[4]. Also in 2000, the Bar changed its Constitution following the Alexander Report 2000[5].

The new Code of Conduct created one category of "practising barrister" so that provided they could meet the educational requirements introduced by the Code (pupillage and three years of "supervised practice"), employed barristers had the same rights of audience as those practising in chambers ("self-employed barristers"). There were transitional provisions for those already in employment and those called before 1 January 2002. Also for the first time barristers working for solicitors were classified as employed barristers and were permitted to advise clients of their employer.

However the new Code made no provision (other than in transitional arrangements which expire on 31 July 2005) for "non-practising barristers". The Leggatt Report rightly points out that the term "non-practising" is something of a misnomer in respect of those providing legal services and that the rules relating to practice by such barristers were unsatisfactory. The solution recommended by Leggatt and adopted in the new Code was to remove all regulation from npbs except the over-riding duty not to act in a dishonest or discreditable way or in any occupation likely to affect the reputation of the Bar.[6] The right to use the title "non-practising barrister" was therefore removed and the former npb was therefore put in the same position as any member of the public.

The revised Constitution gave representation to practising employed barristers in proportion to their numbers. Although the Alexander Report recommended that npbs should be represented by a co-opted member, the Bar Council effectively decided that all npb representation should end at the end of 2002 when the term of office of the one elected npb on the Council came to an end. One additional npb was co-opted for one year in 2000 following the Alexander recommendations, but there have been no co-options since then. In addition, non-practising barristers were disenfranchised and npb subscribers can no longer vote in elections for the Bar Council. The only right they have as subscribers is to attend and vote at the Bar AGM.

The Bar Council suggested that a five year transitional period would give npbs wishing to continue to practise as barristers an opportunity to gain the necessary qualifications to enable them to obtain a practising certificate. Since 2001, a group representing employed and non-practising barristers has been in negotiations with the Bar Council to obtain improved rights for non-practising barristers and to increase the opportunities for pupillage and supervised practice in employment. Such negotiations culminated in the Consultation Paper issued by the Bar Council in November 2003. The ENPBA submitted a response to the Paper (attached as Appendix 2). The results of the consultation have not been formally published but it is understood that the Inns of Court have not yet reached agreement between themselves about the proposals for the use of the title barrister and have therefore set up a separate working party to look at the issue. It also appears that the Bar Council is unwilling to make any significant concessions on waivers for non-practising barristers who are not able fully to comply with the qualification rules of the Code of Conduct and Consolidated Regulations. As a result many very competent barristers will if they wish to use the title "barrister" be

[4] Access to Justice Act 199; Proposed Amendments to the Bar's Code of Conduct; Bar Council Consultation Paper October 1999.
[5] Report of the Working Group to review Bar Council Representation; Bar Council, February 2000
[6] Paragraph 301 Code of Conduct 7th edition, 2000.

forced into the rather draconian "Information Notice" proposed by the Bar Council in its Consultation Paper. The rather dismissive attitude of the Bar Council to this issue is illustrated the only reference to npbs in its Consultation Paper on the Regulatory Review.[7]

The Bar Council expects to have this issue resolved by July 2004, although this timetable is looking increasingly unlikely.

2.4 Non- Practising barristers - Who are they?

a) Employed barristers who are not eligible for a practising certificate

These are those called post 1 January 2002 who have not been able to get a pupillage or to complete the three year period of supervision because there is no barrister with higher rights able to supervise (those called before that date will be exempt from pupillage but may not be able to exercise rights of audience without further training).

The three year rule is more likely to be an issue for those working in solicitors practices. Barristers employed to give advice only to their employer are able to practise as a barrister but without rights of audience. Those working for a solicitor must do pupillage and three years supervision before being allowed to practise as a barrister whether or not they require rights of audience.

In commercial companies and in most firms of solicitors (as opposed to Crown Prosecution Service ("CPS")), local authorities and some government departments) it is unlikely that there will be two barristers with higher rights of audience as required for pupillage. Apart from the CPS and Government Legal Service ("GLS") only a few employers are able to offer pupillages. Even in the whole of the GLS (1900 employed barristers and solicitors) only about 30 training contracts/pupillages are offered each year.[8]

b) Self-employed outside chambers

These are barristers who want to advise clients direct who may or may not be eligible for a practising certificate. When direct access is introduced those who are granted a practising certificate will be able to practise as barristers subject to the restrictive rules imposed by the Bar Council.

However, there are many however who do not qualify for a practising certificate either because they have not completed a pupillage or not completed three years supervised practice. These range from experienced former employed or self-employed barristers to newly qualified barristers, although the latter are more likely to be employed than self-employed. There are many who have come to the Bar later in life maybe to supplement their experience in another profession, e.g. surveyors, who have not been able to complete the pupillage plus three years training required.

[7] Consultation Paper, Review of the Regulatory Framework for Legal Services, para 35; www.barcouncil.org.uk Consultation Papers and Responses

[8] Per Anthony Inglese, Solicitor and Director of Legal Services, DTI; Graya News, Spring 2004.

