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Amendments to the Bar Code of Conduct – New BSB Handbook

For approval by the Legal Services Board

This application is made in accordance with the requirements set out in the Legal Services Board's (LSB) Rules for Rule Change applications. The Bar Standards Board (BSB) wishes to provide the information below to support its application.

Any queries about this application should be made to:

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DETAILS OF THE PROPOSED ALTERATIONS

1. Background

- 1.1 The BSB is seeking approval of the new BSB Handbook, which will replace the 8th Edition of the Code of Conduct (the Code). The Handbook represents the culmination of a number of years' work by the BSB and numerous consultations. The initial impetus was the BSB wanting to ensure that the rules governing barristers are fit for purpose in setting out the standards required of barristers to meet the needs of the public and to ensure the proper administration of justice. More recently the introduction of outcomes focused regulation and the LSB's regulatory standards framework have also been driving the review of the Code forward.
- 1.2 Following the introduction of the Legal Services Act 2007 (LSA 2007) the BSB has already made a number of significant changes to its rules. Examples of previous changes include:
 - a. Allowing barristers to be managers and employees of alternative business structures (ABSs) and other entities regulated by other Approved Regulators;
 - b. Removing restrictions on what self-employed barristers can do, including conducting correspondence, attending police stations, investigating and collecting evidence;
 - c. Widening the scope of public access to include family, crime and immigration work;
 - d. The introduction of the authorisation to practise regime; and

- e. Permitting barristers to work in more than one capacity, for example as an employed barrister for some of the time while working as a self-employed barrister at other times, subject to safeguards to protect clients.
 - f. Removing the restrictions on media comment.
- 1.3 As part of the BSB's continuing commitment to regulatory reform we have also recently addressed other major areas of our regulatory arrangements, including the introduction of an entity regulation regime and the relaxation of the current prohibition on the conduct of litigation by self-employed barristers. A separate application on entity regulation will follow.
- 1.4 The new Handbook continues the process of moving away from restrictions on the way barristers conduct their practice, where these restrictions are no longer in the interests of clients or the wider regulatory objectives. For example, the new Handbook removes restrictions in the following areas:
- a. Liberalising the outdated rules on sharing premises and associations with others, moving instead to an outcomes-based approach where barristers can work with others to deliver services in innovative ways (including via outsourcing arrangements) as long as clients' interests are protected;
 - b. Removing the prohibition on self-employed barristers conducting litigation, in order to open up the market and provide greater choice for consumers;
 - c. Allowing for the development of a payment service, provided this can be done in a way that protects clients' interests and does not involve barristers holding client money themselves;
- 1.5 The BSB's strategic approach to regulation, and the resulting changes, have all been considered with specific reference to the LSB's published regulatory standards framework. The LSB believes that there are four constituent parts to good regulatory practice:
- a. An outcomes-driven approach to regulation that gives the correct incentives for ethical behaviour and has effect right across the increasingly diverse market;
 - b. A robust understanding of the risks to consumers associated with legal practice and the ability to profile the regulated community according to the level of risk;
 - c. Supervision of the regulated community at entity and individual level according to the risk presented; and
 - d. A compliance and enforcement approach that deters and punishes appropriately.
- 1.6 The regulatory standards framework is applicable to all of the work undertaken by the BSB and we have therefore taken the opportunity to draw a number of different elements together into one piece of work (the BSB Handbook). We have done so because we believe that there is a public interest in having one clear publication that summarises our new approach across the board. The intention is to include in the

Handbook all the rules that will apply to barristers, and eventually to BSB authorised entities and to those who work in such entities. The new Handbook replaces the current Code, its annexes and the Bar Training Regulations.

- 1.7 The various rule changes to the current Code over the last few years have culminated in a piecemeal document that may not necessarily provide clarity or consistency for the regulated community or the public. The BSB has therefore conducted a thorough review of the majority of the current Code, looking at whether rules are necessary and consistent with other provisions. The aim of the BSB, in doing so, has been to make the new Handbook easy to understand and follow for barristers, and in due course entities regulated by the BSB, as well as for users of barrister's services and the general public. The new Handbook will enable consumers to better understand what to expect from barristers and should offer greater clarity about the regulatory regime with which they must comply.
- 1.8 As the Handbook is intended in due course to apply to entities, the necessary provisions are included but have been scored out in the version for which approval is sought. These provisions will be submitted separately in 2 subsequent applications, the first for the regulation of non-ABS entities and the second for approval to act as a Licensing Authority.

The market

The changing market for legal services

- 1.9 The market for legal services is changing. On the supply side, there is growing competition between barristers and solicitors for advocacy and, in future, litigation work, with greater fluidity between different types of practice and regulatory regime (with barristers increasingly having the option to choose between different business structures and/or regulator). Barristers are coming under pressure to pool their risks or invest jointly in their businesses. This version of the Handbook is less prescriptive about the ways in which self-employed barristers in particular can adapt their business model to form associations with others. The next application will further reform our regulatory regime to enable the BSB to regulate entities. Barristers are increasingly delivering services on a direct access basis and advice on international transactions is a particular growth area in the UK market. At the same time the development of new technologies and outsourcing arrangements are increasing the ways in which clients can access barristers' services – this is being further driven by new business models and brand names entering the market. There are also an increasing number of unregistered barristers able to provide unreserved legal services direct to clients or as part of larger entities.
- 1.10 On the demand side, a reduction in public funding is one of the factors driving greater demand for value for money, and fixed fee services. Increasingly, clients expect 'one stop shops' and direct access with targeted legal advice for those of limited means, whilst more sophisticated clients are seeking specialist consultancy services with no 'middle man'. The increasing availability of online sources is making 'shopping around' easier for clients.

- 1.11 The individuals regulated by the BSB continue to undertake work mostly on a referral basis. This significantly affects the level of risk to which clients are exposed as the other legal professional acts as a safeguard. End clients cover the full range, segments include:
- Legal aid consumers;
 - Private consumers;
 - SMEs and charities;
 - Large business and government; and
 - Government sole purchaser.
- 1.12 Having undertaken an analysis of the different types of clients, the BSB has concluded that the risks are very much the same irrespective of the nature of the client and that it is therefore not necessary to have different rules for different types of client, unless they are instructing barristers on a public access basis, where additional rules will apply (although the behaviour required to meet a rule may well differ according to the type of client). Similarly, in general we do not consider it necessary to have discrete rules relating to the different legal subjects (i.e. family, crime, civil) or the different types of work undertaken (i.e. advocacy, advice, drafting etc). However where we have identified a particular field of practice which presents specific risks we would tailor specific rules to that area to address those risks, (e.g. as we have already done for criminal work through QASA).
- 1.13 A number of trends in today's legal market such as reductions in legal aid mean that increasingly consumers are priced out of the market and the BSB seeks to promote a profession that is sufficiently flexible to meet the needs of all consumers. The BSB is proposing a regulatory model that will have fewer risks for clients, fewer overheads for legal professionals and hence the possibility of lower cost services to clients of limited means.
- 1.14 Consumers look to the Bar to provide specialist advocacy services across the full range of legal subject areas and types and levels of Courts, tribunals, and arbitration bodies. Barristers advise on the procedural aspects of litigation and participate in mediations and other forms of alternative dispute resolution or sit as arbitrators. These aspects of their work are necessarily very closely related to the activities which the law classifies as the reserved legal activity of "conduct of litigation". Thus, the barrister will typically advise on and draft the claim form or application but, at present, this will be signed by the solicitor and taken to the court office to be issued by an outdoor clerk or employee acting for the solicitor. Where there is no solicitor and the client is instructing the barrister under direct access, the barrister can draft the documents and advise the client on the process of issuing but the formal court documents have to be signed and issued by the client him or herself.
- 1.15 Whilst the referral model remains robust for those cases which require and can afford a division of labour between advocate and litigator, there is a need to allow greater

flexibility in service provision in cases where this is not so. The BSB anticipates a market for privately funded work where clients involved in litigation have a choice between the traditional referral model, one stop services supplied either by solicitor advocates or by barristers who also provide litigation services, public access services where the barrister provides advocacy and advice but the client conducts the litigation and “spot” purchases by self-represented litigants of advice or assistance with particular aspects of their case. Alongside this, the market for publicly funded work is changing as funding is withdrawn from some areas and in others the methods of procurement change.

- 1.16 The BSB’s proposals will liberalise the Bar to respond to these changes as they judge to be appropriate, without having to change their regulator to achieve that. By whatever model advocacy and litigation services are supplied, they have in common that the wider public interest in the administration of justice is engaged. The “consumers” of such services include, for example, judges, victims of crime, self-represented litigants, funders of representation on behalf of others (whether public sector, such as the Legal Aid Agency, or in the private sector, such as insurers), as well as those who stand in a client relationship to the lawyer who supplies the relevant services. It will be necessary to ensure that standards are maintained, for the sake of all those affected, as the market develops.
- 1.17 In addition, barristers often provide highly specialist, bespoke advice in non-contentious matters, such as taxation, intellectual property or regulatory matters. Whilst for many barristers this may be a natural adjunct to their contentious work in the same field of expertise, some Chancery specialists may rarely be involved in litigation and may have a primarily advisory practice. In general, such purely advisory services involve other professionals, whether solicitors acting for the client, in-house lawyers, or accountants, consulting the barrister in relation to the problem in hand. It appears that the referral model (including by way of licensed access to the Bar by non-legal professionals such as accountants) continues to meet the needs of this market segment and there are no obvious signs of market pressures to develop alternatives.

Risks identified in the market

- 1.18 The new Handbook and other published strategies are an opportunity for the BSB to articulate its approach to risk-based regulation, which will be at the core of our approach to regulating individual barristers and in time entities. In redrafting the Handbook we have re-examined the justifications for each rule to ensure that the rule remains necessary in the light of the risks that the BSB is seeking to address and the outcomes that it is seeking to achieve. The key types of risk that we are seeking to address are:
- a. Risks that clients do not receive a competent service that meets their needs; and
 - b. That the public interest is not served because the justice system does not have all the relevant evidence and information before it that is necessary to reach correct decisions.

- 1.19 We note that these two categories of risk can sometimes be in conflict. In analysing the risks in the market, we took evidence from complaints, and the experience of BSB staff (receipt of calls, taking enforcement action etc) as to areas of the code that had historically presented difficulties in interpretation or application. We also looked at other approved regulators' codes of conduct to identify gaps or areas where similar problems had been dealt with differently.
- 1.20 For example the numbers of complaints against barristers by litigants in person that are not upheld suggested that the public would benefit from greater clarity as to the duties owed to the court by the barrister acting on the other side. Equally, as a matter of logic, clear bright line rules defining the duty owed to the court enable the barrister to discharge that duty speedily and with confidence as to what that duty requires, and enable his client and the public to understand why he acts as he does. We therefore retained prescriptive rules but clarified the wording.
- 1.21 The types of complaint received by the BSB are summarised in **Annex A** (categorised by external or internal complainant, where 'internal' complaints are brought by the BSB itself). In the most recent year (2012-13) most complaints raised by the BSB related to failure to comply with CPD requirements (29.9%) or practising without a practising certificate (25.3%). Of the external complainants, litigants in person were a significant (and increasing) number. Allegations of discreditable conduct or dishonesty are the most frequently occurring issue in external complaints. Currently such complaints are recorded as breaches of rule 301 which is broad in scope. The current recording system does not allow for this category to be further broken down. However, a new complaints database is planned to coincide with the introduction of the new Handbook so we will be able to provide more detailed layers of analysis in future. Looking at cases where a charge was referred to disciplinary action, the most common areas of alleged misconduct were being dishonest or otherwise discreditable (25%), acting in a manner likely to bring the profession into disrepute (19.8%), failing to respond promptly to a complaint (16.4%) and failure to complete CPD (13.8%).
- 1.22 A more comprehensive list of the risks that we have identified and the corresponding part of the Code of Conduct and Scope of Practice section of the Handbook is attached at **Annex B**. The first attached table sets out the objectives which the BSB is seeking to achieve, and the behaviours by barristers and other BSB authorised persons (APs) which would put the achievement of those objectives at risk. It then identifies the Core Duties and the rules in the Code of Conduct and Scope of Practice (and, where relevant, the Qualifications Regulations) which seek to mitigate those risks.
- 1.23 The objectives are derived from the regulatory objectives, including the professional principles. The risks are drawn from experience of regulating barristers, dealing with complaints and queries to the help line. Responses to numerous consultations, including consumer views where available, have also been taken into account.
- 1.24 The monitoring and enforcement regime is also relevant to the management of these risks but is not reflected in this table. The second attached table shows the

objectives to which each rule in the Code of Conduct and Scope of Practice sections relates.

Outcomes focused regulation (Rules)

- 1.25 The Handbook and the associated Supervision and Enforcement strategies move further in the direction of outcomes focused regulation, by relating our supervision and enforcement activities to the risks we are concerned to mitigate or avoid and the outcomes we seek to safeguard and promote and by clearly articulating the outcomes we are seeking to achieve in the Code of Conduct. These outcomes, and the high level core duties which support them, establish clearly the intent of the BSB's regulatory regime and provide the basis on which BSB regulated persons will be expected to reach decisions on how to behave. However, the BSB considers that it remains necessary to retain an element of more detailed prescription in the Code. The conduct rules deal only with circumstances in which a greater degree of certainty is required. They do not seek to cover all possible eventualities. On the contrary, conduct rules are included only where experience has shown that they are needed and only after extensive review and consultation about the need for each rule. And where it has been decided that a rule is necessary, it has been drafted at as high a level of generality as possible. For example, rules require Chambers to have effective systems to manage conflicts of interest and confidentiality but do not prescribe the nature of those systems (Other Approved Regulators have detailed outcomes on these subjects which, as they are mandatory, have exactly the same effect as BSB rules). In some areas, the BSB has more detailed rules than other regulators. This is because many of the provisions in the Code relate to the conduct of barristers towards the courts, or as to the circumstances where a barrister is obliged to act or return instructions, or situations where they must take action which would be potentially contrary to the interests of their client. These are rules designed to address low probability / high impact scenarios (such as a potential miscarriage of justice) or to balance access to justice and other principles. Barristers need clarity about the conduct required of them, so that decisions can, if necessary be made in tight timeframes, and clients need to be clear about what they can and cannot expect of their barrister, as, too, do self-represented litigants who are involved in cases where their opponent is represented by a barrister.
- 1.26 The increasing number of complaints from self-represented litigants evidences an increased need for clarity in the rules that apply when appearing in court. Looking at this group more closely, allegations of misleading the court feature in 51% of complaints (compared with an average of 31% across all external complaints). To date, none of those complaints have been referred to disciplinary action, which suggests such allegations are likely to arise from misunderstandings about the role of opposing counsel in proceedings. This was recognised by the Civil Justice Council in its recent report reviewing self-represented litigants in the court system, which concluded that there was a need for additional guidance from regulators on this issue. This evidence suggests a need for clarity in the Handbook to ensure that all parties (including, but not limited to, clients) understand what they can expect.

