

Legal Regulation Review

Appendices to the Call for Evidence

January 2009

www.legalregulationreview.com

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Appendix 1

The Edinburgh Declaration

Source: <http://www.cii.co.uk/app/news/default.aspx?endstem=1&id=859>

Professional Body Statement of Principles

"The Edinburgh Declaration"

As the professional bodies offering most of the qualifications, membership and continuing professional development schemes for the retail financial services sector, we believe there is a strong desire from our industry to have high standards of professionalism.

Our respective responses (and those by the rest of the industry) to the FSA's Retail Distribution Review (RDR) discussion paper demonstrate a genuine desire for an industry-led solution in which professional bodies play a significant role. This builds on the fact that our bodies have already investigated, developed and/or implemented many initiatives to improve professionalism as this is the core remit of professional bodies.

We agreed to formulate this joint statement given this level of agreement and resolve. It commits us – as well as any other interested party – to a series of measures across three key areas: tackling the "alphabet soup" of qualifications; improving professional standards and ethics; and developing higher, minimum qualifications for the retail financial sector.

We think this set of principles will find widespread support from regulators, consumer groups, trade bodies, companies, individuals and other stakeholders.

1. Tackling "Alphabet Soup"

- Measures to simplify the "alphabet soup" of financial adviser qualifications and designations; in an effort to improve the public's understanding and confidence in financial qualifications.

2. Improving Professional Standards and Ethics

- A single, independent professional standards board (the 'Board'), with significant 'lay' representation and an independent chairman, which would create, oversee and develop professional standards ensuring consistency and high standards. The Board would sit above rather than replace existing professional bodies. This would be supported by the retail financial services sector, the regulator and strengthened professional bodies.

The standards of the Professional Standards Board would be underpinned by the following:

- Membership of a professional body to be seen as a demonstration of professionalism;
- The development of an industry-wide Code of Ethics, and with practice standards in more detail set by each professional body for its members;

- Continuing Professional Development (CPD) for which a framework would be agreed by the Board then implemented by the professional bodies in more bespoke detail, under the auspices of the Professional Standards Board;
- Developing the concept of practising certificates tied to the completion of CPD, qualifications and compliance with the Code of ethics and practice standards; and
- A new complaints handling/discipline system in conjunction with the regulators.

In addition to the measures proposed here, it has been agreed that each of the professional bodies signing this Declaration will, with immediate effect, recognise CPD undertaken under the auspices of another signatory's scheme as a precursor to the development of an industry framework for CPD.

3. Introducing a Step Change in Benchmark Qualifications Levels (and Providing Transition Arrangements)

- The introduction of higher-level benchmark qualifications for advisers;
- Appropriate professional standards for the "primary (or assisted purchase) tier" or whatever emerges in this space;
- Pragmatic transition arrangements to enable this to take effect, but which send a clear signal of a "step change" to higher standards as soon as realistically possible; and
- Encouragement of individuals and firms who aspire to higher qualifications even beyond the new benchmark level.

The undersigned organisations agree to commit themselves to these principles and building support for them within the retail financial sector:

Chartered Insurance Institute (CII)
 Chartered Institute of Bankers in Scotland (CIOBS)
 Institute of Financial Planning (IFP)
 Securities & Investment Institute (SII)

Appendix 2

The Committee on Standards in Public Life's Seven Principles of Public Life

Source: http://www.public-standards.org.uk/About/The_7_Principles.html

The Committee on Standards in Public Life - The Seven Principles of Public Life

The Committee believes that 'Seven Principles of Public Life' should apply to all in the public service. These are:

Selflessness

Holders of public office should act solely in terms of the public interest. They should not do so in order to gain financial or other benefits for themselves, their family or their friends.

Integrity

Holders of public office should not place themselves under any financial or other obligation to outside individuals or organisations that might seek to influence them in the performance of their official duties.

Objectivity

In carrying out public business, including making public appointments, awarding contracts, or recommending individuals for rewards and benefits, holders of public office should make choices on merit.

Accountability

Holders of public office are accountable for their decisions and actions to the public and must submit themselves to whatever scrutiny is appropriate to their office.

Openness

Holders of public office should be as open as possible about all the decisions and actions that they take. They should give reasons for their decisions and restrict information only when the wider public interest clearly demands.