Many barristers in common with other professionals offering services to commercial organisations, choose to be self-employed and offer their services as locums, or interim counsel. Companies with headcount restrictions or a temporary staff shortage are relying increasingly on this type of support.

c) Barristers employed by accountants and other professional bodies to give advice to the clients of their employer

The Bar Council was not willing to extend the rights granted to barristers employed by solicitors to barristers employed in other professional firms such as accountants, actuaries or firms of architects. However it seems invidious that a tax barrister when working for a firm of solicitors may appear for his client in court but if he moves to a firm of accountants may not do so.

d) Recently called

Those still trying to get a pupillage, who have only five years from passing the BVC to do so. Less than 50% of those called to the Bar are able to get a pupillage each year leaving a significant number competing with the following year's graduates. Some of these barristers will be employed in legal work of one sort or another and may continue to do so after the five years deadline has expired.

3. Regulation

3.1 Who should be regulated?

We take the view that any barrister providing legal services to the public should be regulated. The Bar Council's proposals for Information Notices[9] are not in our view workable. It is unlikely that they will be used in the suggested format or at all and it is difficult to see how they will be policed other than when they are breached, once a complaint has been made against the barrister. We consider that the public interest requires more control than simply the requirement to carry minimum professional indemnity insurance. Even if a barrister does not use the title then it seems naïve to expect that the fact that he/she is a barrister will not be disclosed in the event of any complaint for negligence or misconduct.

The problem lies in the fact that a member of the public can offer legal services other than those which are reserved for barristers and solicitors. It therefore is difficult to see under the present regime how a barrister could be prevented from carrying out non-regulated services.

We therefore propose a more liberal differentiated regime where the Bar Council would grant a practising certificate to barristers who can demonstrate competence in the area in which they wish to work. If the barrister wished to work in another area then they may be required to do additional training. We believe that barristers should not be able

[9] Bar Council Consultation paper PSC 21 November 2003; www.barcouncil.org.uk; Consultation Papers and Responses

to offer legal services to the public unless they are competent and regulated. Thus barristers without a practising certificate would not be able to offer legal services under the title barrister. The definition of" legal services" may also need review. The Bar Council's Guidance on "Holding Out"[10] shows how difficult it is to draw a dividing line. This is based on the definition of "legal services" in the Code of Conduct[11]. It seems quite extraordinary that, for example, acting as a judge is not regarded as providing legal services. There is also the extraordinary result that a QC, who is not practising in employment or in Chambers, may use the title QC (a title granted by the Crown) but not the title barrister in the provision of legal services (for example as a part-time consultant).

The Bar Council state that it would be too difficult to regulate all barristers providing legal services but we consider that these difficulties are over-stated. Public interest should outweigh any administrative difficulties. The LECG Report for the OFT concluded that appropriate regulation could be made as condition for using the title "non-practising barrister".[12] Any new regulatory regime proposed by the Regulatory Review should be capable of over-coming such objections.

3. 2 Problems with the Current Rules

We fully agree that proper education and training is essential in any profession and that to a certain extent the professional body is best placed to decide the level and constituents of training. Nevertheless the training regime and the rules applying it must meet the principles for good regulation as set out in the Regulatory Review Consultation Paper. We do not consider that the present rules meet these criteria. We therefore believe that there should be a supervisory body addressing some of the issues with the present rules.

3.2.1 Constituents of training

The current training system is entirely geared to those who wish to practise court advocacy. Such barristers are in the minority at the Bar as a whole. Even at the self-employed bar there is less and less emphasis on oral advocacy with cases being tried on the basis of skeleton arguments and written submissions. Mediation and arbitration are also growing. Indeed the whole tenor of the Woolf Reforms was to speed up the litigation process and judges are now in some cases highly critical of parties who have refused opportunities to mediate.

Training should therefore be flexible according to the type of work which the barrister wishes to do, and should also be alert to the fact that practice as a barrister now entails much more than oral advocacy. If later the barrister wished to go into another type of work further training could be required.

---

[10] Guidance on Holding Out as a Barrister; www.barcouncil.org.uk; Rules and Guidance/Code of Conduct/Miscellaneous Guidance, Section D.

[11] Code of Conduct, 7th edition 2000, Para 1001

[12] Competition in the Professions; OFT 328 March 2001; The LECG Report, para 267.

3.2.2 Pupillage system

A necessary corollary of the above, and one that maps onto the question of availability of pupillages to match the number of BVC graduates, is the need to reform the pupillage system both as to form and content.

There is a chronic shortage of conventional chambers pupillages and it is a scandal that less than 50% of those who have passed the BVC (at considerable cost to themselves or their parents) and been called to the Bar can go no further in the profession.

Employed pupillages are very rare (except in the CPS) and the considerable bureaucracy required to register as a Pupillage Training Organisation" is a deterrent to many employers.

This shortage has a number of causes but underlying them all is the fact that the preferred "model" is that of pupillage in chambers.

For the employed Bar the problem is the requirement for two "qualified" barristers before an organisation could become a pupillage training organisation. In all but the largest commercial companies it would be rare to find two barristers with higher rights of audience. Many barristers employed by companies will not have sought to acquire rights of audience, as there will rarely be any requirement for them to appear in Court on behalf of their employers. Although the Bar Council has made a small concession with regard to the location of the supervisor under the three year rule, they refuse to recognise that employed practice is different from that at the self-employed bar.