- 1.27 By way of contrast, the rules on associations were previously prescriptive but complex and their interpretation and application had generated uncertainty and unintended impacts. There was no evidence of associations having been a source of complaints. Whilst we recognised that liberalisation of the rules might change that, after working through the potential problems that might arise, we were satisfied that they could each be addressed under other rules. We therefore went back to the drawing board and in place of prescriptive rules we have guidance which reminds barristers which other rules they must bear in mind when working in an association.
- 1.28 In considering the codes of other legal services regulators and how they had addressed risks, one issue we debated was whether or not to impose a separate business rule on our regulated community, along similar lines to that in the SRA's code. Our conclusion on this was again that the risks presented by a separate business (primarily, confusion on the part of the public as to whether they are dealing with a regulated service) are adequately dealt with by other rules. The SRA's rule curtails choice for consumers and service providers and presents the regulator with a difficult boundary to patrol. We were not satisfied this was a proportionate or effective response to the underlying risk presented by separate businesses.
- 1.29 There are other types of rules in the Handbook that are necessary for the protection of consumers' interests. For example, the BSB's experience tells us that it is important to have proper procedures and systems in place in one's professional practice, so a number of high level rules have been introduced to give effect to this. However, certain additional safeguards for clients remain essential, so additional rules and duties have been retained based on the experience and data discussed elsewhere. One example of this is in relation to complaints handling for self-employed barristers, where our experience tells us that detailed rules are necessary in order to achieve compliance. Another area where we have retained a prescriptive approach is in relation to acceptance and return of instructions, where decisions often need to be made quickly and it is important that both client and barristers understand the circumstances in which instructions must or may be refused or returned.
- 1.30 In the new Handbook, the outcomes are intended as justifications for and aids to purposive construction of the rules but are not the basis for charges of misconduct – the intention is that charges would continue to be for breaches of Core Duties and/or rules (albeit the outcomes will have a significant role in our enforcement strategy). The BSB believes that casting our Handbook in the form of enforceable outcomes could cause difficulties in enforcement. This concern is informed by the views of those with considerable experience in prosecuting disciplinary proceedings across different fields, the views of our own user group and the responses to our consultations. However, the outcomes do have a very important role in our enforcement strategy. The presence of an adverse impact on an outcome will be at the heart of any decision about whether to take enforcement action against a BSB regulated person and at what level the penalty should be. The BSB therefore intends to be operationally outcomes focused, whilst maintaining an element of prescription in rules that is of value to all parties.

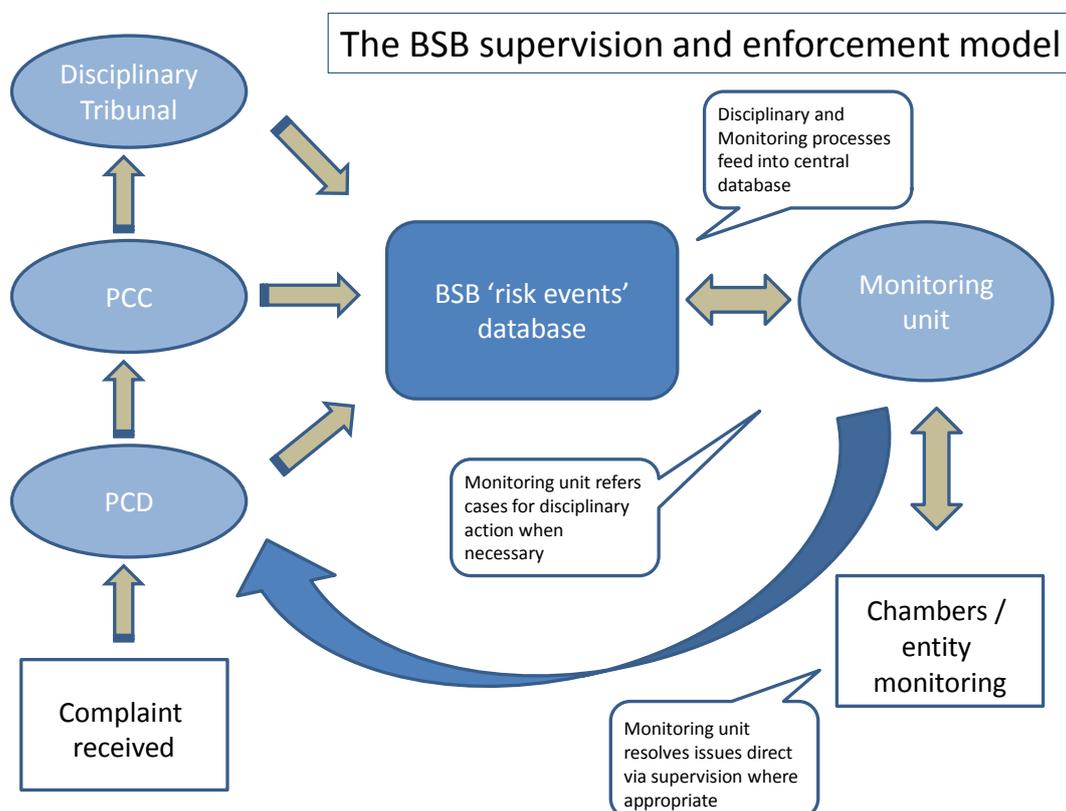
- 1.31 In any case, the Core Duties, which together form the nucleus of the Handbook, are essentially outcomes focused, albeit expressed as positive personal duties which help individuals to understand that they are personally responsible and required to comply. We believe that this is preferable to outcomes expressed in passive terms (i.e. "you must provide a competent standard of work and service to each client", not "a competent standard of work and service is provided to each client", which is much more impersonal. The move to formulating requirements as "You must" was taken following consultation.) Importantly these core duties are mandatory and supervision and/or enforcement action can and will be taken in accordance with our published strategies. There should be no circumstances in which there is no basis for taking enforcement action if a barrister has misbehaved and a client, or the interests of justice, has suffered. This is fundamental. Ours is a culture of individual professional responsibility and we explicitly based the new Handbook on a policy decision that it should remain so. The Core Duties are expressed in those terms and further bolstered by a specific rule about being individually responsible for your work. If a barrister had diligently complied with all the rules and Core Duties and yet there was still a failure to achieve an outcome for a client then that would be a matter at best for supervision and monitoring to assist better practice (if that - the world is imperfect and it is dangerous to assume someone must answer every time the consumer gets a less than perfect outcome) - they are not a matter for enforcement. However, in practical terms the Core Duties (with supporting rules) are the mechanism for ensuring that the outcomes are directly or indirectly enforceable, as there are either direct links between the outcomes and Core Duties, or the links are indirect (e.g. a more detailed outcome may be linked to a rule that articulates the Core Duty in a particular situation). The BSB will continue to review the Core Duties and rules to ensure they meet the needs of clients and the market conditions.
- 1.32 If we were to be able to enforce against the outcomes, then the outcomes must be mandatory (i.e. they are rules, whatever they are called). That means they have to set minimum acceptable standards and have to be achievable through the actions of those subject to them. If the outcomes are not mandatory, they can be more aspirational and can include goals that can only be achieved by a variety of actions, of which compliance with the rules is a necessary but not always a sufficient requirement. An example is "the public has confidence in the administration of justice and those who serve it". That could never be a mandatory requirement but does put rules into context and explain their purpose.
- 1.33 We have consulted four times on the basis of core duties and rules. For the reasons given above, we would have to completely redraft the Handbook if we were to move to mandatory outcomes and there is no appetite for this from any of our stakeholders.

Supervision

- 1.34 Historically the BSB has been a reactive regulator where the level of proactive supervision and monitoring over individual barristers and chambers was minimal. This has begun to change over the last few years. The introduction of the new Handbook is linked to a new approach of proactive supervision and enforcement that is closely linked to our assessment of risk.

- 1.35 In setting out our approach to supervision and enforcement the BSB proposes to be guided by a series of overarching principles. Firstly, our energy and resources should be targeted at the greatest areas of risk. Secondly, we should have a number of tools at our disposal to ensure that our regulatory response is flexible and proportionate. Thirdly, wherever possible regulatory issues should be resolved through an enhanced use of supervision and monitoring, with only the most serious cases being dealt with by way of disciplinary action. Finally, as far as possible the BSB will strive for consistency between the supervision and enforcement mechanisms applicable to individual barristers and eventually entities.
- 1.36 The BSB has established a central Monitoring Unit which will be responsible for monitoring chambers and in due course entities. Further detail of our approach can be found in the current consultation, available on the BSB's website:
- https://www.barstandardsboard.org.uk/media/1454464/risk-based_supervision_consultation.pdf
- 1.37 The new risk-based monitoring strategy will see the Monitoring Unit taking a more active role in the identification and resolution of any regulatory issues that may emerge post authorisation. The Monitoring Unit will endeavour to resolve any regulatory issues through non-disciplinary measures by working constructively with the chambers or entity in question. The Professional Conduct Department (PCD) and Professional Conduct Committee (PCC) will therefore only become involved if all reasonable supervisory measures have failed (or if there is a serious alleged breach of the Handbook that justifies immediate disciplinary action). The Monitoring Unit will build up knowledge of the areas that are causing particular difficulty for entities or chambers, and of where there is a risk of adverse impact on their clients, and can use this knowledge to focus monitoring resources appropriately. The monitoring strategy will be sufficiently flexible to respond to new services or areas of practice. A particular example which we may choose to focus on is the conduct of litigation, which self-employed barristers will be newly permitted to undertake. There will be scope to target specific risks we identify, arising from this area of practice.

- 1.38 The below diagram sets out how the monitoring and enforcement processes will interact:



- 1.39 The work of the Monitoring Unit will continue in parallel with the work of the PCD and PCC. Because the Monitoring Unit's work will be risk based, it will need access to any information that may affect the risk profile of a chambers (and eventually entities). Any information about how a complaint or intelligence has been dealt with (be it dismissed, imposition of administrative sanction, referred to determination by consent, referred to Disciplinary Tribunal) will be fed into the shared risk events database. The database will be a discrete part of the BSB's new core database and will be used to improve the BSB's evidence base for future policy changes.
- 1.40 The Monitoring Unit will be able to access information passed into the database and use this to constantly update their risk profile of chambers. The risk profile of the chambers will then determine the level of supervision that is required of them.

Enforcement

- 1.41 Enforcement action is necessary in order to protect the public interest and to protect the interests of consumers. Aligned to this is the need for the BSB to offer a credible deterrence and to encourage compliance with the Handbook.

1.42 **Annex C** sets out the BSB's enforcement strategy and includes the following key factors:

- a) **Risk-based** – We shall focus our limited resources on the issues that pose the greatest risk to the regulatory objectives. We will consider the nature of any alleged regulatory breach and assess the level of risk posed to determine what action we should take.
- b) **Proportionality** – We will take proportionate action in the light of identified risks to the regulatory objectives.
- c) **Individual responsibility** – Individual responsibility is at the heart of our regulatory regime.
- d) **Flexibility** – We will use a range of measures, including supervision, monitoring, and enforcement to ensure compliance with our regulatory arrangements.
- e) **Outcomes-based** – The outcomes identified in the Handbook, although not themselves enforceable, will be considered when deciding what action to take.
- f) **Fairness and openness** – When taking enforcement action, we will be fair and open and give barristers and other regulated persons a reasonable opportunity to respond to any enforcement action.

1.43 There are a number of substantive changes to the BSB's rules relating to enforcement (which now forms Part V of the Handbook) which are detailed in the relevant section below.

Litigation

1.44 The Handbook will for the first time permit self-employed barristers to apply for an extension to their practising certificate in order to be able to conduct litigation. Entities will also be able to apply for authorisation to conduct litigation in due course. This widens the current provisions which permit only employed barristers to conduct litigation, provided that they meet certain requirements.

1.45 By permitting self-employed barristers to add litigation to the services they offer, we recognise that (much as the referral Bar meets an important need) there is also a need for one-stop services which could be better met by the Bar than it is at the moment.

1.46 At present, lay clients who need a one stop service have a choice between coming to the Bar direct but finding that there are significant limits on the services that can be provided (limits which are increasingly difficult to explain and justify to the lay client) or going to an SRA regulated firm, which must pass on in its charges the overheads it incurs, in particular its higher regulatory and insurance costs, related to the fact it holds client money.

- 1.47 By allowing those who wish to be authorised by us to conduct litigation to do so, we remove some existing anomalies in the scope of direct access work and we again broaden the range of available choice for the Bar and the public (without driving people outside our own regulatory regime to access those choices).
- 1.48 This should promote competition in the provision of one-stop advocacy and litigation services, including the provision of such services to the Legal Aid Agency and other block purchasers. At the other end of the spectrum of sophistication, it should also assist access to justice for those lay clients who lack the expertise to conduct litigation themselves but whose case cannot bear the relatively high overhead, and does not need the resources, of traditional law firms.
- 1.49 We will only be offering authorisation to conduct litigation to barristers whom we also regulate in respect of their advocacy services. Those who want to be authorised by us to conduct litigation will need to add this to their authorisation to appear as advocates: it won't be the case that all barristers become authorised to conduct litigation. Barristers will be able to choose not to add this authorisation and not to offer these additional services.
- 1.50 These features should ensure that we remain a specialist regulator whose regime is primarily focussed on advocacy, that the specialism of those we regulate is not diluted and that the offering to the public from the self-employed Bar (and in time from BSB regulated entities) remains recognisably different from that available from SRA regulated firms.

