



BAR  
STANDARDS  
BOARD

REGULATING BARRISTERS

**LSB consultation – Enhancing consumer protection, reducing regulatory restrictions  
BSB Response**

**Question 1: What are your views on the three themes that we have put at the core of our vision for the legal services market? If different, what themes do you believe should be at the core of our vision?**

1. The BSB considers that the three themes identified all make sense individually. Consumer protection and redress must indeed be appropriate for the particular market. The regulatory burden should not be unduly onerous and as a matter of statute, we must all live up to the better regulation principles.
2. As with all things it is how this is put into effect that needs careful thought, particularly within the overall statutory framework. Firstly, consumer protection and redress should not be the sole focus of regulatory action – all of the regulatory objectives must be properly assessed and balanced. In some circumstances that may well mean that the interests of consumers and certainly the interests of individual consumers must be of lower priority than another regulatory objective, for example supporting the rule of law.
3. Secondly, there must be room for each regulator to assess the appropriate minimum level of regulation for the area of the market that they regulate. The LSB acknowledges in this document that there is a balance needed between outcome focused elements and actual rules, which is to be welcomed. Each regulator is required by section 28 to act in a way that is compatible with the regulatory objectives. This may mean that there is a slightly different view taken on a particular issue by different regulators. Provided that view is reasonable given the available evidence, that possibility is contemplated and permitted by the Legal Services Act 2007.

**Question 2: What is your opinion of our view that the purpose of regulation is to ensure appropriate protections and redress are in place and above this there are real competitive and cultural pressures for legal services to deliver the highest possible standards with a range of options for consumers at different prices? If different, what do you consider that the role of regulation should be?**

4. The Legal Services Act 2007 effectively requires that the purpose of regulation overseen by the LSB is to ensure that the regulatory objectives are delivered. Consumer protection is part of that, as is competition in the provision of services. Restriction to those aspects would not be right as a matter of statute. As mentioned above, the LSB and all legal regulators share the same responsibility for acting in a way that is compatible with the regulatory objectives and in a way that we each consider most appropriate for the purpose of meeting those objectives. The legislation has provided us with a framework that potentially permits a wide variety of approaches to the issues that each regulator faces.

**Question 3: In light of the changing market do you think that specific action may be needed to ensure that more legal services activity can unequivocally be included within the remit of the Legal Ombudsman and, if so, how can this best be achieved?**

5. The BSB considers that this proposal would make sense for consumers. However, this can only be done within current legislative framework, which could be problematic if work is not reserved and people are not authorised. Reserving work and making a wider range of people authorised simply to widen the reach of the Legal Ombudsman scheme may have a number of unintended consequences. That kind of expansion does not seem consistent with only having the minimum amount of regulation that is absolutely necessary. The BSB is supportive of the concept but considers that some careful analysis is needed of the appropriate mechanisms that may be needed to achieve this result if it were to be done compulsorily. Consideration should be given to the possibility of allowing the Legal Ombudsman to receive cases that are referred to him on a voluntary basis.

**Question 4: What are your views of our diagnosis of the weakness of the existing system and the problems within it?**

6. The BSB considers that it would be very useful if the LSB undertook some comparative research or analysis of other professions or other markets to see if similar issues arise. For instance, it would be useful to know if users of other professional services have similar issues with naming of brands, shopping around, knowing quality when they see it and lack of willingness to make complaints. Knowing what solutions may have been employed and what has and has not worked well would be very useful to help shape our intervention strategies. It may be that some aspects are common to all professions but there are some activities which others' experiences would indicate are most likely to be effective.
7. It may also be useful to undertake some research that is more socially focused rather than strongly emphasising economic analysis. The third bullet point in paragraph 89 mentions socially related inertia but does not explore that any further. There may be social or cultural factors at play, for instance in relation to the writing of wills where it may be that there is a perception that making a will is an acknowledgement of mortality that younger people are not comfortable with.

**Question 5: What do you see as the benefits and downsides of regulating through protected title such as solicitor and barrister?**

8. There is clearly a benefit in that people know and recognise the term, which they can associate with specific professional standards. The challenge, it seems to the BSB, is in ensuring that people's expectation of what that term means or guarantees to them and what is actually the case are aligned. The middle ground proposed by the LSB, which blends activity based regulation and title based regulation, seems conceptually appealing. The reality may be rather difficult in practice but the BSB is supportive of exploring how the balance between title and activity based regulation might best work.

**Question 6: What are your [sic] views on whether there should be a consistent approach to the allocation of title to authorised persons? What are your views on whether the title should be linked directly to the activities that a person is authorised to undertake or linked to the principal approved regulator that authorises them?**

9. It seems sensible to have a consistent approach to the allocation of title to authorised persons in the sense that someone shouldn't become a particular type of authorised person without having acquired a minimum amount of knowledge or expertise in key

areas, regardless of the route. As an example, a crime advocate must have achieved one of the levels of QASA, regardless of whether they've done so as a barrister, solicitor or legal exec.

10. At the moment the BSB considers that title is increasingly linked to the work undertaken rather than to a regulator – barristers are regulated by the SRA when they're part of firms regulated by the SRA and the BSB will be doing the same thing once our own entity regulation regime is running. As stated above, the BSB is supportive of exploring how the balance is struck between title based and activity based regulation.

**Question 7: What are your views on our proposal that areas should be examined “case- by- case”, using will-writing as a live case study, rather than through a general recasting of the boundaries of regulation? If you disagree, what form should a more general approach take?**

11. The BSB agrees that a case-by-case approach should be taken. A general recasting of the boundaries of regulation will be a considerable undertaking that would not be completed quickly if it is to be done properly. Using an example (and will writing seems a sensible issue to start with) will be a much better way of identifying issues. It will test all aspects of the process, allowing for refinement as necessary.