For those outside the practising bar as defined above, the potentially rich and varied legal experience many of them possess simply falls outside the definition of eligible experience as set out in the Code of Conduct and Consolidated Regulations. Many of the problems over shortage of pupillage could be overcome by a more imaginative and flexible system that was in tune with the realities of the modern working environment, which would allow trainees to build up a portfolio of valid experience and training.

3.2.3 Waiver system

Any concessions from the rules have to be sought by waiver. This is a deeply unpopular system and generally employers (including solicitors) are unwilling to go through the waiver process. Proposals from a Joint Task Force of the Education and Training and Employed Bar Committees of the Bar Council in 2002 that the second qualified person/supervisor could be a senior solicitor or barrister with limited Rights of Audience were not accepted. The Bar Council insisted that it wanted to continue the waiver system for a further period, in the face of powerful submissions, referred to above, that a general rule change should be implemented.

Thus the Bar Council has been able to allow these unsatisfactory rules re pupil masters/ qualified persons to linger on in spite of strong criticism from the OFT. The Bar Council stated in November 2003 that it is proposing to change the rules so that in future chambers and employers would require approval to take pupils and that Guidelines would be published setting out criteria for approval. It is feared that this will

make the system even more uncertain and to date there has been no sign of these Guidelines

The OFT has commented[13] that "the operation of the waiver system in this context (i.e. in relation to the three year rule) creates a very high degree of uncertainty for barristers who wish to practise at the employed bar and to acquire standing to meet the three year rule. - - - - -Taking into consideration the discretionary nature of the waiver system, the absence of clear published criteria, and that barristers seeking an exemption are unlikely to be in a position to make an application for a waiver until they have entered employment, the hurdles that face those who wish to have a practice in employment are considerable".

The system of waivers, which is loaded against the barrister without court advocacy experience, should be altered. There few published criteria and no time limits. Our help has been sought in one case where an applicant received no response to his waiver application for nearly a year. There is no published data on the numbers of waivers applied for in relation to the numbers granted, in spite of requests to the Bar Council for such information.

3.2.4 Self-employed barristers without a practising certificate

Many of those practising currently as npbs would like to practise as barristers when the Direct Access Rules are finally introduced. Some will qualify for a practising certificate if they have done a pupillage plus three years supervised practice but many will not. Those called before 1989 will probably be granted a waiver subject to carrying out fairly extensive advocacy training but those called after 1989 will almost certainly not be eligible unless they can show substantial advocacy (pupillage and nine months in Chambers as a tenant not accepted as adequate). The rules need to be more flexible so that the authorisation to practise can be related to the work the barrister is intending to carry out. To suggest that a barrister who wishes to advise only companies and law firms in commercial matters should have the necessary advocacy skills to appear in the House of Lords is patently ridiculous. At the very least there needs to be a distinction between the barrister who wishes to advise the man in the street and those only providing services to sophisticated purchasers.

Some of these barristers are acting as interim counsel (i.e. providing services to one or more companies on a temporary basis). Even when direct access is introduced many such barristers will still be unable to practise as barristers (even if in other respects entitled to a practising certificate). For personal tax reasons or more generally at the insistence of the client they normally provide their services through a company. The Bar Council therefore classifies them as employed barristers and as such they are not permitted to serve clients of their employer. Thus such barristers are at a disadvantage compared with solicitors when seeking new clients.

[13] Advice to Lord Chancellor's Department on Direct Access proposals, March 2003; para 2.14

RESPONSE TO THE SPECIFIC ISSUES OUTLINED IN THE CONSULTATION PAPER

OVERVIEW

Background

We agree that the present Regulation of barristers is outdated, inflexible and insufficiently accountable and transparent. The approach of the Bar Council to the issue of non-practising and to a lesser extent employed barristers illustrates these shortcomings.

Terms of Reference

A framework which promotes competition and innovation together with the public and consumer interest must surely take account of the benefits which an effective body of employed and "non-practising" barristers can deliver both in terms of cost and access to justice. The current legal system favours the very rich and the very poor. Non-practising barristers can provide a cost –effective service but need to be regulated, in the interest of the consumer, but in a more flexible manner than currently.

Classification of lawyers

We were delighted to see non-practising barristers included. Subject to the transitional provisions of the Code of Conduct, which expire in July 2005, the Bar Council has ceased to recognise such barristers as a constituency, and no longer sees them as any different from members of the public in respect of the provision of non-regulated legal services.

Principles of Good Regulation

The Bar's Code of Conduct does not satisfy the principles laid down by the Better Regulation Task Force and the National Consumer Council. In particular, parts of the Code of Conduct and Regulations are so complex that few really understand it fully. This results in many queries to the Bar Council which are often not dealt with promptly or adequately. However the Bar Council has issued a detailed Guidance Note for Employed Barristers[14] which deals with many of the queries which have arisen at the Employed Bar.