Initial assessment of the risks

- 1.51 In common with rules of conduct of other regulators, such as the SRA, most of the BSB's rules which are relevant to litigation, similarly apply to advocacy and other legal services. In terms of conduct, the central concerns are the same – ensuring that the duty owed to the client is properly discharged, and providing an appropriate standard of service, whilst also discharging the duty owed to the court.
- 1.52 Employed barristers are currently able to conduct litigation, provided they meet certain training and supervision requirements. The change to the nature of the legal services already provided by self-employed barristers, through introducing litigation, should not be over-estimated. Barristers have always drafted the writ or indictment and other formal court documents, settled witness statements and expert reports, and advised solicitors on all aspects of procedure. Since 2010, they have also been allowed to conduct correspondence and attend police stations for interviews with clients. In practice, there are relatively few steps they are currently prohibited from taking. These are both narrowly defined and generally administrative in nature – they include signing claim forms and taking them to the court office to be issued; or signing off on a list of disclosure. Some aspects of these steps could be effectively delegated to support staff in practice, subject to appropriate supervision.
- 1.53 The current narrow definition in the law of what constitutes the conduct of litigation also persuasively supports the case for permitting self-employed barristers to

undertake this activity. 'Conducting litigation' has a statutory definition in Schedule 2 of the Legal Services Act:

4 (1) The 'conduct of litigation' means -

- (a) the issuing of proceedings before any court in England and Wales,*
- (b) the commencement, prosecution and defence of such proceedings, and*
- (c) the performance of any ancillary functions in relation to such proceedings (such as entering appearances to actions)*

The last subheading 'ancillary functions' has been defined further in *Agassi v Robinson* [2005] EWCA Civ 1507. The definition of ancillary functions is construed narrowly and is limited to the formal steps required in the conduct of litigation.

- 1.54 The remaining restrictions for self-employed barristers on activities associated with the conduct of litigation are:
- Issuing any claim or process or application notice;
 - Signing off on a list of disclosure;
 - Instructing expert witnesses on behalf of a lay client;
 - Accepting liability for the payment of expert witnesses; and
 - Any other 'formal steps' in the litigation of a sort that are currently required to be taken either by the client personally or by the solicitor on the record
- 1.55 The recent judgement in *O'Connor v Bar Standards Board* [2012] All ER (D) 108 (Aug) (which addressed the scope of the meaning of the conduct of litigation, citing *Agassi*) established that signing a declaration of truth did not amount to conducting litigation, and has further underlined that litigation is narrowly defined.
- 1.56 The conduct of criminal litigation is more limited in scope than the conduct of civil litigation because of the role of the prosecuting authorities. For example, prosecution disclosure is undertaken by the police and is overseen by the CPS and there are limited duties to disclose for the defence beyond drafting defence statements (a task which is already undertaken by barristers).
- 1.57 Other formal steps involved in criminal litigation are also more limited because the prosecution process is shorter than civil procedure and is largely prosecution-driven. Barristers already undertake many of the drafting tasks, such as completing Criminal Procedure Rules forms (for example the Plea and Case Management Form at the Crown Court, notices and grounds of appeal to the appellate courts).
- 1.58 It is also important to recognise the distinction between undertaking reserved instrument activities and conducting litigation. Barristers are already authorised to undertake, and routinely do undertake, reserved instrument activities (such as preparing any instrument for the purpose of the Land Registration Act 2002, or making an application or lodging a document for registration under that Act).

- 1.59 We do not envisage that individual barristers are likely to look to undertake larger-scale or multi-faceted litigation cases which are better suited to large law firms or other authorised bodies.
- 1.60 We envisage that individual barristers will apply for a litigation extension so that where it is convenient for a direct access client they can undertake specific tasks in the conduct of litigation, but where they are primarily doing this in the context of traditional advocacy and advice services.
- 1.61 In terms of the professional expertise, knowledge and understanding required by barristers to conduct litigation, the BSB has been unable to identify particular risks beyond those posed by other authorised persons conducting litigation. Barristers are trained in the relevant procedural and evidential rules, just as solicitors are – in practice, solicitors frequently refer to barristers when there is doubt about the interpretation of such rules.
- 1.62 Similarly, the conduct and professional values displayed by self-employed barristers in terms of their dealings with clients and providing advocacy and advice services, are already at a very high level. The BSB believes these professional, client-focused skills should be relatively easily translated to conducting litigation. Furthermore, barristers have long had the option of acting on a direct access basis and therefore the issues that litigation raises, in relation to barristers having a direct client relationship with the lay client, are no different from those that arise in that context. To underline this, the BSB proposes that self-employed barristers wishing to conduct litigation will ordinarily be expected to have completed the public access training, which the BSB is currently revising.
- 1.63 In assessing these risks, the BSB has looked at evidence including independent research commissioned by the SRA, and considered by the LSB – ‘Map of England and Wales Solicitor Day One Outcomes against a Barrister of England and Wales on completion of pupillage’ (2011). The research was produced in the context of the Qualified Lawyers Transfer Scheme. The conclusion drawn in this research is that learning outcomes are similar in key areas that are relevant to the conduct of litigation, including:
- Day 1 Outcome D – Legal, professional and client relationship knowledge and skills
 - Day 1 Outcome F – Professional values, behaviours, attitudes and ethics
 - Knowledge of criminal litigation (procedure)
 - Knowledge of civil litigation (procedure)
- 1.64 The BSB believes that the main area of novelty, and therefore that which may raise the greatest risks to the client, does not relate to specialist professional expertise, but to the administrative aspects of managing litigation, such as keeping track of deadlines, maintaining proper records and keeping the client informed as the matter progresses. We have reached this conclusion taking into account discussions with

barristers undertaking direct access work as well as the evidence provided in response to the BSB's consultation on 'Regulating Entities' (September 2010) and its 'New BSB Handbook' consultation (March 2012). The BSB believes that the solution to these risks, so far as they are new risks, largely turns on putting in place appropriate business systems. In our view, prescribing those systems in detail would be inappropriate for a regulator. However, there seems to be little reason to think that barristers, should be unable to find commercial solutions, particularly as the problems faced are very similar to general client-relationship issues faced by other legal professionals, and indeed in the context of many professional services. For this reason, we will make barristers themselves responsible for putting appropriate systems in place and making sure they are clear about how to use them, before they apply for authorisation.

Authorisation process

- 1.65 Self-employed barristers who apply for a litigation extension will be required to complete a self-assessment questionnaire, confirming a number of mandatory and discretionary factors, which include:
- Their knowledge, skills and experience of civil and/or criminal litigation procedure, including related drafting skills;
 - That they have done the Public Access course or obtained a waiver from it
 - That they have appropriate administrative systems in their place of practice and have the skills to use these effectively in order to manage litigation, including appropriate client-facing skills;
 - That they have appropriate insurance.
- 1.66 The mandatory and discretionary factors are further illustrated in the authorisation flow chart at **Annex D**.
- 1.67 Barristers receive a high level of training in civil and criminal litigation procedure and related drafting skills during the vocational stage (BPTC) and professional stage (pupillage) of training.
- 1.68 Having reviewed available evidence, we believe that the vocational and professional stages of training equip barristers with knowledge, skills and experience of litigation procedure to a standard which is comparable to a newly qualified solicitor. Nonetheless, we do not believe it is sufficient to rely solely on the initial stages of training. For this reason we are not proposing to allow pupils to conduct litigation. We will also require barristers who are less than three years' standing to conduct litigation under the guidance of a qualified person, providing an additional safeguard (discussed below). Barristers who are more than three years' standing will be required to explain in the questionnaire how they have developed and maintained their litigation knowledge and skills in practice, since completing their initial training. As we are concerned with outcomes, we do not consider that we should prescribe how this should be done. Many applicants will have current experience of litigation work. Some may previously have been authorised to do litigation. Others will have undertaken CPD or other study. Yet others, especially in entities, will be planning to

work within a team which has litigation experience. The application process is discussed in more detail below.

- 1.69 Once the application has been approved, a barrister will be authorised to conduct both civil and criminal litigation, subject to their general duty to only undertake activities which are within their professional competence. Just as barristers who have practised exclusively in criminal law are expected to act within their competence, which means they are unlikely to be able to take instructions in respect of personal injury advice work, likewise barristers who have gained knowledge of criminal litigation procedure exclusively are unlikely to be able to take instructions to undertake civil litigation (or vice versa) unless they have first updated their own knowledge or are working with an experienced colleague.
- 1.70 The evidence provided as a result of our recent public consultations gave a strong steer that the key area of risk if self-employed barristers conduct litigation does not arise from a lack of knowledge and understanding of litigation procedure, but rather from the risk that barristers do not have sufficient knowledge of the administration and management of litigation.
- 1.71 In order to provide evidence of appropriate systems and client-facing skills, applicants will have to confirm they meet the minimum standards to achieve the outcomes set by the BSB.
- 1.72 We consulted on the basis that barristers would need to have appropriate policies and procedures in place, meeting criteria for:
- Diary management
 - Holidays and absence from practice
 - Case management and recording systems
 - Filing systems
 - Available software and IT systems
 - Financial systems
 - Accepting instructions, litigation costs and client money (via a third party payment service if applicable)
- 1.73 We have revised these criteria in light of the proposed requirement for all self-employed barristers wanting to do litigation to do the Public Access course. We have redrafted these in terms of outcomes to be met and will produce guidance on what we would ordinarily expect to see by way of evidence either in the application form or when subject to a check. (Please see the attached draft questionnaire at **Annex E**).
- 1.74 Since consulting we have separately developed our proposals for Public Access accreditation. We will expect self-employed barristers applying for a litigation extension to have undertaken the training requirements for Public Access and to be registered with the Bar Council as being ready to undertake such work, or to have received a waiver. We anticipate that self-employed barristers will normally conduct litigation on a direct access basis for which they will anyway need to have completed the course.
- 1.75 The revised outcomes for the Public Access training address key risks to the litigation client: knowing and understanding the skills required for managing cases including writing appropriate letters and keeping files; and interacting appropriately and

effectively with clients. The proposed revisions to the course will include more training on working with vulnerable clients.

- 1.76 Those barristers of several years call who do not have recent experience relevant to the conduct of litigation will need to undertake further professional development before being ready to be authorised to conduct litigation. One possibility we are considering is to add an optional litigation module to the public access course addressing learning outcomes specific to litigation. Other CPD providers may also develop suitable litigation courses. Evidence of attendance at such courses would be an important factor in considering a barrister's application.
- 1.77 Other evidence might be prior authorisation to conduct litigation, or experience of conducting litigation under supervision, subject to such experience being fairly recent.
- 1.78 As already explained, self-employed barristers who are less than three years' standing, will also be required to conduct litigation only under the guidance of a 'qualified person' in their place of practice. This will create an additional safeguard for less experienced barristers who are providing litigation services direct to the public.
- 1.79 A qualified person will be:
- A barrister or other authorised person in the applicant's place of practice who is personally authorised to conduct litigation;
 - Who has practised for a period of at least six years in the previous eight years;
 - For the previous two years has made such practice his primary occupation
- 1.80 The requirements for a qualified person are mainly carried over from the current qualified person requirements for employed barristers conducting litigation, which have worked well. Qualified persons will be more senior barristers or other authorised litigators who will have been part of litigation teams, often working very closely with solicitors. They will also need to have obtained their own authorisation to conduct litigation, including having in place and knowing how to use appropriate systems and procedures, as well as having had several years' experience of working with clients and dealing with the sorts of issues which arise in preparing for court proceedings. They will be well placed to advise less experienced barristers, and to provide an additional safeguard.

Employed barristers

- 1.81 Employed barristers can be authorised to conduct litigation under the current Code of Conduct, provided that they comply with the requirements of Annexe I, the Employed Barristers (Conduct of Litigation) Rules. We propose to now amend the authorisation requirements, removing some aspects and so far as possible making the requirements consistent with those for self-employed barristers.
- 1.82 Barristers who are employed other than by authorised bodies (for example as in-house counsel) are allowed to provide services to their employer only and do not pose a direct risk to the public if they conduct litigation. In order to be authorised they will need to complete a version of the self-assessment questionnaire, providing evidence of their knowledge, skills and experience of civil and/or criminal litigation procedure, including related drafting skills. We believe they should meet the same standards as self-employed barristers in this respect.

- 1.83 Barristers who are employed other than by authorised bodies will not be expected to complete the public access course prior to authorisation to conduct litigation because they will not be providing services to the public, either directly or indirectly through their employer.
- 1.84 Barristers who are employed by authorised bodies and who are of less than three years standing will, like self-employed barristers, have to work with a qualified person who is available to provide guidance. Other employed barristers, who provide services only to their employers, will only have to work with a qualified person if they are of less than one year's standing. This replicates the current position. The risks to the employer are less than the risks to the public so we do not think it would be necessary or proportionate to extend the guidance period beyond a year.
- 1.85 Barristers working in this way are not providing services to clients in the traditional sense so the risks to the public do not apply. We believe any parallel risks, such as the impact of missed deadlines, should be dealt with as a matter of employment. It will be the responsibility of barristers' employers to ensure that there are appropriate administrative systems in their workplace and that they have the skills to use these effectively in order to manage litigation, so these aspects will not be asked about in the questionnaire.
- 1.86 A significant number of employed barristers are employed by the Government Legal Service and the Crown Prosecution Service. It is important to note that these barristers already have rights to conduct litigation by virtue of the primary legislation that applies in the context of their employment. This has given rise to few regulatory difficulties, which is evidence in support of extending the permission to conduct litigation to employed barristers more widely. However, their authorisation attaches to their employment rather than to them as individuals. This means that barristers employed by the GLS or the CPS would need to complete an application for an individual litigation extension if they changed their employment, or became self-employed, and wished to conduct litigation.
- 1.87 Employed barristers will of course need to conduct litigation only that is within their competence and, as is usual practice for in-house counsel, will be able to instruct other lawyers externally, on behalf of their employers, where additional litigation expertise is needed.
- 1.88 Barristers who are employed by and/or are managers of authorised bodies (for example in solicitors' firms) provide services to the public, giving rise to some of the same client facing risks as in a self-employed context. A key difference to the self-employed context is that the authorised body will itself have to be authorised to conduct litigation, for example a solicitor's firm regulated by the SRA. This means we can be satisfied that there will already be appropriate administration systems in place for the management of litigation and at least one authorised person who is able to manage them. We will not require further evidence of this as part of the application.
- 1.89 As with barristers employed other than by authorised bodies, and self-employed barristers, we will require barristers employed by authorised bodies to complete a version of the self-assessment questionnaire, providing evidence of their knowledge, skills and experience of civil and/or criminal litigation procedure, including related drafting skills. We will also ordinarily require new applicants to undertake the Public Access course. Like self-employed barristers, if they are of less than three years standing, they will have to work with a qualified person.