Honesty

Holders of public office have a duty to declare any private interests relating to their public duties and to take steps to resolve any conflicts arising in a way that protects the public interest.

Leadership

Holders of public office should promote and support these principles by leadership and example.

Appendix 3

Better Regulation Task Force's Five Principles of Good Regulation

Source: www.berr.gov.uk/whatwedo/bre/consultation-guidance/page44482.html

Five Principles of Good Regulation

The table below described the **Five Principles of Good Regulation** and what regulators should bear in mind when devising, implementing, enforcing and reviewing regulations.

Proportionality

Regulators should only intervene when necessary. Remedies should be appropriate to the risk posed and costs identified and minimised.

- Policy solutions must be proportionate to the perceived problem or risk and justify the compliance costs imposed – don't use a sledgehammer to crack a nut.
- All the options for achieving policy objectives must be considered – not just prescriptive regulation. Alternatives may be more effective and cheaper to apply.
- “Think small first”. Regulation can have a disproportionate impact on small businesses, which account for 99.8% of UK businesses.
- EC Directives should be transposed without gold plating.
- Enforcement regimes should be proportionate to the risk posed.
- Enforcers should consider an educational, rather than a punitive approach where possible.

Accountability

Regulators must be able to justify decisions and be subject to public scrutiny.

- Proposals should be published and all those affected consulted before decisions are taken.
- Regulators should clearly explain how and why final decisions have been reached.
- Regulators and enforcers should establish clear standards and criteria against which they can be judged.
- There should be well-publicised, accessible, fair and effective complaints and appeals procedures.
- Regulators and enforcers should have clear lines of accountability to Ministers, Parliaments and assemblies, and the public.

Consistency

Government rules and standards must be joined up and implemented fairly.

- Regulators should be consistent with each other, and work together in a joined-up way.
- New regulations should take account of other existing or proposed regulations, whether of domestic, EU or international origin.

- Regulation should be predictable in order to give stability and certainty to those being regulated.
- Enforcement agencies should apply regulations consistently across the country.

Transparency

Regulators should be open and keep regulations simple and userfriendly.

- Policy objectives, including the need for regulation, should be clearly defined and effectively communicated to all interested parties.
- Effective consultation must take place before proposals are developed, to ensure that stakeholders' views and expertise are taken into account.
- Stakeholders should be given at least 12 weeks, and sufficient information, to respond to consultations.
- Regulations should be clear and simple, and guidance, in plain language, should be issued 12 weeks before the regulations take effect.
- Those being regulated should be made aware of their obligations, with law and best practice clearly distinguished.
- Those being regulated should be given the time and support to comply. It may be helpful to supply examples of methods of compliance.
- The consequences of non-compliance should be made clear.

Targeting

Regulation should be focused on the problem and minimise side effects.

- Regulations should focus on the problem and avoid a scattergun approach.
- Where appropriate, regulators should adopt a "goals-based" approach, with enforcers and those being regulated given flexibility in deciding how to meet clear, unambiguous targets.
- Guidance and support should be adapted to the needs of different groups.
- Enforcers should focus primarily on those whose activities give rise to the most serious risks.
- Regulations should be systematically reviewed to test whether they are still necessary and effective. If not, they should be modified or eliminated.

Appendix 4

The FSA's 11 Principles for Businesses

Source: <http://fsahandbook.info/FSA/html/handbook/PRIN/2/1>

The FSA's 11 Principles for Businesses

1 Integrity	A firm must conduct its business with integrity.
2 Skill, care and diligence	A firm must conduct its business with due skill, care and diligence.
3 Management and control	A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.
4 Financial prudence	A firm must maintain adequate financial resources.
5 Market conduct	A firm must observe proper standards of market conduct.
6 Customers' interests	A firm must pay due regard to the interests of its customers and treat them fairly.
7 Communications with clients	A firm must pay due regard to the information needs of its clients and communicate information to them in a way which is clear, fair and not misleading.
8 Conflicts of interest	A firm must manage conflicts of interest fairly, both between itself and its customers and between a customer and another clients.
9 Customers: relationships of trust	A firm must take reasonable care to ensure the suitability of its advice and discretionary decisions for any customer who is entitled to rely upon its judgment.
10 Clients' assets	A firm must arrange adequate protection for clients assets when it is responsible for them.
11 Relations with regulators	A firm must deal with its regulators in an open and cooperative way, and must disclose to the FSA appropriately anything relating to the firm of which the FSA would reasonably expect notice.