[14] Guidance for Employed Barristers; www.barcouncil.org.uk; Rules and Guidance/Code of Conduct/Miscellaneous Guidance; Section O

Chapter A Regulation

The Consultation paper highlights the fact that although there is a considerable amount of review of the Rules of the Bar by the OFT and the Legal Services Consultative Panel, changes which have occurred have been piecemeal and incremental and have not been reviewed as part of total regulatory strategy. Also it is not clear to what extent particular groups within the profession, particularly a group such as non-practising barristers without any representation on the Bar Council, can influence the final outcome if the Bar Council chooses to ignore representations. The Legal Services Consultative Panel seems to be fairly far removed from what is happening "on the ground". Having looked at a selection of recent Minutes of its meetings, it is not clear that there is wide consultation of interested bodies. For example, we are not aware that either BACFI or ENPBA has ever been consulted by the Panel. In any event we understand that only amendments to the rules relating to rights of audience are required to be approved by the Lord Chancellor and therefore go before the Panel. In relation to the Panel, we were surprised to note that "Ministers had specifically told the Panel not to respond" to the Regulatory Review Consultation Paper, although Panel members could comment as individuals.[15]

There should be more rigorous scrutiny of the Rules to ensure that they meet the objectives set out above. There should also be a mechanism for challenging restrictive rules such as section 203(1)(b) of the Code and Regulation 47 (1) (iii) of the Consolidated Regulations before a regulatory body which is independent of the Bar and which can hear evidence from interested parties. Such scrutiny should also include a "competition test". Although the OFT can comment to the Lord Chancellor on rule changes there is little evidence that competition concerns have played a major part in the review of rule changes to date. For example, although Direct Access has been introduced to meet competition concerns, the OFT's concerns about the rules implementing Direct Access appear to have been largely ignored.

We believe that the rigid structure of the Bar with its focus on court advocacy and its limits on direct access (even following the forthcoming relaxation of the rules on direct access) is depriving the public of cost –effective high quality legal services and also depriving companies of commercial legal advice at a much lower cost than charged by the major law firms or the senior self-employed bar. Thus competition is being unjustifiably stifled. This was identified by LECG in their report for the OFT on Competition in the Professions in their comments on the withdrawal of npb status. "The prohibition (on the use of the title npb) could restrict competition for work that non-practising barristers are perfectly competent to undertaker given that they have completed all but the final stages of a barrister's training.[16]

[15] Minutes of the 48th Meeting of the Legal Services Consultative Panel, 29 March 2004.
[16] Competition in the Professions, OFT 328, March 2001; LECG Report, paras 266-269.

Question A1

What objectives do you believe should form the cornerstone of a regulatory system for legal services?

To summarise our views we believe that the objectives of regulation should be:

- Access to justice and legal services for all at affordable cost
- Ensuring all providers are properly trained and keep up to date
- Maintaining the independence of the profession
- Flexibility to adapt to new forms of service delivery and new providers.
- Promoting consumer choice and competition between providers
- Setting standards of competence and ethical practice against which providers can be measured
- An effective complaints procedure

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?

We think the precepts out lined in the Consultation Paper encompass the necessary aspects. We are not aware that there is any difference of opinion on these matters. A split between the representative and regulatory functions of the Bar Council would facilitate dealing with conflicts on which barristers wished to seek guidance from their professional body.

Chapter B Regulatory Models

Questions B1 – B3

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 function?

B2 Which model best meets the criteria of the Terms of Reference?

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?

We do think it undesirable that the Bar Council encompasses both regulatory and representative functions. Although there are different groups within the Bar these fulfil professional rather than representative functions. In the current debate about the rights of npbs, the nbp group has not been able to turn to any effective representative body. Both BACFI and ENBPA have no staff or funds to fulfil this role and rely on individuals who devote their time voluntarily. Practising employed barristers are represented on the Bar Council but have only 25% of the seats. Non-practising barristers are not separately represented and have no voting rights in elections to the Council.

In its Consultation Paper on the Regulatory Review, the Bar Council states that there is no evidence to support the view that there is tension between its representative and regulatory functions.[17] The ENPBA has evidence of considerable dissatisfaction from barristers whom the Bar Council should be representing.

Although Model A has attractions, it may be a step too far for the legal profession. There would be some merit in having common rules for services which span two or more of the professional bodies, e.g. conveyancing, advocacy. This would also facilitate LDPs which we support. The FSA model has not eliminated all the problems in the financial services industry and has created a great deal of bureaucracy. We understand that the costs and complexity of compliance is distorting competition and stifling innovation.

Model B seems the better option provided that the supervisory function of the Legal Services Board was able to fulfil some of the objectives necessary for dealing with the defects in the present system. The LSB's remit should certainly include a more critical and transparent scrutiny of the Rules against clear criteria than currently appears to exist through the Legal Services Consultative Panel. We agree with the Bar Council's views expressed in its draft Consultation Paper on the Regulatory Review that the Regulator should be able to call in all rules and not just those relating to Rights of Audience.[18] However we do not agree that the "substantial changes to the rules have achieved the stated aim of increasing access to the profession".[19]

Although we agree that the profession including, in the case of the Bar the Inns of Court is best left to decide on entry qualifications, the requirements should be flexible enough to reflect what barristers actually do or intend to do, (rather than the current model which requires extensive court advocacy training, and a particular and rather restricted model of pupillage as referred to above), whilst ensuring that standards are maintained and the public protected. It should also take account of all those called to the Bar before 2007 who wish to practise law but are unable to get a pupillage not through lack of ability but because there are simply not enough to go round. The Bar should not be able simply to "wash its hands" of such candidates.

---

[17] Consultation Paper on the Review of the Regulatory Framework for Legal Services, para 36. www.barcouncil.org.uk; Consultation Papers.