- 1.90 Paragraph 1(d) of the current Annex I requires employed barristers of less than three years' standing to complete at least six hours of CPD on 'an approved litigation course'. This requirement will be removed as it will become redundant because the BSB will no longer approve courses. Barristers will be expected to undertake relevant CPD in litigation in the same way they should undertake CPD relevant to their other activities.
- 1.91 Prior to authorisation to conduct litigation, employed barristers currently have to be supervised by a qualified person for a period of 12 weeks. We propose to remove this requirement. The other arrangements we propose to put in place makes this requirement unnecessary. It is only one way in which an applicant will be able to demonstrate they have the required skills and experience.
- 1.92 We propose to carry across employed barristers' existing rights to conduct litigation through a 'grandfathering' arrangement, without having to make a fresh application for authorisation.

The practising certificate extension

- 1.93 Once a completed application from an individual barrister has been approved by the BSB, we will issue an amended practising certificate. The records on our Barrister Connect database will be updated and litigation will be included under the list of authorised reserved legal activities under the individual entry for the barrister on the Barristers' Register and the records for the Chambers.
- 1.94 The BSB proposes to charge a small administrative fee for a litigation extension application. The exact cost will be calculated factoring in the costs of checking and following up on the evidence provided in the questionnaire, where necessary. There will be no additional annual authorisation fee for litigation extensions.

Pupils

- 1.95 Following consultation, the BSB has been persuaded by those respondents who highlighted a number of risks if pupils were permitted to conduct litigation. We therefore do not propose to authorise pupils to conduct litigation, though this will not prevent pupils from gaining valuable experience of litigation during their training by undertaking the less complex tasks involved in support of litigation that is undertaken by a pupil supervisor or another member of Chambers.

Multiple applications

- 1.96 Where multiple individuals apply for authorisation to conduct litigation from the same chambers, each individual application should cross-refer to any evidence already provided to the BSB that there are appropriate administrative systems in place for managing litigation. This will help avoid duplication and streamline the process.
- 1.97 Each individual applicant will however be asked to confirm that they have the appropriate skills, knowledge and ability to take overall individual responsibility for the operation of administrative systems for the management of litigation, where appropriate.
- 1.98 If an applicant works in Chambers which is already has barristers in it who are individually authorised, then the applicant will be able to refer the BSB to its records.

Moving practice and dual practice

- 1.99 Where barristers who are authorised to conduct litigation move their place of practice, they will need to comply with their general obligation to notify the BSB of their change of practice. As they will already have satisfied the knowledge requirement, they will not have to provide further information about that, but if they are moving to self-employed practice, they will need to demonstrate that there are suitable systems in their new place of practice.

The self-assessment questionnaire procedure

- 1.100 The BSB will expect barristers to provide details in the questionnaire of how they demonstrate their competency, beyond evidence of completing the BPTC and pupillage. As discussed above, this may include a number of factors including: experience of working on cases involving litigation or working with others authorised to conduct litigation; having completed targeted CPD, litigation training or other relevant, self-directed training; or having been previously authorised to undertake litigation (for example as a solicitor or GLS barrister). They will also have to confirm that there are appropriate systems in place with which they are familiar.
- 1.101 There will necessarily be a discretionary element in our decisions whether or not to authorise a litigation extension and borderline decisions will need to be taken at the right staff level (for example the Authorisation Manager). We will develop both internal guidance for staff decision making and external guidance for barristers who wish to apply for an extension, explaining how our discretion will be exercised.
- 1.102 A sample of self-assessment questionnaires will be subject to checking and further investigation by the BSB in respect of the administrative systems that are in place for the management of litigation and insurance. Applicants whose questionnaires are sampled will be asked to substantiate their claims with further written evidence. This will ordinarily take the form of copies of relevant written policies or procedures.
- 1.103 We propose to undertake simple random sampling of returned questionnaires, subject to the following factors:
- A higher percentage of early applications will be sampled, which will help us to immediately identify any high risk areas and to encourage compliance;
 - A higher percentage of applications from individual barristers who are the only individual in their Chambers authorised to do litigation will be sampled

The sample of questionnaire returns that are subject to further checking may be adjusted as the BSB learns more about the risks arising. This will also be informed by the new monitoring and supervision arrangements.

Appeals

- 1.104 If the BSB refuses an application for a litigation extension, the applicant will be able to seek a review by the Qualifications Committee and, if still not satisfied, appeal using the same regulatory appeals procedure as for wider authorisation to practise.

Client money

The ban on handling client money

- 1.105 The BSB Handbook maintains the existing ban on barristers handling or receiving client money. There was strong support during consultation for continuing the ban on the grounds that this is a strong protection for clients and that a regulatory regime to oversee client money handling would be associated with significant risks and high costs, which would sacrifice one of the key benefits of our regulatory regime. The BSB believes that by maintaining the ban it can achieve a more proportionate, cost-effective and less interventionist regulatory regime.
- 1.106 We have revised the definition of handling client money to clarify further that it includes entering into any arrangement which gives a barrister de facto control over the use and/or destination of funds provided by or for the benefit of the barrister's client, or intended by another party to be transmitted to the client, whether or not those funds are beneficially owned by the client. This is in recognition of the possibility that barristers might otherwise enter into arrangements where they would not themselves make or receive payments, although they might have overall control over them, and it helps to mitigate the key risks which otherwise arise from the authorisation of payments and control of funds.

Third party payment services

- 1.107 In order for barristers to be able to conduct litigation, and to provide services that are competitive with other providers, the BSB recognises that they may need to make use of third party payment services, as an alternative to handling client money, for the effective management of fees, disbursements or settlement monies.
- 1.108 The underlying purpose of using a payment service is to remove responsibility for the management of client money from barristers and to give that responsibility to a regulated third party. This is a means of transferring the main risks associated with handling client money and concentrating them in one place - with those providing the third party payment service, who are acting as trustees and managers of the accounts and ensuring these risks are mitigated by a suitably qualified regulator.
- 1.109 We identified a number of key risks during our process of public consultation, as well as in discussion with a number of financial institutions, the Financial Conduct Authority (FCA), with the Bar Council's new third party payment service, BARCO, and with the Solicitors Regulation Authority in relation to the existing, parallel risks which arise through solicitors handling client money.
- 1.110 We concluded that the major risk is that barristers might be able to withdraw money, or otherwise authorise payments, without the client's consent and/or seek to misappropriate the funds. The mechanism for verifying instructions and for

authorisation to release funds must therefore be stringent enough to mitigate this risk and must be dependent on obtaining the client's consent.

- 1.111 Other significant risks we have identified arise if the payment service provider becomes insolvent, or if it fails to keep proper records, preventing clients from accessing their money.
- 1.112 In the consultation paper on the draft Handbook, the BSB proposed to consider authorising a third party to provide a payment facility for self-employed barristers and BSB regulated entities, subject to being satisfied about the proposed arrangements. We said that the BSB's role in the scheme would be in setting criteria which suppliers would need to comply with.
- 1.113 The approval criteria we consulted on were, in summary:
- The provider will be required to properly account for funds and ensure they are explicitly for the purpose intended;
 - To keep adequate records of all transactions handled, including itemisation of all receipts and disbursements of each transaction;
 - To conduct background checks on all officers, directors, managers and employees;
 - To keep a separate fund account(s) in an authorised high street bank, segregated from the provider's own funds;
 - To have appropriate insurance in place to protect against negligence and crime;
 - The fund holder must have properly considered the checks that will need to be made about the funds it intends to hold, e.g. money laundering requirements (and Customer Due Diligence);
 - To have appropriate systems and checks in place to verify instructions to release funds;
 - To only make disbursements after receiving deposits directly relating to the account in amounts at least equal to the disbursements; to make disbursements the next business day after the business day on which the funds are deposited (unless the deposit is in cash or by electronic transfer);
 - To be audited annually by an auditor approved by the BSB, who would also need to have access to the accounts of the barristers and entities using the facility.
- 1.114 However, following consultation, the BSB has undertaken a further, detailed review of these criteria and the extent to which they are addressed through regulation by the FCA, to which for any payment service is likely to be subject
- 1.115 The BSB's revised approach takes account of the key risks we have identified, as well as the need to ensure that we do not unnecessarily duplicate FCA regulation, and that we do not step beyond our competence as a regulator of legal services. It is clear that the BSB is not established or equipped to regulate financial services to any substantive degree and any significant move in this direction would expose it to undesirable regulatory risks and might give clients an unjustified sense of security.

The BSB's approach to the use of third party payment services

1.116 Having revised our approach, the BSB intends to place the responsibility on barristers for ensuring that any third payment services they make use of meet a number of fundamental requirements:

- To ensure that the service does not result in the barrister receiving or handling client money;
- Restricting use of the service to payments to or from or on behalf of the client that are made in respect of legal services (e.g. fees, disbursements, settlements);
- Taking reasonable steps to ensure that making use of the service is consistent with a barrister's duty to act competently and in the client's best interests.

1.117 The checks which barristers will be expected to undertake include checking whether the service is suitably authorised or regulated by the FCA as a Payment Institution under the Payment Services Regulations 2009. In particular, barristers will need to ensure that there are suitable safeguarding arrangements for clients' funds, including the segregation of accounts and adequate insurance.

1.118 We will also expect barristers to inform clients appropriately about the level of protection their funds attract. They will be advised to make clients aware that the Financial Services Compensation Scheme does not cover Payment Institutions regulated by the FCA.).

1.119 In order to address the risks arising around the authorisation of payments discussed above, we will expect barristers to ensure that the terms of any service they make use of require the client's consent before any payments are made. Therefore the onus will be on barristers to ensure that their clients will be safe in using a payment service as a means of transmitting or receiving funds.

1.120 We also make it clear in the relevant guidance that barristers should advise their clients not to use a payment service where they are not satisfied that it meets these requirements.

Compensation arrangements

1.121 In the light of our continued prohibition on holding client money and the proposed requirements (in particular the insurance requirements) for any payment service, we do not believe that there is sufficient risk in the proposed regulatory arrangements to necessitate a compensation fund, since all money would have to be paid direct to the payment service rather than via the barrister, the money will be segregated from the payment service's own funds and protected in the event of its insolvency and any residual risks relating to acts or omissions of the providers of the service should be insurable. There is no evidence arising from our current regulatory arrangements to suggest that there is a risk of barristers holding client money in breach of the Code of Conduct. Indeed the availability of a payment service regulated by the FCA may

mitigate any risk by providing a secure method of dealing with client money. We therefore think it would be disproportionate to introduce the additional regulatory burden of a compensation fund (or equivalent) at this time. Our approach will therefore focus on the existing remedies available to clients.

Management of client affairs

- 1.122 As part of the Handbook consultation the BSB considered whether it should withdraw the current prohibition on managing clients' affairs. The BSB considered what the risks would be if the prohibition was lifted. The majority of respondents to the consultation considered that the ban should be retained. In light of responses and also on considering the risks further, the BSB decided to retain the ban.
- 1.123 Managing client affairs could include things such as having a power of attorney or could more generally include managing or advising on the lay client's financial affairs, such as assisting individuals in structuring their corporate assets or real estate. The BSB considers that if barristers were able to undertake these sorts of tasks, this could lead to situations where the barrister's independence is compromised but also there is a more serious concern that barristers would be undertaking tasks that they are not competent to do. Furthermore the BSB is seeking to position itself as a niche specialist regulator focussing on advocacy and ancillary services. To regulate beyond this more widely would be outside the scope of the BSB's remit and could lead to additional costs and potentially regulatory failure.

Referral Fees

Summary of the BSB's approach

- 1.124 The Handbook maintains the existing ban on barristers paying, or receiving, referral fees. Part II C2 O1 of the Handbook sets out the outcome we wish to achieve by maintaining this ban: Referrals to or by BSB authorised persons by third parties are made solely in the interests of clients and are not influenced by the financial interests of the person making a referral.
- 1.125 Alongside this we intend to publish guidance on those referral and marketing arrangements for barristers which we are likely to consider are permitted by the rules, taking a nuanced and flexible approach wherever possible, and recognising that there are a variety of possible payment arrangements which would not give rise to prohibited referral fees (draft guidance is included at **Annex F**).
- 1.126 We have reviewed the ban on referral fees in light of the LSB's intended outcomes for consumers and with reference to the Regulatory Objectives, including protecting and promoting both the interests of consumers (providing value for money) and the public interest more widely; as well as promoting and maintaining adherence to the professional principles. Our duty is, as far as reasonably practicable, to act in a way which is compatible with the Regulatory Objectives and which we, as the approved regulator, consider to be most appropriate for meeting those objectives. In view of the way in which the great majority of barristers work, namely on a referral basis, we have concluded that maintaining the ban is necessary if we are to fulfil that duty.

1.127 This section first considers the questions of principle and evidence why referral fees should not be permitted in traditional referral work. It then goes on to consider direct access work, where the needs of consumers are different from traditional referral work, and where our approach focuses on identifying any potential value provided to consumers by referral arrangements which might offset the potential risks.

Interests of clients and access to justice – referral work

- 1.128 The great majority of work done by self-employed barristers is on a referral basis. Although the number of barristers entitled to do direct access work has increased, such work usually constitutes only a small part of their practice. This is likely to continue to be the position for the foreseeable future, even when the BSB starts authorising entities. For this reason, the thrust of our approach addresses the risks arising in referral work.
- 1.129 Solicitors (and a number of other professionals) are bound by professional duties to protect and promote the best interests of their clients – duties which extend to ensuring that, where the services of a barrister are needed, the most appropriate barrister is instructed in each case. The underlying principle behind maintaining the ban is therefore that the selection criteria for choosing barristers should be based solely on what is in the best interests of clients, and should not be influenced by personal financial incentives. Referral fees paid to solicitors would undermine this fundamental principle, and would create a risk both to their independence and integrity.
- 1.130 We have considered the argument that referral fees can help to increase access to justice by reducing ‘information asymmetries’ in the market for legal services, particularly for more vulnerable or less experienced consumers. There may be value to consumers in an ‘introducer’ who has more information about the market than they do and who is able to identify professionals who are suited to their needs – this may also act to reduce marketing costs that would otherwise be passed on to consumers. We believe that, whilst there is force in this argument, it applies only to direct access work, discussed below.
- 1.131 We do not think the access to justice argument generally applies to instructing barristers on a referral basis. Instructing solicitors do not suffer from an information asymmetry because they are already well-informed about which barristers to instruct – that is an important part of their role. They do not require assistance in accessing justice. If barristers were to pay referral fees to solicitors there would be no value passed on to consumers – such fees would operate only as a financial incentive to choose one barrister over another. For referral work, we have concluded that referral fees are clearly contrary to the public interest, as a matter of principle.
- 1.132 There is nothing in our proposals that would prevent a solicitor from charging clients for the service of referring work on their behalf to a barrister. That would not be a referral fee – it would simply be one of a number of fees notified to the client up front, to which the client would consent if it was in his/her interests to do so, making a judgement about the relative value of the arrangement compared to other legal services providers. However, the risks and perceptions are different where a similar

level of charge is introduced by the solicitor (to be paid by a barrister) at a different stage in the process (even if the client is asked to consent to the payment). This would have the effect of artificially inflating the costs to the client (as the referral fee would not be passed onto the client as a discount) or creating the perception of bias (as the solicitor may be referring to the highest bidder rather than the most appropriate advocate). Where the solicitor had already been instructed and become familiar with the client's case (and possibly charged fees already) a client may feel unable to withdraw due to the increased cost or inconvenience of having to instruct different solicitors.