Appendix 5

Report of the Review of the Regulatory Framework for Legal Services in England and Wales, Chapter A

Source: <http://www.legal-services-review.org.uk/content/report/chapter-a.htm>

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

Chapter A

The Objectives and Principles of a Regulatory Framework for Legal Services

Introduction

1. The Consultation Paper sought to explore the possible objectives of a regulatory regime for legal services and to consider some of the principles which lie behind the provision of those services by lawyers. In terms of the operation of the regulatory framework, the Consultation Paper also considered whether regulatory authorities should use their resources where the risks to those established objectives and principles were greatest.

2. A decision to regulate a market arises from the decision that leaving the activity unchecked could lead to undesirable consequences and that the benefits that will flow from regulation will outweigh the costs of that regulation. Because any regulatory system will involve the application of rules giving guidance as to acceptable standards of conduct within the area being regulated, it should lead to an increase in trust and confidence in institutions and the sector generally. And allied to the issue of trust and confidence, regulation can also lead to greater certainty of outcome for both consumers and providers. But beyond simply engendering confidence in the market, regulation has an important role to play in protecting the consumer, ensuring there are no unjustifiable restrictions on competition, that appropriate standards of education, training and conduct are maintained, and that there are appropriate redress mechanisms.

Objectives of the Regulator

3. The Consultation Paper proposed that the first step in defining the regulatory regime should be to make clear what the objectives of the regime should be. This is critical for those charged with regulatory responsibility, since the objectives represent the criteria against which they must determine the appropriate regulatory action; and against which they will be held accountable. Objectives also need to be clear to those being regulated and other interested parties.

4. In general I favour a short clear list of objectives, much along the lines of those which direct the work of the Financial Services Authority (FSA). In the case of the FSA, the four primary objectives can be summarised as:-

maintaining confidence in the UK financial system;

promoting public understanding of the financial system;
securing the right degree of protection for consumers; and
helping to reduce financial crime.

5. The Regulator will need appropriate objectives, whether it is a direct Regulator under Model A as the FSA is; or if it follows Model B, or some variant, where it acts as an oversight regulator.

6. Almost all respondents appeared to support the view that the Regulator of legal services should operate to a set of clearly defined objectives.

7. The Consultation Paper identified six possible key objectives for any Regulator of legal services:-

- i. **Maintaining the rule of law** - The rule of law embodies the basic principles of equal treatment of all people before the law, fairness, and a guarantee of basic human rights. A predictable and proportionate legal system with fair, transparent, and effective judicial institutions is essential to the protection of both citizens and commerce against any arbitrary use of state authority and unlawful acts of both organisations and individuals.

The Consultation Paper suggested that those charged with regulating legal service providers should have an important part to play in ensuring the rule of law by creating conditions necessary for its delivery.

- ii. **Access to justice** - The Consultation Paper also suggested that a Regulator of legal services should have the objective of improving access to justice for all. Access to justice has a geographic dimension (and issues such as rural access are discussed in the context of LDPs in Chapter F), but it is critically also an issue about access for those who are disadvantaged and in particular those who cannot afford to pursue their legal rights. The Regulator will be concerned that access is proportionate; it cannot be provided for all issues irrespective of cost. Thus it would be expected that the Regulator would want to work closely with other bodies, such as the 'not-for-profit' sector providers and the Legal Services Commission.

- iii. **Protection and promotion of consumer interests** - Given the asymmetry of information which exists in the provision of legal services between provider and consumer, the Regulator has a duty both to protect and to further the interests of the consumer. The consumer's principal interests include higher quality and lower prices. In part this includes the giving of choice to an informed consumer. In this way the ultimate choice of whether to accept a risk is made by the consumer.

The Consultation Paper suggested that the Regulator of legal services should have a twin duty in respect of consumers: first to ensure that consumers have sufficient information about the standards of the services provided so that they are able to take informed decisions about these services; and second, given that consumers may not always be 'informed', to have powers to act in the market, for example, to prohibit oppressive marketing practices, raise or set

standards, develop information/awareness programmes, resolve disputes and protect vulnerable groups.