[18] Ibid; para 43

[19] Ibid; para 28.

We think there is merit in taking out rule making according to service type which would facilitate common standards across providers and would ensure that providers are measured according to the work they do rather than the profession they represent.

It is not easy to see how representative and regulatory functions within the Bar might be separated. A new body within the Bar would need to be set up whose members were drawn from all sectors of the Bar which would have a clear role as a representative body. It should represent all barristers not just those with practising certificates. In fact those unable to obtain practising rights have more need of representation than those with such rights. The regulatory functions should be also be exercised by a body with representatives from all sectors of the Bar and with representation from out side the Bar. There should be a clear distinction between the regulatory and representative functions.

Question B6 International considerations

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

The European Commission is currently considering competition in the professions. It is important that legal service providers in the UK are not placed at a disadvantage in relation to providers from other countries. Also the regulatory arrangements should ensure that lawyers from other European countries are not able to carry out work in the UK that UK lawyers with equivalent qualifications are restricted by the rules of the profession from carrying out. The Bar should not be able to shelter behind decisions such as that in Wouters[20] to prevent the liberalisation of the profession.

Chapter C Complaints

This is one area where the Bar has an excellent record both in the low level of complaints and the way in which complaints are dealt with. We commend Michael Scott, Chairman of the Professional Conduct Committee for the diligent and sensitive way in which his committee handles complaints. We think it is important that the profession retains a key role in the handling of complaints subject to oversight as is the case currently.

Chapter 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 these be in reaching these decisions?

The government should have the power to determine what legal services should be regulated but there should be strong input from the Regulator, the profession and from public interest groups. There should also be an examination by an independent

[20] JCJ Wouters/NOVA; European Court of Justice, 19 February 2002; C-309/99.

Regulator of whether services which are restricted to one sector should be opened up to other sectors. An example is the right to conduct litigation. Restrictions on barristers in this area arise partly from the Courts and Legal Services Act and partly from the Bar Code of Conduct.

Employed barristers now have the right to be authorised to conduct litigation. If they have such skills then why should they be prohibited from exercising them when they move into self-employed practice? The efficacy of the Direct Access rules is greatly hampered by the fact that a barrister may draft documents for use in litigation but may not correspond with third parties or take witness statements. In the lower courts and tribunals employed and non-practising barristers are well used to taking a case through from Claim to appearance before the Court/Tribunal Hearing. The Bar Council has devised a stringent checklist of competence for the purposes of the Employed Barristers (Conduct of Litigation) Rules and there seems no reason why this test could not be extended to all barristers wishing to have the right to conduct litigation. The separation of functions between barristers and solicitors in these simple cases cannot be in the public interest. This view was also expressed by the OFT in their advice to the Lord Chancellor on Direct Access. "We note that certain of the existing rules of the Bar's Code of Conduct continue to restrict the ability of barristers to compete freely and effectively in the provision of legal services. In particular, we remain concerned that as long as the Bar maintains in force restrictions on the right to conduct litigation, liberalisation of access rules will only have limited impact upon the freedom of barristers to adapt the services they provide".[21]

The OFT also commented on the service type restrictions on Direct Access, particularly in relation to family law where there is a need for a lower cost alternative for those ineligible for Legal Aid. The recent publicity of the Fathers for Justice campaign has highlighted how many parents caught up in family disputes do not have access to low cost advice. The OFT comments that "to suggest, as the current proposals do (i.e. in relation to arrangements for client care for vulnerable clients) that no barrister would be capable of this, appears patronising".[22] It is recognised that any relaxation of rules such as these will be seen as a move towards fusion but it cannot be in the consumer's interest that the barrister accepting direct access instructions can only take the case so far. It will be interesting to see what take-up of direct Access there will be in view of the considerable restrictions surrounding such work. Any new regulatory regime should require a review of the Direct Access provisions to test whether the anticipated benefits have been achieved. This point was also highlighted in the OFT advice on the Direct Access Rules. " If a client has to instruct a solicitor to do these tasks (e.g. collect evidence, take witness statement etc) then the object of direct access which is to make legal services more accessible and cheaper for the client would be largely defeated."[23]

There is also a potential regulatory gap in relation to npbs providing legal services. The result of the Bar Council consultation referred to above will determine to what extent this is a serious gap which requires further regulation.

[21] OFT Advice to Lord Chancellor on amendments to the Bar Code of Conduct in relation to Direct Access, March 2003; covering letter.

[22] Ibid; para 2.25

[23] OFT Advice to Lord Chancellor on Direct Access. March 2003; para 2.28.

Question E2

What are the main factors one should consider in deciding whether a service requires regulation?

The main factors must be public interest and the protection of consumers. We understand that the reason immigration services were brought within regulation was the growth of unqualified immigration advisers some of whom we understand were non-practising barrister which may explain why npbs generally have not found favour with the Bar Council. Unfortunately in the immigration field regulation has not solved the problem completely, and there are several unscrupulous advisers still operating, many of whom are solicitors. Clients of such firms usually are desperate people needing to keep a low profile and therefore unlikely to complain.

One way of deciding whether a service needs regulation is to measure the number of complaints received by consumer bodies and by the professions themselves. However, there may be many cases where the consumer has received poor advice and may not be aware of the fact. An independent review of quality of advice and competence of providers may be considered.