- 1.133 Additionally, we have also taken account of the following evidence and specific contexts in which referral fees have been judged to be undesirable.

Personal injury referral fees

- 1.134 We believe that the conclusions reached in the Jackson Report, in relation to personal injury work, should apply equally to other areas of work undertaken by barristers who are privately funded. In particular, the Report concluded that 'there is no benefit in competition terms to be gained from allowing referral fees' and it did not accept that referral fees are necessary for access to justice. It concluded that in very many cases referrers simply refer cases to the highest bidder, which in no sense matches the case to the appropriate lawyer or remedies the information asymmetry.

Publicly-funded referral work

- 1.135 The arguments against allowing referral fees are even stronger when they are made in respect of publicly-funded referral work, where the wider public interest is directly engaged.
- 1.136 In criminal defence work, the instructed advocate (IA) receives payment of the whole case fee from the Legal Aid Agency and no separate claim can be made by another advocate in respect of the same case. Nonetheless, the IA is able to arrange for a substitute advocate, who may be a barrister, to attend hearings or a trial and is free to agree levels of remuneration following negotiation. This leaves open the possibility, if referral fees were to be permitted, of barristers negotiating referral fees with solicitors in order to win work.
- 1.137 However, the case fee, which is set by the Legal Aid Agency, is designed to pay a fair amount for the work undertaken on behalf of the consumer, which includes the advocacy element. It is not intended to cover the cost of finding a substitute advocate, yet any barrister paying a referral fee will in effect be paying a proportion of the case fee to fund that task. In this case the barrister would be accepting less remuneration for undertaking the advocacy than the Legal Aid Agency expressly intended for that purpose.
- 1.138 There is an inherent risk to the consumer that the quality of service is reduced if barristers use a portion of their remuneration in order to pay referral fees to win work. Barristers could be forced into cutting corners by, for example, allowing inadequate time for case preparation, reducing the quality and value for money of service

provided to the consumer. As a result, further pressure could be placed on the publicly-funded Bar at a time when it is already facing challenges as a result of wider funding reform.

- 1.139 As with privately-funded work, we believe that the selection criteria for solicitors choosing barristers on behalf of their clients should be based solely on what is in the best interest of their clients and should not be influenced by cost, especially since remuneration is already fixed by the Legal Aid Agency.
- 1.140 If barristers were to pay referral fees in these circumstances they would be contributing to the improper performance of an activity for which the public purse provides. Barristers are officers of the court and their duties extend beyond their clients to obligations in the wider public interest. We also believe that there may be grounds by which a referral fee in these circumstances would be deemed to constitute a bribe under the Bribery Act 2010.

Commissions in the financial sector

- 1.141 More broadly, we have also had regard to the approach taken in other sectors. The Financial Conduct Authority's (formerly FSA's) new rules on Adviser Charging and inducements, introduced as part of the Retail Distribution Review (RDR), do not allow financial adviser firms to receive commissions offered by financial product providers. The rules make it clear that charges should only reflect the services being provided to the client, not the particular product provider, or product, being recommended, and that any payments made between firms and third parties must be designed to enhance the quality of the service to the consumer.
- 1.142 The BSB believes that the same principle should apply in legal services. Any payments made between barristers, professional clients or third party introducers should be only with the aim of enhancing the quality of legal services provided to the consumer, rather than to influence selection between barristers.
- 1.143 Prior to introducing its new rules, the former FSA consistently identified commission bias, where adviser firms are unduly influenced in their choice of product providers by the commission they are paid, as a feature of the market for financial products, as well as the distorting effect of asymmetric information on competition.
- 1.144 We believe it would be unwise to liberalise the payment or receipt of referral fees by barristers against the backdrop of the introduction of a ban on commissions in other professional services and we support greater consistency in addressing this issue across professional services. In meeting the Regulatory Objectives, barristers are obliged to act in a manner that is consistent with the status of belonging to a profession, and we believe the approach we have taken helps them to meet this obligation.

Direct access

- 1.145 For direct access work, the arguments are rather different. We have considered which arrangements might provide best value for consumers. Where barristers

provide direct access services, we believe there could be value for consumers in using a third party introducer who is able to find an appropriate barrister on their behalf. There are already examples in the market of agents providing such services which do not amount to referral fees. In certain circumstances we believe this could help to promote access to justice, particularly in areas where barristers may not be effectively marketed to potential clients.

- 1.146 We believe that the prohibition on referral fees (whilst continuing to be necessary to protect consumers' interests) is entirely compatible with a number of commercial arrangements which achieve the purported benefits of referral fees in direct access cases, whilst protecting against the risks that we have identified and promoting the Regulatory Objectives
- 1.147 Despite recognising the potential benefits of using third party introducers, we consider that risks of allowing referral fees even in these limited circumstances outweigh the possible benefits, particularly as those benefits can be achieved in other ways which better meet the Regulatory Objectives. Referral fees usually involve private arrangements between the payer and the recipient without reference to the client and even in direct access work may well not be in the client's interests.
- 1.148 There would also be considerable confusion and the risk of evasion if the prohibition of referral fees did not apply to direct access work, which remains a relatively small part of barrister's work. As discussed above, the great majority of instructions by barristers are taken on a referral, rather than direct access, basis. We believe it is important to take a consistent approach to both types of instructions.
- 1.149 The objective of improving access to justice by making it easier for a direct access client to find a suitable barrister to act for them can instead be achieved if third party introducers charge an upfront fee to consumers for finding appropriate barristers to instruct. This will ensure that consumers are clear about what they are paying for at the start and that costs are not 'hidden' by the barrister paying a fee to the introducer at a later stage, when it might be harder for the consumer to decide to withdraw. This also reflects the new approach in financial services, where advisers will be expected to be transparent about charging an upfront fee when they act as an introducer.
- 1.150 We also intend to permit barristers, as well as consumers, to pay third party introducers on a one off or annual, fixed fee basis. Such payments would not normally depend on the number of referrals received from the introducer, helping to ensure there is no direct link between an individual referral and a payment. Alternatively, if the barrister does pay varying amounts to the introducer, depending on the number of referrals received, he must be able to demonstrate that the introducer makes an independent judgement as to which barrister best meets the client's needs for the given case and that the percentage the introducer receives is the same regardless of which of the barristers on its panel is instructed. This approach removes any incentive to pass the work to the highest bidder. It ensures the selection of a barrister is based solely in the interests of clients and is not influenced by the financial interests of the person making a referral (the outcome we wish to achieve).

1.151 The BSB believes it should be made transparent to consumers that such a third party introducer provides no legal advice or services itself (as it is not an authorised body under the LSA 2007). The primary service that a third party introducer provides to consumers is to put them in touch with individual self-employed barristers who have the relevant expertise to meet their needs and who are able to be instructed on a direct access basis. Our approach recognises that this service can be valuable to consumers. There is no restriction on public access intermediaries from charging a fee up front for the service of finding a barrister, but we are seeking to eliminate any bias in the allocation of a barrister to a client.

Draft guidance

- 1.152 A series of specific examples are included in the draft guidance at **Annex F**, which illustrate seven possible commercial arrangements which the BSB would be likely to consider are permitted by the rules. These examples are by no means intended to be exhaustive and barristers will be free to develop a range of other suitable arrangements, allowing them to innovate where this is compatible with the identified risks.
- 1.153 The guidance also identifies a number of features which are likely to indicate whether a payment is a prohibited referral fee – as well as some features which may suggest that the relevant payment is not a referral fee. We intend to take a purposive approach, in considering any enforcement action, which will consider the underlying nature and purpose of the arrangements and whether or not they would be likely to be in the best interests of clients.

2 BSB Handbook

- 2.1 The Handbook is broken down into various sections including the Code of Conduct, scope of practice, authorisation and licensing rules, qualification regulations, enforcement rules and definitions.
- 2.2 The structure of the Handbook and how it is presented represents a significant change in approach from that adopted in the 8th Edition of the Code. The intention is that it should be primarily a web based resource with hardcopies only available on request or for disability reasons. The Handbook applies to ‘BSB regulated persons’ rather than simply barristers, which in time and subject to the outcome of a separate application to the LSB will include both legal disciplinary practices and barrister only entities in addition to their owners, managers and authorised persons and therefore represents a broadening of the scope of regulation by the BSB.
- 2.3 In order to show how the new Handbook differs from the current Code of Conduct, a destinations table has been prepared (see **Annex G**). The following sections summarise some of the key changes introduced by the relevant sections.

Introduction (Part I)

- 2.4 The introduction section highlights the fact that the BSB is a specialist regulator focusing primarily on advocacy, litigation and associated advice services. It also sets out various other things such as application of the Handbook, commencement and waivers. These are all standard elements of the 8th Edition that have been collected in one convenient section.

Code of Conduct (Part II)

- 2.5 The Code of Conduct includes all the Core Duties, outcomes and conduct rules which will apply to barristers. To assist in the interpretation of the Core Duties and rules the Code of Conduct also includes guidance.
- 2.6 It is anticipated that the Code of Conduct will apply not only to individual barristers but also in time to BSB authorised bodies, their managers (whether authorised persons or not) and all authorised persons (barristers or others) working in them (whether as managers or as employees).

Core duties

- 2.7 The Core Duties underpin the entire regulatory framework and set the mandatory standards that all BSB regulated persons are required to meet. They also define the core elements of professional conduct, drawing heavily on the professional principles in the LSA 2007 plus some additional requirements based on the BSB’s analysis of the risks and our various consultations on these issues. They are mandatory and enforcement action can be taken on the basis that the duties have been breached. The Core Duties are new but they build on rules that are in the current Code. However, in the new Handbook they have been extended to apply to all barristers, not just practising barristers (therefore unregistered barristers are required to comply

with the Core Duties). Under the current Code only rules similar to Core Duties 1, 2 and 4 apply to barristers without practicing certificates. The Core Duties are:

- a. You must observe your duty to the court in the administration of justice [CD1].
- b. You must act with integrity and honesty [CD2].
- c. You must maintain your independence [CD3].
- d. You must not behave in a way which is likely to diminish the trust and confidence which the public places in you or the profession [CD4].
- e. You must keep the affairs of each client confidential [CD5].
- f. You must act in the best interests of each client [CD6].
- g. You must provide a competent standard of work and service to each client [CD7].
- h. You must not discriminate improperly in relation to any person [CD8].
- i. You must be open and co-operative with your regulators [CD9].
- j. You must manage your business effectively and in such a way as to achieve compliance with your legal and regulatory obligations [CD10].

Conduct rules

2.8 Supplementing the Core Duties are the Conduct Rules, which have been broken down into the various sections. This approach is more user-friendly and will allow the profession and public to easily identify the applicable rules. The sections are as follows:

- a. You and the court;
- b. Your behaviour towards others;
- c. You and your client;
- d. You and your regulator; and
- e. You and your practice.

Outcomes

2.9 At the beginning of each of the above sections the BSB has identified outcomes, which seek to explain the reasons behind the regulatory scheme and what it is designed to achieve. The outcomes are derived from the regulatory objectives as defined in the LSA 2007 and the risks which must be managed if those objectives are to be achieved. The inclusion of outcomes which describe the purpose of the rules is new. As discussed above, the outcomes put the rules into context and, together with

the Core Duties, help barristers to determine how they should act if a specific situation is not covered by the rules or it is not clear how a rule should be applied in a particular situation.

- 2.10 The outcomes are not themselves mandatory rules, but they are factors which BSB regulated persons should have in mind when considering how the Core Duties and rules should be applied in particular circumstances. The BSB will take into account whether or not an outcome has, or might have been, adversely affected when considering how to respond to alleged breaches of the Core Duties and the rules. As such, barristers and their clients should have the outcomes in mind when interpreting the rules.
- 2.11 Misconduct charges and administrative sanctions will continue to be based on breaches of Core Duties and/or rules. This will provide greater clarity for barristers, and clients, especially in situations where the barrister owes conflicting duties.

Rules

- 2.12 The BSB recognises that in many aspects of professional life it is necessary to ensure that those whom we regulate have a clear understanding of exactly what is required of them, and that clients and the public know what they can reasonably expect of those who provide legal services. Therefore, the rules in each of the above sections supplement the Core Duties and are similarly mandatory. However, the rules are not intended to be exhaustive. In any situation where no specific rule applies, reference should be made to the Core Duties. In situations where specific rules do apply, it is still necessary also to consider the Core Duties, since compliance with the rules alone will not necessarily be sufficient to comply with the Core Duties.

Guidance

- 2.13 The BSB has traditionally provided guidance on its website to supplement the Code of Conduct. The new approach to the Handbook seeks to present relevant guidance alongside the rules in the Handbook. The guidance contained in each of the sections serves several purposes. It may assist in the interpretation of the rules by giving further explanations and examples of how the rules apply in certain circumstances. It may draw attention to related rules. Also it may provide examples of the types of behaviour that might lead to compliance with the rules or factors that need to be considered by the regulated person if they are to act in compliance with the Core Duties and the rules and achieve the outcomes. Failure to comply with the guidance will not of itself be proof of failure to comply with a Core Duty or rule, but the BSB regulated person will need to be able to demonstrate how the Core Duty or rule has been met in spite of the BSB regulated person's non-compliance with the guidance.