- iv. **Promotion of competition** - The Terms of Reference refer to a regulatory framework that would best promote competition. The Consultation Paper acknowledged that one of the trends in recent years had been the increased emphasis on competition. It noted that, specifically within the legal services industry, the Government had encouraged competition between lawyers from different professional bodies. Against this background, the Consultation Paper proposed that any Regulator of legal services should have as an objective the prevention of unjustified restrictions on the supply of, and encourage competition in, the provision of legal services and the promotion of choice in both the number and type of providers, subject to the proper safeguard of consumers' interests.
- v. **Encouragement of a confident, strong and effective legal profession** - The Consultation Paper suggested that a regulatory objective of maintaining a strong and effective legal profession (including setting appropriate entry standards and supporting new entrants to the market) would help to ensure access to justice, the maintenance of a healthy supplier base for publicly funded work and continued support for pro bono initiatives, thereby serving the public interest. It would also underpin the international efforts of our legal sector.
- vi. **Promoting public understanding of the citizen's legal rights** - Drawing on the financial services industry as an example, the Consultation Paper suggested that any new legal services Regulator should maintain the professional obligation on lawyers to set out for clients their rights and the consequences of different options. It questioned whether the Regulator should have a wider duty, in conjunction with the industry, to improve consumer knowledge of some of the most commonly used parts of the law, for example, around buying a house.

8. In terms of the appropriateness of the six objectives set out above, most respondents to the Consultation Paper felt that those identified were broadly the right ones. Some respondents took the view that the objectives did not fully cover all of the key issues. They proposed minor changes to the regulatory objectives set out in the Consultation Paper. In most cases these sought to expand on, or give additional emphasis to, existing parts of the text which supported each objective. Where additional objectives were put forward by respondents they were for the most part either subsets of the objectives set out above, or the result of a combination of some or all of those objectives. However, a number of comments provided insights which merit particular consideration.

9. The Bar Council commented, in connection with the six objectives:-

"...whilst this is an admirable list of policy considerations to which any regulator of legal services should have regard, it seems to us that it does not directly state what we would understand to be the basic purposes of regulation - namely, to seek to ensure that members of a professional body (or other providers of a relevant service) are (a) suitably qualified and (b) observe appropriate ethical standards."

10. My view is that this is a rather profession centric view of the "*basic purposes of regulation*". Nevertheless it is an important point" and it might be that the drafting of the objective of a 'confident, strong and effective legal profession' should specifically refer to the need for those covered by the regulatory framework to be suitably qualified and in particular to the need for high ethical standards. Other respondents, such as the First Division Association (the association representing senior civil servants, including members of the Government Legal Service) also referred to the adoption of standards:-

"By "standards" we mean two elements - Firstly, proper professional competence, which goes beyond entry standards, which is the element mentioned in the Paper. There are also continuing professional development obligations on legal practitioners, as there are in many professions."

Proper professional competence, including continuing professional development, should be an important part of the new regulatory framework. This Review, and in particular Chapter F, has much to say about greater competition between lawyers and liberalisation of the way in which they conduct business; but none of this is intended to lower the standard of legal advice provided or the ethical professional standards of practitioners.

11. In contrast to the Bar Council's view, the Consumers' Association in its response raises concern about singling out a 'strong and effective legal profession' as a specific objective:-

"In our view a 'strong and effective profession' is one that successfully exerts power and influence with decision-makers. The interests of the profession do not always coincide with the public interest. A strong and effective legal profession may or may not ensure a healthy supplier base for publicly funded work. The detailed objectives set out within that paragraph are more usefully brought within access to justice and competition."

Whilst it is possible to see a strong legal profession as a sub-set of access to justice, I continue to see it as an objective in its own right, not least because, beyond our own borders, the profession in England and Wales has a significant international standing. English law and English lawyers are often chosen for international transactions; and the regulatory framework should seek to enhance this standing and certainly not to damage it.