Question E 3

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?

We would certainly not favour the proliferation of regulatory bodies to deal with new services as they become regulated. We would hope that a way could be found within Model B+ to avoid this. Nevertheless the model should be flexible enough to allow for providers of different services within the profession to be represented in regulatory issues.

Chapter F Alternative Business Structures

Questions F1 – F5 LDPs

Since 2000 when barristers became able to practise in a solicitor's firm, there has been a steady flow of barristers going to work for solicitors. As solicitors now have higher rights of audience it is attractive to have one or more barrister on the staff to carry out advocacy for the firm and to train solicitors in advocacy. We see no reason why such barristers should not be eligible for partnership in the firm if they so wish. This may give the client greater confidence that the barrister is on equal footing to his solicitor colleagues. Indeed the ban on partnerships between solicitors and barristers may well deter some barristers from working for a solicitor's firm.

The Bar Council in its Consultation Paper on the Regulatory Review takes the view that if barristers wish to become partners in a solicitor's firm they should become solicitors.[24] We do not agree that barristers could not remain to be governed by the

[24] Consultation Paper, Review of the Regulatory Framework for Legal Services; para 81; www.barcouncil.org.uk; Consultation Papers and Responses

basic rules of the Bar Code of Conduct although there may need to be some discussion with the Law Society about areas of overlap of regulation. The Bar Council seems concerned about the issue of handling client's money which is prohibited for barristers. In all but the smallest firm, the individual solicitor would never handle client's money, this being the responsibility of the Finance Department of the firm.

We do not see any difficulty in the owners of the practice being non-lawyers. Lawyers employed by commercial concerns are responsible to non-lawyer owners and managers. That is not to say that conflicts of interest do not occasionally arise but employed lawyers have learned to deal with these without compromising their professional integrity.

We would agree however that where a lawyer was employed to provide services to the public there should be a certain level of experience required and possibly a restriction on one-lawyer departments. In addition the where the lawyer did not have experience of dealing direct with the public some additional training should be required.

Questions F6 – F8 MDPs

These pose many more issues of regulation and we are not sure that there is a real demand. Our experience of accountants firms which have associated with a solicitors practice or set up their own solicitors practice suggests that this structure has not been popular with many commercial clients. We are not in a position to comment on demand elsewhere. In the post-Enron environment MDPs may not be the right way to go at the moment.

Question F10

We think that MDPs may make the UK an attractive source of professional services but we are not sure to what extent this could contribute significantly to the national economy. We note the ABA's reservations.

Response submitted by the Bar Association for Commerce Finance and Industry, P O Box 3663, Bracknell, Berks, RG12 2FH.

Contact for further information: Helen Fletcher Rogers, General Committee, BACFI. Tel/fax: 01582 607806; e-mail: hfrogers@dial.pipex.com

3 June 2004

APPENDIX 1

Qualification to practise

The rules of the Code of Conduct ("CC") (most relevant are sections 2 and 5) and the Consolidated Regulations ("CR") are complex but may be summarised as follows:

Pupillage

All barristers wishing to practise must now complete a 12 month pupillage (section 202). This may be in chambers, in employment (including solicitor's offices) or split between the two and may include periods in other organisations such as the European Commission, or as a judge's marshal. The rules on pupillage are set out in Part V of the CR [25].

Applications to be registered as a Pupilmaster are made to the Inns of Court but applications from employers to be registered as "Pupillage Training Organisations" are made to the Bar Council. There is no similar approval system for chambers although the Bar Council intends to introduce an approval mechanism.

The rules require that a Pupilmaster may only take a pupil if there is a "second qualified person" in the organisation or chambers, that is a barrister or solicitor of three years standing who is entitled to exercise rights of audience in all courts and proceedings (CR section 47.1 (iii)). The Pupilmaster must be of at least six years standing and have been entitled to exercise **a right of audience** for the immediately preceding two years (CR 48.3). Thus the right of audience qualification is more stringent for the second qualified person than for the Pupilmaster. This anomaly was drawn to the attention of the Bar Council in 2002 but has still not been remedied.

Supervised Practice ("the three year rule")

[25] The Consolidated Regulations of the Inns of Court and the General Council of the Bar, 1 October 2003; available on the Council of Legal Education website; www.legaleducation.org.uk

Following pupillage, all barristers wishing to exercise rights of audience must be supervised by a "qualified person" during the first three years of practice. (CC 203.1 (b)) The requirements to be "qualified" for these purposes differ from those for the second qualified person during pupillage. The qualified person for these purposes must be of six years standing and been entitled to exercise rights of audience in all courts and proceedings for the previous two years.(CC 203).

For those barristers in employment not wishing to exercise rights of audience the rules differ depending on whether they ARE employed by solicitors or employed in other organisations. Barristers working for solicitors must complete three years supervised practise to retain their practising certificate whether or not they wish to exercise rights of audience.

APPENDIX 2

Consultation on Non-Practising Barristers offering Legal Services
(Bar Council document dated November 2003 PSC 21)

COMMENTS FROM EMPLOYED AND NON-PRACTISING BAR ASSOCIATION

Executive summary

1. Regulation

All barristers providing legal services under the title barrister should be adequately insured and regulated by the Bar Council. If the Bar Council does not wish to take on full regulation, then as a minimum they should require an "Annual Return" which would list volume of work, insurance arrangements and number of complaints.