Relationship between Core Duties, outcomes, rules and guidance

- 2.14 The BSB has critically examined the balance between Core Duties, outcomes, rules and guidance. Core duties continue to underpin the entirety of the BSB's regulatory framework and pervade the whole Handbook. As before, compliance with the Core

Duties will be mandatory and they define the core elements of professional conduct. Rules are intended to supplement Core Duties where a Core Duty alone is considered insufficient to address the perceived risk or where experience suggests that additional, but mandatory, rules are needed to achieve the required end. In some cases rules are necessary in order to clarify the nature of competing duties owed by barristers.

- 2.15 Our general approach has been to express all requirements that are genuinely mandatory as rules, whilst providing further information or examples of behaviour that would breach rules in guidance. We have endeavoured to use prescription in rules only where this is necessary to achieve a desired outcome. In general, we have sought to remove or minimise rules which seek to dictate how barristers organise their business. That should normally be a matter for them unless any of the regulatory objectives, especially the interests of clients, might be adversely affected. The consultation specifically asked about the balance between rules and guidance and the general feedback was that the balance had been correctly struck.

Key changes introduced by Part II section D (Conduct rules)

II.C3.R5 – not misleading clients and potential clients.

- 2.16 This rule seeks to manage the risk that clients may be misled about the status of the person providing legal services to them. There have been cases, for example, in which unregistered barristers have misled clients into believing that they were practising barristers, covered by insurance and subject to full BSB regulation. Another example of circumstances where there may be a risk of clients being misled is where services are provided by pupils. Also the new freedom for a self-employed barrister to share premises with non-barristers introduces the risk that clients will assume that the barrister is responsible for services provided by the non-barristers.

II.C3.R7 – accepting instructions.

- 2.17 There have been some amendments to these rules to deal with problems which have occurred in practice, particularly in relation to the late return of instructions. The rules seek to clarify when instructions must be refused or returned, and the circumstances in which instructions may be returned.

II.C3.R14 – requirement not to discriminate.

- 2.18 The requirement not to discriminate has been extended to cover all services. Previously it related only to advocacy services.

II.C3.R15 – the cab rank rule.

- 2.19 The rule will eventually be extended to apply to all BSB authorised bodies and authorised individuals working in them where instructions are given on a referral basis and seek the services of a named authorised individual. The power for the Bar Council to deem fees to be “reasonable” for the purposes of the Code has been removed. The rule has been extended to instructions to do work in England and Wales from lawyers in Scotland, Northern Ireland or EEA Member States. We expect

to engage in discussions with the SRA over the possibility of applying the cab rank rule to solicitors as well as barristers in order to promote access to justice in the legal profession. If we make progress on this, we will consider extending the cab rank rule to public access work in due course.

II.C4.R2 – reporting requirements.

2.20 The reporting requirements have been extended and tightened up.

II.C4.R3 – reporting serious misconduct.

2.21 This is new requirement to report serious misconduct to the BSB. Regulated persons will be required to self-report and report others in relation to “serious misconduct” only.

2.22 Limiting the requirement to report to cases of “serious misconduct” should largely meet the concern that regulated persons would otherwise be inhibited from discussing possible marginal breaches of the rules with colleagues. Such conversations help to secure the primary objective of compliance. It is important not to inhibit the seeking of advice from a more experienced colleague if faced with a difficult situation or if worried that some decision which had perhaps to be taken in a hurry had inadvertently breached a rule. It is therefore in the public interest that such conversations should normally be confidential. However, if a regulated person does reveal “serious misconduct”, then the public interest requires that the regulator should be informed so that it can take appropriate action. Where legal professional privilege applies, this will override the requirement to report another barrister’s “serious misconduct”.

2.23 An exception to this rule will apply for any discussions held on a confidential basis with the Bar Council’s ethical help line. This exception is justified on the basis that it is good regulatory practise to have a confidential source of advice that barristers may use to discuss potential breaches of the Code. If a confidential service was not offered it would lead to situation where barristers were prevented from discussing potentially serious breaches and obtaining advice about how best to resolve the matter. Such a situation would likely increase any potential harm to the lay client and the administration of justice.

II.C4.R9 – ceasing practise.

2.24 New requirements have been imposed when ceasing to practise to ensure the orderly winding down of business in the interests of clients.

II.C5.R1 – client money: payment service.

2.25 See paras 1.115 – 1.121 above.

II.C5.R3 – insurance.

2.26 The requirements have been generalised and made less detailed. The new Handbook will make it a requirement that all barristers (self-employed or otherwise)

must have insurance in place which covers all of the legal services they supply to the public.

- 2.27 Any BSB authorised person, must comply with the minimum level and terms of insurance which may be stipulated by the BSB from time to time. Self-employed barristers will be obliged to take out the minimum cover with BMIF.
- 2.28 Employed barristers will not be required to have their own insurance if they provide legal services only to their employer. If they supply legal services to other people they need not take out their own insurance as long as the employer's insurance covers them for claims made in relation to all services provided.

II.C5.R6 – II.C5.R13 associations with others and outsourcing.

- 2.29 This is a new section. It recognises that barristers may want to work in new ways while maintaining safeguards to guard against clients' interests being adversely affected. The prohibition on barristers sharing premises with people other than other barristers (and a restricted and complicated list of other people) has been abolished, as has the prohibition on associations with others. This will enable barristers to work in new ways. This section is intended to ensure that sufficient safeguards are in place to protect clients. The risks it addresses include evading regulation by outsourcing, conflicts of interests when a barrister has an interest in a business to which he refers a client or which refers clients to him, and misleading client about the activities which are regulated. As associations with others may pose added risks to clients, there is a requirement to notify the BSB if a barrister enters into an on-going association so this information can be taken into account in its supervision arrangements.

II.C5.R16 – administration of chambers.

- 2.30 At present normally only the Head of Chambers and members of management committees are subject to the rules regarding the administration of chambers. The new Handbook requires all members of chambers to take reasonable steps to comply with the requirements (a similar approach has been adopted with the new Equality and Diversity Rules). Rule II.C5.R18 provides that what is "reasonable" will depend on the role the individual plays in the arrangements for the administration of Chambers. This means that even junior members of Chambers will be expected not to oppose changes needed to ensure compliance and to take appropriate action if they are aware of breaches. Other new provisions relevant to the management of practices include:

- II.C5.R16.2 – a requirement to appoint someone to liaise with the BSB as regulator.
- II.C5.R.16.3 – a requirement not to employ someone who has been disqualified by the BSB or another Approved Regulator.
- II.C5.R16.6 – the BSB consulted on a proposal that would have obliged chambers and entities to ensure all employees should be employed under a contract of employment which requires them to comply with applicable provisions of the Handbook and not to do anything which would cause any authorised individual within

Chambers to breach the Handbook. On reflection the BSB has now acknowledged that this requirement would have been unworkable and possibly unlawful. S176 of the LA 2007 offers enough protection without the need for specific terms in the employment contracts. There will still be an obligation on Chambers to ensure that employees are aware of and comply with the Code requirements

- II.C5.R16.8 – requirement to have risk management arrangements in place (in addition to the various other existing requirements to have suitable procedures and systems in place.

Changes introduced by Part II section D (Rules applying to specific groups)

II.D1.R12 – Equality and diversity

- 2.31 These rules reflect the new requirements which were approved by the LSB as amendments to the old Code of Conduct.

Section D2 – Public access and licensed access

- 2.32 This section repeats many of the old rules but also includes the various amendments made in our recent rule change application. The BSB has not yet undertaken a wider review of the public access and licensed access rules (which remain unchanged for the purposes of this application), but plans on doing so when time and resources permit. The basic policy position being considered is that these rules need to be rationalised further, with some of the detail being replaced by greater guidance issued around existing more general rules that appear in other areas of the Handbook.

Section D5 – unregistered barristers

Key changes

- 2.33 All of the core duties will now be applied to unregistered barristers when they are providing legal services. When not providing legal services, only the core duties relating to: (a) not behaving in a way which is likely to diminish the trust and confidence of the public; and (b) co-operation with regulators will apply.
- 2.34 Rules II.D5.R1.1-R1.2 (provision of information to clients) is new. These rules create an obligation for unregistered barristers to explain to more inexperienced clients (defined as including those able to complain to the Legal Ombudsman) that they are not practising as a barrister, are not subject to rules applicable to practising barristers, and may not be covered by insurance. They must also explain how the client can complain while making it clear that the client cannot complain to the Legal Ombudsman.

Vires & justification for the regulation of unregistered barristers

- 2.35 Historically, the regulatory jurisdiction of the Bar Council (and thus the BSB as its delegate) was founded primarily upon those whom it regulates (i) subscribing to and holding a practising certificate from the Bar Council, and (ii) being members of one of

the Inns of Court. Thus, among other matters, (i) the Bar Council's authority, powers and duties were set out in and derived from its Constitution, which was approved by resolution of the Senate and the Bar; and (ii) all barristers agreed (and were required) to comply with the Code of Conduct, which was approved by the Bar Council pursuant to such authority, powers and duties, and which included more detailed provisions as to powers exercisable by the BSB. These arrangements were provided with some statutory underpinning by s.27 of the Courts and Legal Services Act 1990, but in essence the Bar Council was an unincorporated association whose authority, powers and duties derived from the agreement of its members. As a result, the Bar Council retains a jurisdiction to regulate barristers who are not authorised persons for the purposes of the LSA 2007.

- 2.36 The LSA 2007 defines a barrister as an individual “who has been called to the Bar by an Inn of Court, and is not disbarred by order by an Inn of Court.” A student is able to join an Inn of Court prior to commencing the vocational stage of training (the Bar Professional Training Course). The student is then called to the Bar by his or her Inn after completing the BPTC – at this point the title of barrister is conferred, bringing the person within the meaning of the definition of barrister in the LSA 2007 and also within the meaning of ‘the Bar’ as defined in the Bar Council constitution.
- 2.37 The BSB decided to introduce these changes (specifically applying all core duties to unregistered barristers) as it is necessary to ensure that appropriate standards are maintained when unregistered barristers are working for employers or clients. We believe that applying all Core Duties to unregistered barristers will increase protection for their clients. This has become more vital now as the numbers of unregistered barristers providing legal services have grown. As this seems likely to continue, the public should have the protection of knowing that fundamental standards apply to unregistered barristers and that individuals who fall seriously short of meeting these standards will have sanctions imposed on them. On the other hand, it would be disproportionate to apply to them all the rules which apply to those practising as barristers as they may only provide services of a kind which can be supplied by anyone and, in order to avoid misleading clients, they may not describe themselves as barristers when supplying legal services.

Section D6 – Cross border activities within the EEA

- 2.38 The Bar Council is a signatory of the Code of Conduct for European Lawyers. It is an obligation of that Code that its provisions relating to cross-border activities are incorporated into the Code of Conduct in each signatory state. At present, the provisions of the Code of Conduct for European Lawyers forms annex Q to the Code. The majority of the general provisions in the Code for European Lawyers, such as the need for independence, trust and personal integrity and confidentiality will already be covered in the new Handbook. The relatively few additional points, primarily concerning the recovery of fees, have been added to section E6 in Part 2 of the Handbook. There are no changes in the substance of the rules. The approach adopted is the same as that adopted by the SRA in its rules

International practising rules

2.39 The current Code has a separate annex setting out the international practising rules. In the new Handbook, these rules have been incorporated into the Code of Conduct and Scope of Practice rules. The main changes of substance are as follows:

- The definition of international work has been changed and replaced by three new definitions of “foreign work”, “foreign clients” and “foreign lawyers.” The new definitions will make the application of the circumstances in which the cab-rank rule and the professional client rules more consistent and logical.
- The cab rank rule has been extended to apply to instructions for non-advocacy work in England and Wales coming from lawyers in Scotland, Northern Ireland and EEA Member States. It would be unreasonable to go further and require instructions to be accepted from any foreign lawyer, about whom nothing might be known.
- For advocacy work in England or Wales, a solicitor (or other litigator) must be instructed unless the barrister can do litigation or public access work but the barrister may do preliminary work in the meantime.
- A professional client is required for international work unless the barrister is able to do litigation or public access work.

Significant omissions

2.40 There are a number of deliberate omissions from the new Handbook, which were no longer thought to be necessary:

- The requirement to have a professional client present when appearing in court has been removed;
- Detailed rules on fees have been removed; and
- Detailed rules on advertising have been removed.

Scope of practice and authorisation rules (Part III)

2.41 Part III of the new Handbook sets out the rules which relate to the scope of practice for authorised persons and sets out the practising certificate requirements for barristers

Section B: Scope of practice rules

2.42 For individual barristers, this section largely replicates the present rules subject to the removal or relaxation of certain current prohibitions and the introduction of the possibility of conducting litigation. The main changes are discussed below.

2.43 Individual barristers will continue to be permitted to supply legal services to the public as either: (a) a self-employed barrister; (b) an employed barrister; or (c) a manager or employee of another authorised body (e.g. SRA regulated law firm). They will also be allowed to work in more than one such capacity.

- 2.44 In future, the BSB will consider whether to relax the current prohibition that prevents employed barristers working for a non-authorised employer from supplying unreserved legal services to clients of their employer (i.e. an employed barrister working for KPMG might possibly in future be permitted to supply legal services to clients of KPMG as an unregistered barrister in the same position already can)).
- 2.45 Barristers of less than 3 years' standing¹ may only conduct litigation if their principal place of practice is also the principal place of practice of a qualified person who is themselves authorised to conduct litigation. This alters the current requirements for employed barristers and is part of the new arrangements for self-employed barristers.

Removal of prohibitions

- 2.46 The existing rules on sharing premises are replaced with more outcomes focused rules on associations and outsourcing. The main policy intention behind these rules is to ensure that barristers do not use associations or outsourcing as a means to circumvent BSB regulation.
- 2.47 The prohibition on undertaking litigation has been deleted as well as many of the detailed rules in the current Code about the types of activities barristers may undertake. By removing the overly prescriptive rules the BSB has taken a more outcomes focussed approach, which again should facilitate new approaches to how barristers are able to undertake their work.
- 2.48 The prohibition on dual authorisation (i.e. authorisation by more than one Approved Regulator at the same time) will remain. The rule avoids unnecessary confusion for clients. It would be problematic to accurately define when a jointly authorised person was (for example) acting as a barrister or acting as solicitor, and consequently what regulatory regime should apply. There is also a concern that allowing joint authorisation might facilitate rule avoidance. This approach is consistent with the provisions of the LSA which requires that a Licensing Authority must remove an ABS's licence if it obtains a licence from another Licensing Authority.

Section C: The Practising Certificate Rules

- 2.49 These rules were approved by the LSB in August 2011. The rules remain largely the same, except rules in relation to the authorisation of barristers to conduct litigation. The relevant rules are discussed in greater detail elsewhere in the application.