**Question 8: What are your views on our proposed stages for assessing if regulation is needed, and if it is, what regulatory interventions are required?**

12. The stages for assessing if regulation is needed seem sensible and basically contain the steps one would expect in a robust policy analysis process. The BSB considers that care must be taken to ensure that section 162 guidance “on the high level regulatory arrangements that are most likely to proportionally (sic) address the problems and protect against the detriments that have been identified” is indeed issued at a high level. This would give the approved regulators the necessary flexibility to properly tailor their responses to their sectors or activities, liaising on matters of common interest where necessary.

**Question 9: What are your views on the implications of our approach for professional privilege?**

13. The BSB agrees with the LSB that professional privilege has a number of benefits and that care needs to be taken to understand any consequential impacts on the issue when considering changes to regulatory boundaries and connected regulatory decisions.
14. It is, as the LSB acknowledges, a very complex area and will require detailed consideration to ensure that we don't end up with a perverse result that is not in the public interest, supporting the rule of law or breaching the regulatory principle that client affairs must be kept confidential (s1(3)(e)).

**Question 10: Do you believe that any of the current reserved legal activities are in need of urgent review? If so, which activities do you think should be reviewed and why?**

15. The BSB does not consider that there is any urgent need for review of the reserved legal activities at this stage.

**Question 11: What are your views on our analysis of the regulatory menu and how it can be used?**

16. The BSB agrees that entities will need to have proper systems and controls in place and regulators will need to require those things. Regulators' supervision and enforcement processes will need to take account of those mechanisms. It is likely that managers will be required to ensure that contracts of employment etc take proper account of the duties being placed on the entity. However, it is not likely in our view that this will be a complete substitute for personal responsibility and accountability, although our enforcement strategies might specify situations where our focus would be on one or the other.
17. It is vital that appropriate individual responsibilities are in place alongside entity level ones in order to make sure that people do indeed take proper responsibility for activities. We must avoid the possibility of the growth of an entity culture that results in a decrease in personal responsibility. It will undoubtedly be the vulnerable who suffer if that were to occur. People must be held properly to account in any regulatory regime. We must not allow them to hide behind a corporate personality. While we do not have specific evidence on this point, we consider it highly likely that consumer research would show that consumers expect that individuals are held to account. Much as it is expected that an individual doctor should be struck off rather than a surgery being censured, people expect that individual barristers or office holders will be personally accountable.
18. Also, while a number of people will be working in entities, it is also likely that many barristers will continue to work in chambers. There is not the same entity culture or corporate control approach in that environment.
19. In the BSB's view, we must ensure that there is a proper balance between entity controls and individual controls that take into account all working environments. We have reservations about how realistic it is to regulate for the "culture" of an entity.
20. The LSB has made a number of statements in the consultation document about any change to the reserved legal activities, whether to something that is already regulated by approved regulators even though not a reserved legal activity or something that is being regulated for the first time. Either situation will require a full application from the approved regulator to either continue regulating or become a regulator for that activity. There is no mention of the transitional designation provisions provided in section 25 being utilised. In the BSB's view this should be an option considered by the LSB, especially if the newly reserved activity is one which regulators have already been regulating. As the provisional designation would only be for a specified period, we suggest that this would be a proportionate way of ensuring that the area is regulated while also providing a realistic timeframe for any improvement of regulatory arrangements to be undertaken. We also consider that where it is proposed to extend the reserved activities to include something that regulators already regulate, the LSB should have to show how the regulator's arrangements are inadequate. This would be part of showing that regulation is necessary in the particular area. The burden of proof should be on the LSB rather than the regulators in this regard. This could be fitted within the stages of assessing whether regulation is necessary.
21. Turning to the main point of the question, the BSB broadly agrees with the four groupings/categories of different regulatory tools outlined by the LSB. Clearly each application will need an analysis of which is needed for the particular circumstances. The BSB agrees with the LSB's statement that "effective non-statutory options, such as properly enforced general consumer and competition laws and voluntary schemes, wherever possible" should be favoured. We also particularly agree that there will need to be a wide range of tools used to meet all circumstances and that the approved regulators must have maximum flexibility in that regard.

**Question 12: Do you have any comments on our thoughts on other areas that might be reviewed in the period 2012-15, including proposed additions or deletions, and suggestions on relative priority?**

22. The LSB has set out quite a large number of potential areas for review during the 2012-15 period. The BSB asks that the LSB consider carefully the timing of each area given that the work involved for both the LSB and approved regulators could be quite significant. The financial ramifications could also be significant. We anticipate that the current financial constraints will continue through this period meaning that the LSB should also be mindful of the financial implications for the profession of any significant change and the overall costs of regulation to them. Given that this process is new, the BSB endorses the LSB's intention of addressing a discrete area in the first instance to test the system and approach that is recommended in this consultation paper. It follows that more complex areas should be examined once the systems are more established and tested. The BSB thinks that this is particularly pertinent to consideration of the treatment of general legal advice as that is a very wide area and will cover many different aspects. The benefit of several other examinations will be very useful when that topic is addressed.
23. The BSB notes that the paper refers to "corporate law" as the heading for paras 153-156. However the discussion in those paragraphs may be better summarised as "corporate clients". There is a huge range of legal fields that will be of interest to the corporate client – from employment to tax to civil to insurance. The key thing is that the client is a sophisticated one rather than someone who will have difficulty identifying quality or value for money.

**Bar Standards Board  
4 November 2011**