2. Pupillage

In order to halt the increase in the number of nbps, call should be deferred until a second six place has been obtained thus ensuring that most of those who are called will have completed pupillage.

3. Waiver proposals

Many npbs who advise commercial companies and law firms do not wish, nor would be required by their clients to have, rights of audience. The Bar Council already permits barristers who have more than one contract to obtain a practising certificate as employed barristers. This practice could be extended to those advising business clients only. If the Bar Council will not accept this then a broad interpretation of the Collyear outcomes, particularly in relation to advocacy, should be applied.

The criteria for waivers are not specific enough to give applicants guidance as to whether they have reached the right level. The trial set up to test the process and to reassure sceptical applicants has not worked

Waiver application should be dealt with promptly with an initial review within one month and a final decision within two months. There should be a right of appeal.

4. Information Notices

The sample notices are phrased negatively and it is questionable whether barristers will be prepared to use them. The wording should not be compulsory. The compensation references are misleading and should be reviewed.

Third party notices should not be required for employed barristers. It should also be made clear what notices have to be given by employed barristers who advise the public on behalf of their employer (Law Centres/Solicitors firms).

5. Voting Rights

All barristers subscribing to the Bar Council, whether or not in possession of a Practising Certificate, should have voting rights in Bar Council elections.

Detailed Comments

1. General

a) Regulation

We believe that all barristers offering legal services should be fully regulated by the Bar Council. This begs the question as to what level of training/ competency should be required but the fact remains that there are many who will not be able to satisfy the requirements for a practising certificate but yet may be perfectly competent to carry out certain services. If they are not competent then they should be prohibited from offering any legal services under the title barrister.

The requirement for insurance introduces some limited form of regulation but apart from this the Bar Council does not wish to regulate. This is not in the public interest.

The concept of an "Information Notice" is something of a "fudge". We question whether barristers will be willing to apply the Notices and how the Bar Council will police their use.

b) Pupillage

One of the reasons there are so many non-practising barristers (there is no official record of numbers but based on the figures from Lincolns Inn there could be as many as 25,000) is the difficulty of obtaining pupillage. The Bar Council state that deferring call will not help to a great extent, as call will be required before the second six. However this could be overcome by deferring call until a conditional second six place has been obtained thus ensuring that most who are called will complete pupillage.

c) Numbers affected

Para 30 of the Consultation document states that the number who seem concerned about the rules is relatively small. This is open to question. The number who ceased to subscribe to the Bar Council following the change in the Code is estimated to be about 2,000. The Bar Council apparently has no record of these people so it is not possible to contact them. The comments on the ENPBA's recent survey shows a lack of timely response, and in some cases a lack of courtesy, by the Bar Council to people who do enquire of them. The feeling is that many just give up and go away.

ENBA is aware of one case where an npb (pupillage plus 2 years in practice and many years as an employed barrister) applied for a waiver in May 2003 and has still had no response in spite of regular chasing by him and latterly by ENPBA on his behalf.

d) Voting Rights

Following the Alexander Report non-practising barristers lost the right to vote in Bar Council elections in spite of the fact that they were encouraged to, and many still do, subscribe to the Bar Council. There appears to be no justification for this disenfranchisement.

Comments on the specific questions posed by the Bar Council.

1. Waiver Proposals (questions posed in paras 42&43)

a) Are the proposed criteria appropriate?

The introduction to Annex 2 states that the procedures apply to employed and non-practising barristers. However, paras 8-14 seem to apply only to npbs. There seem to be three categories to whom the waiver process may apply; non-practising barristers; employed barristers seeking rights of audience; employed barristers not seeking rights of audience. This should be made clear.

Para 9 of Annex 2 states that a level of experience "commensurate with the outcomes of pupillage" is required. This is defined in Appendix 4 of the Collyear Report. However Collyear outcomes are not specific as to the level of experience which has to be achieved. The applicant therefore is not able to judge whether his/her experience in these areas will be sufficient. Nor does the application form ask for experience under the Collyear headings. If Collyear is to be the benchmark then the form should be re-designed. The two paras of Collyear likely to cause difficulty are paras 4 and 7 (preparing a case for trial and advocacy). A barrister who has undertaken only advisory work is unlikely to have this experience. Para 14 of Annex 2 refers to this but still envisages limited court advocacy experience. We do not agree that court advocacy experience is necessarily relevant for many employed or non-practising barristers doing advisory work only.

Geoffrey Vos has stated that he wants as many as possible to gain a Practising Certificate via this route and that lack of Court advocacy will not be a barrier. However it is not clear that the Bar Council and the TASC share this view. The requirement that all self-
- employed barristers need to have full rights of audience does not in our view reflect modern commercial reality where many self-employed legal advisers provide services to law firms and companies and would never be required to appear in Court. The same applies to employed barristers although they can get a PC without ROA. We take the view that it should be possible for a self-employed barrister who is advising only commercial organisations to have a PC without rights of audience in the same way as an employed barrister and if at any time the barrister wished to appear in Court then he/she would, as does an employed barrister, have to apply for Rights of Audience.