12. The Law Society welcomed the introduction of the specific objective of 'promoting public understanding of the citizen's legal rights', and commented in its response to the Consultation Paper that:-

"This has not, hitherto, formally been regarded as a regulatory responsibility of the Law Society, although the Society has been increasingly active in this field."

13. The National Consumer Council (NCC) also welcomed the specific objective but argued in its response that the objective did not go far enough:-

"The objective to promote public understanding of citizens' legal rights does not go far enough because it fails to distinguish between consumer information and consumer education. The notion of consumer education is concerned with knowledge, understanding, values, skills and attitudes, and is necessary to obtain the

most from information and advice. With the combination of information, education, advice and redress in place, consumers may become empowered rather than just informed. Empowered consumers also have the confidence to make their voices heard - a really important dimension. So, for the objective concerning consumer considerations, we would rather the emphasis was put on empowering consumers, which helps them become the enablers of competitive markets."

In general I agree with this point. The regulatory system should be concerned with education, advice and redress as well as information. But in the precise drafting it will be important not to impose upon the framework more than it could possibly deliver. In particular, education about legal rights and processes presupposes basic educational standards for those reaching adulthood, an important issue but one beyond the reach of the legal regulator.

14. As already mentioned, a number of respondents have proposed minor changes to the regulatory objectives set out in the Consultation Paper and to the text which supports each objective. However, it has not been the intention of this Chapter to draft precisely the necessary objectives. The precise wording of statutory objectives would be subject to detailed analysis by Parliamentary draftsmen, and subsequent examination by Parliament itself. Whilst I do not believe it sensible to attempt that detailed analysis here, I do believe that the six objectives set out in this Chapter can provide the core around which a regulatory framework for legal services can be built.

Professional Principles/Precepts

15. The Consultation Paper recognised that, as well as setting regulatory objectives, any regulatory framework for legal services would need to ensure that the professional codes and standards to which lawyers operated were consistent with certain professional principles and precepts. The Consultation Paper identified the following key principles and precepts:-

Independence - Lawyers have a duty to act with independence in the interests of justice;

Integrity - The codes of conduct maintained by the main legal professional bodies generally require their members to act with integrity towards clients, the courts, lawyers and others, to maintain high standards of professional conduct and professional service, and not to bring the profession into disrepute;

The duty to act in the best interests of the client - The codes of conduct of the main legal professional bodies generally require their members to act in the best interests of the client, except where it would be unlawful to do so or where the interests of justice would be compromised; and

Confidentiality - The codes of conduct of the legal professional bodies generally require lawyers to keep clients' affairs confidential. Communications between a client and his lawyer may be subject to Legal Professional Privilege (i.e. certain communications between a client and legal adviser in the context of obtaining legal advice or assistance are protected from disclosure, even in legal proceedings).

Whilst these principles and precepts should be contained within professional codes applicable to lawyers, some might also be included in legislation governing the legal

profession, as they are at present. For example, sections 27 and 28 of the Courts and Legal Services Act 1990 [Endnote 9] place on those exercising litigation and advocacy rights a duty to the court to act with independence in the interests of justice.

16. As with the objectives of the Regulator, most respondents acknowledged the existence and importance of precepts and principles in the provision of legal services, and that those identified in the Consultation Paper were broadly the right ones. There were some suggested additions.

17. The General Council of the Bar suggested that there should be included, an additional principle that a lawyer should not discriminate in the provision of his or her services (e.g. in respect of gender, ethnic origin, beliefs or opinions about the nature of the client). There is merit in this suggestion; however, I take the view that issues of discrimination are generally provided for in law. As such it is not clear that a specific principle is necessary or appropriate. If the principle of non-discrimination were to be included, it could be argued that other principles of human rights, or principles such as freedom of information, should be specifically referred to.

Risk Weighting of Objectives and Principles

18. A number of respondents noted that the Consultation Paper did not attempt to rank either the regulatory objectives or legal principles/precepts in order of their importance, with some respondents taking the view that there were aspects which merited a particular weighting. For example, some lawyers emphasised the independence and integrity of lawyers:-

"... from our perspective perhaps the key objective is the need to maintain the independence and integrity of the legal profession and to balance this correctly with serving the public interest." Allen & Overy.