Section D: The Registration of European Lawyers Rules

- 2.50 There are no changes of substance to these rules.

Qualification regulations (Part IV)

- 2.51 This part of the Handbook incorporates changes to the Admission and Call Declarations set out in the Bar Training Regulations for which the LSB issued a direction for exemption in January 2013. There are no other changes of substance to

¹ One year's standing for an employed barrister providing services only to his employer and certain other specified people.

this part of the Handbook. Any changes that have been made are purely stylistic to ensure the regulations fit with the new Handbook. The BSB has postponed review of this section until the outcome of the Legal Education and Training Review is known.

Enforcement Rules (Part V)

2.52 As discussed above, the BSB intends wherever possible to work with authorised persons to help them to achieve compliance and only to take formal enforcement action when the matter is serious or the informal approach is unsuccessful. The BSB's monitoring and supervision role will be supported by the rules in the Code of Conduct which require the provision of information to and co-operation with the regulator. The process itself does not require rules but we are developing a supervision policy which is currently in the process of being consulted on. The consultation is due to close in June and will feed into the final supervision policy. Formal enforcement action does require rules. Part V of the Code makes a number of substantive changes to the BSB's enforcement regime. The main changes are summarised below. Our enforcement processes will be supported by a new enforcement strategy (see **Annex C**).

Administrative sanctions

- 2.53 At present, only breaches of certain requirements of the Code of Conduct can be dealt with by the imposition of administrative sanctions. Breaches of all other rules, even if minor, are treated as professional misconduct and are potentially referred to a Disciplinary Tribunal. This is disproportionate regulation. The new Handbook therefore allows administrative sanctions to be imposed for the breach of any rule if that is the appropriate and proportionate response.
- 2.54 The power to impose administrative sanctions rests with the PCC, but senior PCD staff will be given delegated authority to impose sanctions in appropriate cases. This means that post-investigation it will initially be PCD staff who assess the evidence and determine, on the balance of probabilities, whether or not there has been a breach of the Handbook.
- 2.55 If there has been a breach, PCD staff will then decide, having regard to the published criteria, whether an administrative sanction is appropriate. If PCD staff are unsure whether an administrative sanction is appropriate, or if the breach appears to amount to more serious professional misconduct, the matter will be referred to the PCC for consideration.
- 2.56 The maximum administrative fine that can be imposed by either the PCC or the PCD will be £3,000 for an entity or £1,000 for an individual. For individuals, this is an increase from the current £300.
- 2.57 Where the PCD or PCC has imposed an administrative sanction, the relevant person may appeal this decision to an independent panel administered by the COIC, in accordance with the rules set out in Part V of the Handbook. In the absence of an appeal, non-compliance with an administrative sanction is likely to be treated as a matter of professional misconduct and referred to a Disciplinary Tribunal.

Professional Misconduct

- 2.58 The most substantive changes relate to the Direction Hearings process. The current system of agreed direction has been replaced by one of automatic directions that will take effect 21 days after the charges have been served. Variations to the automatic directions can only be made on application where the Judge considers it necessary.
- 2.59 Although not appropriate in every case, provision has been made to allow the directions to be varied so a balance has been struck between progressing swiftly and ensuring fairness to defendants. A defendant, who wishes to, can put any issues before a directions judge. It is not, however, a good use of resources to insist that a directions judge be involved in all cases, no matter how straightforward. Spurious applications to a Directions Judge may result in an adverse costs order against the defendant.
- 2.60 A further change is that a copy of the certificate of conviction relating to any offence shall be conclusive proof that the defendant committed the offence. Any court record of the findings of fact upon which the conviction was based (which may include any document prepared by the sentencing judge or a transcript of the relevant proceedings) shall be proof of those facts, unless proved to be inaccurate.
- 2.61 We have also adopted changes to the appeals rules that will make it possible, with the consent of the PCC, to bring appeals against sentence and dismissal of charges. At present, the BSB can appeal against dismissal of a charge only if at least one charge has been found proved, which makes no sense. It is envisaged that the appeal power will continue to be used sparingly and we will obviously be liable to pay costs if any appeal is dismissed. We will only be permitted to bring appeals on the limited grounds that the decision of the Disciplinary Tribunal had:
- taken into account irrelevant considerations;
 - failed to take into account relevant considerations;
 - reached a decision that is wrong in law; and/or
 - reached a decision which no reasonable Tribunal could properly have reached.

Disqualification powers

- 2.62 The BSB will have disqualification powers over non-authorized employees working in chambers (this power can also be used in relation to barristers). All employees of BSB authorized persons will be subject to disqualification if they breach, or cause an authorized person to breach, rules which apply to them, and if it is necessary in the public interest to prevent them continuing to work for a BSB authorized person.
- 2.63 The Handbook places general obligations on authorized individuals to ensure that their chambers are competently run and that any non-authorized employees have the necessary skills and experience to do their jobs properly. Non-authorized persons working in chambers will also still be under an obligation, pursuant to s176 of the LSA

2007, to comply with the general requirement not to do anything, or cause an authorised person, to breach rules which applied to them.

- 2.64 Any serious failure to comply with the Handbook may therefore lead to disqualification proceedings being brought against the non-authorised employee. A successful disqualification order will make it professional misconduct for any BSB authorised person to employ the disqualified person without prior BSB approval.
- 2.65 Only the Disciplinary Tribunal or Interim Panel would have the power to disqualify any non-authorised employees working in chambers. An Interim Panel would only impose an interim disqualification if it considered that it would be likely that a Disciplinary Tribunal would impose a sentence of disqualification and if it considers it necessary in the public interest to do so.

Other areas of interest

- 2.66 As is the case now, only the most serious cases of alleged professional misconduct will be referred by the PCC to a Disciplinary Tribunal. The PCC shall only refer a matter of alleged professional misconduct to a Disciplinary Tribunal if it is satisfied that:
- The imposition of an administrative sanction would be inappropriate;
 - There is a realistic prospect of a finding of professional misconduct being made or that disqualification is likely to be the outcome; and
 - The regulatory objectives are best served by pursuing disciplinary procedures.
- 2.67 In deciding whether to refer a case to a Disciplinary Tribunal the PCC shall also consider whether a three or five person panel should be established. The PCC shall direct that a five person panel be established if it considers that:
- A BSB regulated person is likely to be disbarred or suspended from practice for more than 12 months (currently three months); or
 - The relevant person would be likely to be disqualified indefinitely or for a defined term of more than twelve months; or
- 2.68 The procedure to be adopted by the Disciplinary Tribunal is set out in the Disciplinary Tribunal Regulations in Part V of the Handbook. Decisions of the Tribunal will continue to be made on the basis of the criminal standard of proof (beyond reasonable doubt). The BSB has considered whether to change the standard of proof required but has concluded that it is important to apply the same standard as the Solicitors Disciplinary Tribunal so that if a solicitor and a barrister face charges on related matters, the same standard of proof will apply to both of them.
- 2.69 Following conviction, a five person panel has a range of sanctions at its disposal including the power to:
- Disbar or suspend a BSB regulated individual;

- Disqualify a BSB regulated individual or non-authorised employee from working for a BSB authorised person.
 - Place conditions on a BSB regulated person's authorisation or licence and impose fines, issue warnings or offer rebukes or advice;
 - Issue fines up to the maximum of £50,000 against a regulated individual. All fines must be imposed having proper regard to the BSB's published fines policy. These fines represent a large increase. Currently the maximum fine which can be imposed on a barrister is £15,000.
- 2.70 A three person tribunal has the same range of sanctions at its disposal except it does not have the power to disbar an individual, suspend an individual for more than twelve months, or disqualify an individual. Where a three person tribunal considers that the sanction warranted is beyond its powers, it may refer the case to a five person tribunal for sentencing.
- 2.71 Without gaining our prior approval, it will be a breach of the Handbook for any regulated person to employ someone who has previously been disqualified. Disqualified persons may apply to us to have the disqualification lifted or amended.
- 2.72 The full range of sentencing powers of Disciplinary Tribunals are included in the Handbook, Part 5, as annexes to the Disciplinary Tribunal Rules.
- 2.73 Appeals arising out of decisions made by a Disciplinary Tribunal will be heard by the Visitors. The Visitors are High Court judges exercising their powers as Visitors to the Inns of Court. Appeals to the visitors are administered by the Judicial Office on behalf of the Lord Chief Justice. A defendant must provide written notice of their intention to appeal within 21 days from the date of the relevant decision (We are currently in the process of transferring the jurisdiction to the High Court via primary legislation. We expect this process to be complete sometime in the middle of 2013, at which point the relevant section of the Handbook will be repealed, along with any minor and consequential changes needed elsewhere.

Determination by Consent

- 2.74 A complaint which the PCC otherwise intends to refer to a Disciplinary Tribunal may be referred to a Determination by Consent (DBC). The DBC procedure will only be applicable if the relevant person submits to the jurisdiction and the PCC considers that:
- There is a realistic prospect of a finding being made;
 - There are no substantial disputes of fact;
 - Having regard to the regulatory objectives, it is in the public interest to use the DBC procedure;

- If proved the alleged professional misconduct (combined with the relevant person's disciplinary history and any deferred sentences) does not appear to warrant disbarment, suspension or disqualification.
- 2.75 Following conviction at a DBC, the PCC has the power to impose a range of sanctions including:
- Reprimands and warnings;
 - Fines (at the same levels as those available to Disciplinary Tribunals);
 - Conditions on a practising certificate, licence or authorisation.
- 2.76 The PCC does not have the power to disbar, suspend or disqualify under this procedure. There are no appeals arising under the DBC procedure. However, if the defendant is dissatisfied with a decision they may elect to have the matter referred to a Disciplinary Tribunal. In such cases the original findings of the PCC are set aside and the matter is considered afresh.

Interim Suspension and Disqualification Panels

- 2.77 We have enhanced the PCC's powers with respect to Interim Suspension and Disqualification Orders. In particular the triggers for referral, and the powers available to the Panel, have been widened and we have introduced a general public interest test.
- 2.78 On receipt of a complaint or any other information, the PCC shall have the power to refer an individual to a three person Interim Panel. The PCC may only refer a matter to an Interim Panel if one or more of the following criteria have been met:
- The defendant has been convicted of, or charged with, a criminal offence (other than a minor criminal offence); or
 - The defendant has been convicted by another Approved Regulator, for which they have been sentenced to a period of suspension or termination of the right to practise.
- 2.79 Assuming one or more of the above criteria is satisfied, the PCC must then satisfy itself that an interim order is appropriate in all the circumstances, having regard to the regulatory objectives.
- 2.80 Following a finding, an Interim Panel has the power to impose a range of sanctions, including:
- Deciding that an interim order is not warranted;
 - Deciding to impose an interim suspension, disqualification or condition pending disposal of the case by a Disciplinary Tribunal;
 - In lieu of imposing a period of suspension, disqualification or condition, accept an undertaking from the individual on any terms the Interim Panel thinks fit;
 - Require the individual to inform lay and professional clients about any conviction, charges or other matters the Interim Panel thinks fit.

- 2.81 An interim suspension or disqualification order will remain in place until a Disciplinary Tribunal has been convened to consider the case. Individuals can ask for Interim Orders to be reviewed or can appeal the imposition of an Interim Order to an independent panel administered by COIC.

Immediate Interim Suspension or Disqualification Orders

- 2.82 We have introduced new powers that, in very serious and urgent cases, allow the PCC to impose an immediate interim suspension or disqualification before referring the matter to an Interim Panel. An immediate order may only be handed down by the PCC if it they are satisfied that this is the appropriate course having considered the risk to the public if such action were not taken.
- 2.83 There is no appeal from an immediate interim suspension or disqualification order, but it will automatically lapse within four weeks.

Definitions (Part VI)

- 2.84 Part VI provides a list of defined terms, which are highlighted throughout the Handbook.

3. Destinations table

- 3.1 **Annex G** includes a destinations table, which provides a comprehensive comparison between the new Handbook and the previous Code of Conduct.

4. Capacities and capabilities

- 4.1 The BSB has established a programme to undertake an analysis of the capacities and capabilities necessary to deliver the additional elements of the new Handbook. An action plan for the delivery of these capacities and capabilities is attached at **Annex H**.

5. The regulatory objectives

Protecting and promoting the public interest

- 5.1 The Bar's reputation is based on public trust in barristers and, going forward in the entities in which they work. Maintenance of this trust requires BSB regulated persons to act with integrity, honesty and independence when fulfilling their duties to the court and acting in the interests of their clients. The whole thrust of the regulatory arrangements set out in the new Handbook is designed to uphold these standards by setting out clear core duties that are applicable to all BSB regulated persons, the requirements for professional conduct and a range of sanctions that are in place to uphold the regulations and hence standards. Key elements in the Handbook designed to protect the public are as follows.
- Ten core duties which set out the mandatory standards that all BSB regulated persons are required to meet and define the core elements of professional practice. These core duties include the requirements to act with integrity and honesty, maintain independence and act in the best interests of clients. The core duties will provide a baseline for professional conduct and make clear to clients and the wider public the standards they should expect of BSB regulated persons.
 - We will risk assess each chambers against a transparent set of criteria related to the likelihood and impact of any risk to the regulatory objectives that the chambers presents. The risk factors will aim to ensure that chambers have sufficient systems in place to manage risk, given the nature of the work undertaken. This analysis will determine the level of supervision that the BSB requires of the chambers.
 - Where there is a finding of professional misconduct or a disqualification order has been made, we will normally publish on the BSB's website the name of the relevant person against whom such the finding or order has been made and the terms thereof.
 - The BSB has widened its powers of interim suspension so that, in appropriate circumstances, it may impose interim suspension and/or disqualification orders against barristers. In addition, we have introduced a power that will allow an immediate interim suspension or disqualification to be imposed if we are satisfied

that such a course of action is justified having considered the risk to the public if such an interim suspension or disqualification were not implemented.

Supporting the constitutional principle of the rule of law

- 5.2 The new Handbook sets out clearly the standards of professional conduct expected of BSB regulated persons. These standards are made explicit through the core duties, associated outcomes and rules set out in the Code and the requirements relating to the scope of practice. By emphasising the need to act with independence, honesty and integrity, and stressing the duty to the court, we believe that the Handbook and the regulations contained therein support the constitutional principle of the rule of law.
- 5.3 The core duties, applicable to all BSB regulated persons, stress the importance of observing the duty to the court in the administration of justice and the need to manage business in such a way as to achieve compliance with legal and regulatory obligations. In addition, the Code sets out the conduct rules regarding the relationship with the court and identifies as key outcomes the requirements that the proper administration of justice is served and the public has confidence in the administration of justice and those who serve it. The rules set out in the Code provide the basis on which action can be taken against a BSB regulated person who is suspected of failing to deliver these outcomes and meet the core duties.