We do not therefore agree that court advocacy experience is necessary and feel that oral advocacy before other bodies, which is just as much a test of the barristers skill, should be accepted in lieu of court advocacy experience. This is endorsed by the Dutton report which comments that that there is less opportunity for oral advocacy in Court than in the past and sets out clearly the necessary oral advocacy skills required.

Para 10 deals with exemption from the three-year rule and requires experience commensurate with a barrister practising in a similar area of practice. This seems much more reasonable as it relates to the work the barrister is actually performing.

We agree that junior barristers (under 6 years call) would not normally be eligible for exemption.

b) Are there other criteria that should be adopted?

As stated above there should be more flexibility in reviewing experience for those who have not completed a pupillage. Some examples of experience from say the employed bar would be helpful. The existing criteria are too broad as to give confidence that barristers showing a good track record as employed barristers will qualify. The Collyear outcomes could be interpreted restrictively and in any event the form is not designed to cover the Collyear outcomes (see below).

c) Are any changes needed to the forms or the procedures?

The comments above are rather speculative until we see how the criteria will be interpreted by the TASC who are charged with reviewing applications. It was agreed with Geoffrey Vos and the Bar Council that a few trial applications would be submitted to see how the process would work in practice so that necessary amendments to the procedures and the forms could be made before the process “went live”. This should have happened in the autumn and trial applications have been submitted but the Bar Council have not yet reported back on the trial. Until we see the results of the trial we do not know whether it will allow many np and employed barristers to obtain Practising Certificates. There is a great deal of sceptism as to whether these new procedures will be any improvement on the present situation and the trial was agreed to try to allay some of these concerns.

Paras 17-21 set out how applications will be considered. Currently the TASC meets only three times per year although we have been told it can meet as often as necessary. Given the current record of the BC in dealing with waiver applications there should be a time limit. We suggest that there should be an initial reply within one month and a full reply (after interviews etc) within 2 months.

There should be an appeal against refusal of a PC.

The form could be better designed and as mentioned above probably should reflect the Collyear outcomes for those who have not completed a pupillage. There is an omission the first page in that (b) should read "I wish to practise as a barrister in self-employed practise or in employment with full right of audience". Detailed comments on the form will be given to Mark Stobbs once the trial results are reported back.

2. Information Notices

a) & b) Insurance arrangements

We are pleased that the Bar Council has accepted the recommendation that all barristers providing legal services to the public (in its widest sense) must be insured either personally or through their employer.

The amount of insurance should reflect the volume, value and type of work carried out by the barrister. £250,000 may not be adequate for someone billing £100,000 per annum in high risk type of work.

c) General questions

- **Is the Bar Council right to accept the concerns of the Inns and of non-practising barristers?**

  The Bar Council is right to accept these concerns.

- **Does the drafting of the Code achieve what we seek to do?**

  The amendments to the Code state the notice to third parties should include the absence of compensatory powers. The recommended notice does not include this reference. See below as to comments on the suggested notices in particular on compensation.

- **Do the new arrangements achieve a balance of interests?**

  As stated above we feel that all barristers providing legal services should be fully regulated which would eliminate the need for the notices to go into the question of compensation. Subject to this, we believe that the arrangements do

achieve a balance of interests, although the recommended notices could be improved to appear less negative (see below).

- **Should the wording of the statements be compulsory?**

  As the statements have to cover many different types of practice the wording should not be made compulsory.

  Regarding the wording of the Notices:

Notice to clients

The notice should specify that the barrister is required to be insured and (optionally) state the level of insurance cover. In this event it would not seem necessary to make reference to compensation. Apparently the Bar Council does not pay compensation unless recommended by the Ombudsman and only in the case of employed barristers can it require the barrister to pay compensation to the employer or, in the case of barristers employed by solicitors, to the employer's clients. The Notice may imply that all barristers with PCs are subject to compensation powers whereas this is not the case.

Notice to Employers

The Notice should state that the barrister can appear in a tribunal or court as an employee.

The compensation statement is appropriate here as we understand that barristers in employment can be required to pay compensation to their employers or to their solicitor employer's clients.

It is not clear what Notice barristers who are employed to give advice to the public should give (para 501 and 502 of the Code). They will give the requisite notice to the employer but it is not clear whether they have to give a notice to those members of the public with whom they deal on behalf of their employer.

Notice for those who have re-qualified as solicitors

It should be made clear that this Notice need only be given if the barrister seeks to rely in some way on his qualification as a barrister (other than mentioning it on his CV). We cannot see any cases in which this would apply if the person were regulated by the Law Society.

Third party Notice

We believe that there should not be a requirement to apply the third party notice in respect of barristers who provide services to their employer. The requirement to give such a notice will inevitably mean that such barristers will not use the title, as their employers are hardly likely to wish such a notice to be given to third parties. In many organisations there will be others in the department who do have rights of audience or who can conduct litigation. Unlike at the self-employed bar, an employed lawyer works as part of a legal team.

The only circumstance in which a Notice might be required would be where the lawyer is a sole lawyer and the transaction is one in which the lack of rights would be an issue.

- **Are there any other requirements which should be imposed?**

  Perhaps a half-way house to full regulation would be to require an "Annual Return" specifying the type and volume of work performed during the preceding year, details of insurance cover and any complaints made against the barrister.

  ENPBA 28 January 2004