19. I appreciate that respondents are likely to place a different weighting on each of the principles, or objectives, depending on their own perspective. However, I consider that it should be for the Regulator, operating a risk based approach to regulation, to judge the relative importance of each consideration on a case by case basis. A risk based approach is one under which regulatory objectives or principles become a central consideration in determining how regulatory powers and resources are used.

20. Most respondents supported the concept of a risk based approach to regulation as discussed in the Consultation Paper. Some questioned how any new Regulator might discharge its duties on the basis of risk; others put forward suggestions, for example that regulatory efforts should be concentrated in certain sectors (such as where services are provided to the public rather than commercial institutions). Precisely how any new Regulator should discharge its regulatory functions on the basis of risk would be for it to determine, against the risks which it perceived at the time to its statutory objectives and to the principles and precepts of the profession. It would be wrong to try to constrain the Regulator here in making what may be fine judgements, which would vary depending on the circumstances; and accordingly I make no proposals about the ranking of objectives.

Conclusion

21. I conclude that the first step in defining the regulatory regime should be to make clear what the objectives of the regime are. The Chapter proposes six primary objectives of the regime. These would be the objectives against which the Regulator must determine the appropriate regulatory action; and against which it would be held accountable. I consider that the legal precepts or principles, discussed in this Chapter, should be incorporated within the regulatory arrangements.

Endnotes

9. As amended by section 42 of the Access to Justice Act 1999

Appendix 6

The Legal Services Act, Part One

Source: http://www.opsi.gov.uk/acts/acts2007/ukpga_20070029_en_2#pt1

THE LEGAL SERVICES ACT

PART 1 THE REGULATORY OBJECTIVES

1 The regulatory objectives

(1) In this Act a reference to “the regulatory objectives” is a reference to the objectives of—

- (a) protecting and promoting the public interest;
- (b) supporting the constitutional principle of the rule of law;
- (c) improving access to justice;
- (d) protecting and promoting the interests of consumers;
- (e) promoting competition in the provision of services within subsection (2);
- (f) encouraging an independent, strong, diverse and effective legal profession;
- (g) increasing public understanding of the citizen’s legal rights and duties;
- (h) promoting and maintaining adherence to the professional principles.

(2) The services within this subsection are services such as are provided by authorised persons (including services which do not involve the carrying on of activities which are reserved legal activities).

(3) The “professional principles” are—

- (a) that authorised persons should act with independence and integrity,
- (b) that authorised persons should maintain proper standards of work,
- (c) that authorised persons should act in the best interests of their clients,
- (d) that persons who exercise before any court a right of audience, or conduct litigation in relation to proceedings in any court, by virtue of being authorised persons should comply with their duty to the court to act with independence in the interests of justice, and
- (e) that the affairs of clients should be kept confidential.

(4) In this section “authorised persons” means authorised persons in relation to activities which are reserved legal activities.

Appendix 7

Solicitors Code of Conduct 2007, Rule One

Source: www.sra.org.uk/solicitors/code-of-conduct/193.article

Preamble and Rule 1 – Core Duties Solicitors’ Code of Conduct 2007

Professional Ethics

Dated 10 March 2007 and commencing on 1 July 2007

The Solicitors’ Code of Conduct 2007

Rules dated 10 March 2007 commencing 1 July 2007 made under Part II of the Solicitors Act 1974 and section 9 of the Administration of Justice Act 1985 with the concurrence of the Master of the Rolls under that section and the approval of the Secretary of State for Constitutional Affairs under Schedule 4 to the Courts and Legal Services Act 1990, regulating the conduct of solicitors, registered European lawyers, registered foreign lawyers and recognised bodies.

The guidance printed with these rules is not mandatory and does not form part of the Solicitors’ Code of Conduct.

Rule One – Core Duties

1.01 Justice and the rule of law

You must uphold the rule of law and the proper administration of justice.

1.02 Integrity

You must act with integrity.

1.03 Independence

You must not allow your independence to be compromised.

1.04 Best interests of clients

You must act in the best interests of each client.

1.05 Standard of service

You must provide a good standard of service to your clients.

1.06 Public confidence

You must not behave in a way that is likely to diminish the trust the public places in you or the profession.