Improving access to justice

- 5.4 The BSB is convinced that the best way to ensure and improve access to justice is the development of a strong and vibrant market for the provision of legal services. To ensure that such a market is developed, it is vital for there to be competition between providers that will lead to innovation and development in the services provided. The BSB believes that the new Handbook will help to develop a strong and vibrant market in a number of ways.
- Wherever possible we have sought to remove unnecessary restrictions from our existing regulations and thereby provide BSB regulated persons with greater flexibility to decide which services they wish to provide. One example of this is the removal of the prohibition on the conduct of litigation. Safeguards are in place to require barristers who wish to conduct litigation to pass through a further authorisation process. We believe that by allowing barristers to undertake litigation this will increase choice for the public, promote competition and should contribute to providing greater access to justice.

Protecting and promoting the interests of consumers

- 5.5 The best interests of clients will be served, in a general sense, if the market in legal services is strong and vibrant and competition drives innovation in the delivery of services and keeps costs low. We have already indicated how our approach to regulation contributes to this process. However, in relation to interactions with individual clients, the regulatory arrangements have a number of features designed

to protect clients and ensure that BSB regulated persons conduct themselves and their business appropriately.

- One of the core duties set out in the Code specifically requires BSB regulated persons to act in the best interests of each client. This duty is then underscored in the section, You and Your Client, in which a series of outcomes are identified including providing a competent standard of work, ensuring that clients are adequately informed as to the terms on which work is to be done and that they understand how to bring a complaint. A set of explicit rules relating to these outcomes make clear to clients and the profession the standards of professional conduct that are expected of BSB regulated persons and provide the basis for action to be taken against any BSB persons who fail to meet these standards.
- The Handbook also includes requirements relating to the scope of practice of BSB regulated persons, making it clear that reserved legal activities can only be provided if the person concerned is authorised to so do (Part III). This part of the Handbook sets out the requirements for practice for differing types of regulated person including self-employed barristers, employed barristers, and in time will apply to BSB regulated entities and the owners and managers of BSB regulated entities. The requirements are set out to ensure that all BSB regulated persons conduct their business in a way that protects their clients' interests and meets the standards of professional conduct we have established.

5.6 A key outcome, relevant to barristers, is that clients must not be misled as to who is legally responsible for the work done for them and whether and by whom that work is regulated. This is particularly important when barristers use different models to obtain work such as ProcureCos. New rules on associations with others will allow barristers to work in new and flexible ways and there will be sufficient safeguards in place, including the key requirement that clients must not be misled in order to ensure that the best interests of consumers are served.

- Key in ensuring that the interests of consumers are protected are the regulatory requirements that are put in place to ensure that BSB regulated persons have the relevant knowledge, understanding and skills to undertake their roles competently. BSB regulated individuals will be required to meet stringent educational and qualification requirements in order to be able to obtain a practising certificate. Once practising, individuals will be required to ensure that their knowledge, understanding and skills are kept up to date through conducting annual continuing professional development (CPD). Chambers will be required to ensure that their employees are competent to carry out their duties and are made aware of BSB regulatory arrangements that may affect or be relevant to the performance of their duties.

5.7 As well as risk assessing chambers the BSB, will be setting in place arrangements to monitor chambers to ensure that clients and the public are protected. We are developing a risk based supervisory approach which will determine the appropriate level of supervision that each chambers should be subjected to. Chambers will be

required to submit information on an annual basis through chamber's monitoring so that we can continue to review the level of risk that they pose and adjust our supervisory arrangements accordingly. Our aim is to ensure adherence to the standards that we have set and we will work closely with BSB regulated persons to ensure that they continue to meet these standards. We have set out our approach to regulation and the sanctions that are in place to ensure compliance. Enforcement action will only be taken if the misconduct is serious or other steps to ensure compliance have failed.

Promoting competition in the provision of services

- 5.8 We have already indicated how the BSB's approach to the regulation of individuals is predicated on the basis of ensuring that consumers have a range of options to consider when seeking legal services. The removal of the prohibition on the conduct of litigation will ensure that consumers have the ability to choose between a range of providers, individuals, operating under different regulatory regimes. We believe that such competition will be beneficial both to consumers and the legal profession allowing the provision of legal services to thrive and develop.

Encouraging a strong, independent and diverse legal profession

- 5.9 Opening up litigation to the self-employed Bar and recent changes to the public access rules will increase opportunities for the Bar. We believe that these changes will allow BSB persons to offer a viable alternative to other providers of legal services and ensure that this market is dynamic and competitive.
- 5.10 Measures that we have taken to remove restrictions on practice will provide greater flexibility for BSB regulated persons to determine how they wish to manage business and the services they wish to provide, allowing them to be more competitive. Examples of such changes include:
- Liberalising outdated rules on sharing premises and on associations, moving instead to an outcomes-based approach where barristers can work with others to deliver services in innovative ways (including via outsourcing arrangements) as long as clients' interests are protected.
 - While maintaining the prohibition on holding client money, allowing for the development of a payment service provided this can be done in a way that protects clients' interests. We believe that this approach will allow self-employed barristers the flexibility to make commercial decisions on whether or not to conduct litigation, while putting in place arrangements to mitigate risks and to protect clients.

Increasing public understanding of the citizen's legal rights and duties

- 5.11 The regulatory arrangements set out in the new Handbook are designed to ensure that BSB regulated persons interact appropriately with their clients and other members of the public in the provision of services. By setting in place a coherent set of regulations relating to BSB regulated individuals, it will be easier for clients and the

wider public to gain a better understanding of the standards of professional conduct they can expect of BSB regulated persons. The BSB will also be producing a guide for clients and the public on what they should expect from a barrister. In turn, this should empower clients and the public to demand that these standards are maintained and take action to ensure that they are, through dialogue and interaction and, as a last resort, by pursuing a complaint. By supporting the establishment of a healthy relationship between clients and BSB regulated persons our expectation is that clients will enjoy a better level of service which should, in turn, help to facilitate increased understanding of their legal rights and duties.

6. The better regulation principles

Transparent

- 6.1 The Handbook sets out in one coherent and comprehensive document the BSB's approach to the regulation of individuals. Setting the regulatory arrangements out in this way is intended to make the BSB's regulatory arrangements as transparent as possible. The BSB believes that there is a public interest in having one clear publication that summarises our new regulatory approach across the board. This will enable consumers to better understand what to expect from barristers within the full range of business structures that will be possible in the future. It is our intention to bolster public understanding of our regulatory arrangements by publishing, in due course, a document which sets out in plain English what a member of the public can expect of BSB regulated persons.
- 6.2 The Handbook sets out in a clear and rational way the regulatory arrangements, together with guidance which is designed to clarify the meaning and application of these requirements for those seeking to use the Handbook. Our approach has been to express all requirements that are genuinely mandatory as rules, while providing guidance in the form of further information or examples of behaviour that would breach the rules. The Code also includes definitions of individual terms both in relevant sections and as a comprehensive glossary, designed to make the document more accessible to users. The Handbook will be supplemented by published strategies on Supervision and Enforcement. Taken together, we believe that these steps will help to ensure that those who use the Handbook, clients, the general public and BSB regulated persons, understand the standards of professional conduct expected of those whom we regulate and how we will supervise and enforce these standards.
- 6.3 In operating the regulatory arrangements we will seek to ensure that matters are dealt with in a transparent way. Consequently, regulatory and disciplinary decisions will be made known to the BSB regulated persons concerned, together with the reasoning behind those decisions, so that the basis on which they have been made is clear. Tribunal hearings are in public unless the Tribunal considers that there is good reason to hear a case, or part of it, in private (or the case concerns whether a barrister is medically fit to practise). As already stated, where any finding of professional misconduct or a disqualification order has been made, we will normally publish on the BSB's website the name of the relevant person against whom such the finding or order has been made and the terms thereof. Again, this will help to protect the public and ensure that our regulatory decisions are transparent.

Accountable

- 6.4 The new Handbook sets out in a clear and coherent way the rules of professional conduct and the approach to authorisation and disciplinary action. This will ensure that BSB regulated persons understand the regulatory arrangements and associated

processes and how they can address any decisions or actions with which they disagree.

- 6.5 Regulatory and disciplinary decisions will be made known to regulated persons, together with the reasoning behind those decisions. This will allow BSB regulated persons to understand the basis on which a decision has been made and to identify any grounds on which they disagree with the outcome. The arrangements that we have set in place allow such decisions to be reviewed and for there to be the opportunity for independent appeals to be held. Taken together, these measures will ensure that the BSB is accountable for any decisions and actions which it takes in relation to regulated persons

Proportionate

- 6.6 In developing the new Handbook we have sought the views of the profession and wider public through series of consultations in order to ensure that the arrangements put in place are appropriate. We have reviewed all the rules to decide whether they are still needed. We have removed unnecessarily detailed requirements, moving instead to higher level more outcomes focused rules, and we have done away with many outdated restrictions on how BSB authorised persons practice. We have sought to ensure that the requirements placed on barristers are proportionate to the risks faced by the public seeking the provision of legal services. Hence, the Handbook sets out requirements for all BSB regulated persons while identifying specific requirements relating to their scope of practice depending, for example, on whether they are self-employed or employed barristers, and including the provision of legal services directly to the public.
- 6.7 Having set out the regulatory requirements expected of BSB regulated persons, we will be seeking regular annual information from chambers to monitor any risks they pose in the way that they practise to ensure that appropriate supervisory measures can be put in place if necessary. The overriding aim of our regulatory arrangements is to ensure compliance with the standards that we have set. BSB regulated persons will be expected to resolve problems with their clients directly so that, as far as possible, issues do not need to be escalated to us or the Legal Ombudsman. We will work closely with BSB regulated persons to help them to understand and adhere to the regulatory arrangements, seeking to use an informal and collaborative approach wherever possible. Enforcement will only be resorted to if a matter is serious or other attempts to resolve problems have failed. We have identified a range of regulatory sanctions that can be applied to individuals when there has been a breach of the rules and disciplinary action is appropriate. Minor breaches of the handbook will be dealt with by administrative action with sanctions of fines, warnings and reprimands. For professional misconduct the sanctions include disbarring or suspending an individual, or imposing larger fines. This range of sanctions will allow us to ensure that proportionate action is taken to protect the public, depending on the severity of the professional misconduct and the level of risk to which clients and the public are exposed.

Consistent

- 6.8 The new Handbook contains all the regulatory arrangements relating to BSB regulated persons, be they bodies or individuals. The intention is to ensure that, as far as possible, the arrangements are coherent and consistent and afford the same level of protection to the public and clients, regardless of the type BSB regulated persons providing legal services.

Targeted

- 6.9 As already indicated, our objective is to ensure that the requirements placed on BSB regulated persons are proportionate and targeted in order to ensure that the same standards of professional conduct and levels of protection for clients and the public are in place. We have reviewed all our conduct and scope of practice rules and retained only those necessary to support the Core Duties. We will be developing our approach to risk to ensure that our supervision of chambers is tailored to address the risks which they pose and so ensure that clients and the public are protected. Chambers will be expected to submit routine information on an annual basis in order to monitor their performance. We will use that information and other information such as about complaints to risk assess chambers and determine the level of monitoring they should be subject to. We will seek to work with chambers to ensure that they meet our regulatory arrangements and wherever possible address issues informally and through dialogue and support. Enforcement action, designed to ensure adherence to the regulatory arrangements, will only be taken if a matter is serious or other steps have been exhausted. The range of sanctions set out in the Handbook provide us with a sophisticated battery of measures that can be used appropriately to address differing levels of professional misconduct

7. Desired outcome

7.1 Approval of the new BSB Handbook.

8. Other regulators

8.1 All of the other regulators have been invited to contribute to our various consultations and we have been in discussions with a number of them on different aspects of our work.

9. Date of implementation

9.1 The date of implementation for the Handbook is January 2014.

10. Consultation processes undertaken

10.1 The BSB has conducted a series of consultations on the review of the Code, which can be found with accompanying reports at the links below:

Review of the Code of Conduct – issued June 2007

Review of the Code – conduct rules – issued March 2009

The Structure of self-employed practice – issued August 2009

Code of Conduct for the Bar – issued January 2011

BSB Handbook and Entity Regulation – issued March 2012

10.2 In addition to carrying out consultations the BSB has also actively sought views through road show events, surveys and by facilitating user group discussions.

Consultation responses

10.3 Since the creation of the BSB there have been four consultations on the structure and content of the Code of Conduct (now renamed the Handbook). The first sought views on the aspects of the Code which needed to be reviewed and put forward the proposal to move to a Code based on core principles supported by rules and guidance. Subsequent work has been based on the general acceptance of the proposed approach. All the priority issues identified as a result of that consultation (and many others) have now been reviewed and the results included in the new Handbook. The second Code consultation concentrated on the proposed principles (now renamed Core Duties) and the higher level Conduct Rules. These were generally supported and were incorporated (with amendments as necessary in light of comments) into the consultation on the full Code for barristers including what was then a separate section on lower level practising rules. The split between Conduct rules and practising rules did not find favour and a different approach has been adopted in the new Handbook which also explicitly introduces desired outcomes for the first time.

10.4 The more recent consultation which was issued in March 2012 included the BSB's detailed proposals for an entity regulation regime and introduced a redrafted Handbook. A full consultation report is at **Annex I**.

Road shows

10.5 The BSB has held a number of road show events, with the more recent ones taking place over the consultation period for the final Handbook and entity regulation consultation. The events were organised in conjunction with the circuits and Specialist Bar Associations.

Consumer input

10.6 The Legal Services Consumer Panel has responded to our consultations. In addition to this the BSB has specifically included a number of consumer organisations as part of its consultee list. As this has not always elicited responses the BSB has sought to actively engage its own User Group.

10.7 A separate summary of the steps we have taken to get consumer input is attached at **Annex J**.

11. Equality and diversity impact

11.1 The following equality analyses are attached to the application:

- New Handbook equality analysis (**Annex K**).
- Litigation equality analysis (**Annex L**).
- Enforcement strategy equality analysis (**Annex M**).