Guidance to rule 1 – Core duties

General

1. A modern just society needs a legal profession which adopts high standards of integrity and professionalism. As a solicitor, registered foreign lawyer (RFL), registered European lawyer (REL) or recognised body you serve both clients and society. In serving society, you uphold the rule of law and the proper administration of justice. In serving clients, you work in partnership with the client making the client’s business your first concern. The core duties contained in rule 1 set the standards which will meet the needs of both clients and society.

2. The core duties perform a number of functions:

- (a) They define the values which should shape your professional character and be displayed in your professional behaviour.
- (b) They form an overarching framework within which the more detailed and context-specific rules in the rest of the Code can be understood, thus illuminating the nature of those obligations and helping you to comply.
- (c) The core duties can help you to navigate your way through those situations not covered in the detailed rules, as no code can foresee or address every ethical dilemma which may arise in legal practice.
- (d) The core duties are fundamental rules. A breach may result in the imposition of sanctions.

3. Where two or more core duties come into conflict, the factor determining precedence must be the public interest, and especially the public interest in the administration of justice. Compliance with the core duties, as with all the rules, is subject to any overriding legal obligations.

4. It will be a breach of rule 1 if you permit another person to do anything on your behalf which would compromise or impair your ability to comply with any of the core duties.

Justice and the rule of law – 1.01

5. You have obligations not only to clients but also to the court and to third parties with whom you have dealings on your clients' behalf – see in particular rule 10 (Relations with third parties) and rule 11 (Litigation and advocacy).

Integrity – 1.02

6. Personal integrity is central to your role as the client's trusted adviser and must characterise all your professional dealings – with clients, the court, other lawyers and the public.

Independence – 1.03

7. See also rule 3 (Conflict of interests) and rule 9 (Referrals of business).

Best interests of clients – 1.04

8. You must always act in good faith and do your best for each of your clients. Most importantly, you must observe:

- (a) your duty of confidentiality to the client – see rule 4 (Confidentiality and disclosure);
- (b) your obligations with regard to conflicts of interests – see rule 3 (Conflict of interests); and
- (c) your obligation not to use your position to take unfair advantage of the client – see 10.01 (Not taking unfair advantage).

Standard of service – 1.05

9. You must provide a good standard of client care and of work, including the exercise of competence, skill and diligence. Disciplinary action will not always follow where breaches of this duty are minor and isolated.

Public confidence – 1.06

10. Members of the public must be able to place their trust in you. Any behaviour within or outside your professional practice which undermines this trust damages not only you but the ability of the profession as a whole to serve society.

Appendix 8

Lord Falconer's speech from the second reading of the Legal Services Bill

Source: <http://www.publications.parliament.uk/pa/ld200607/ldhansrd/text/61206-0002.htm#06120666000002>

Extended extract from Lord Falconer's second reading speech

1. Legal Services Bill [HL]

3.32 pm

The Secretary of State for Constitutional Affairs and Lord Chancellor (Lord Falconer of Thoroton): My Lords, I beg to move that this Bill be now read a second time.

The Legal Services Bill is an important landmark in the development, reform and modernisation of our framework for legal services regulation and provision.

6 Dec 2006 : Column 1162

The Bill puts consumers' interests at the heart of the regulatory arrangements. It provides for a Legal Services Board to provide strong, independent oversight with day-to-day regulation left to front-line regulators; statutory objectives for those with regulatory duties and principles for the legal profession; alternative business structures to enable lawyers and non-lawyers to work together on an equal footing to deliver legal and other services—external investment will also be possible; a single and fully independent Office for Legal Complaints; and a mechanism to protect consumers if new problems occur.

I pay tribute to Sir David Clementi, whose independent review brought a refreshing new dimension to the debate and set the direction for change which has shaped the thinking of not only Government but the stakeholders. I also thank those members of *Which?*, the National Consumer Council, Citizens Advice, the Federation of Small Businesses, and the Office of Fair Trading who, through membership of our Consumer Advisory Panel, have helped to shape the Bill before your Lordships today. I would also like to record my appreciation for the constructive way in which the leaders of the professional bodies—the Law Society, the Bar Council and others—have approached this major programme of change.

The Bill was published in draft earlier this year. I pay a genuine and particular tribute to the members of the Joint Committee on the draft Legal Services Bill, chaired by the noble Lord, Lord Hunt of Wirral, whom I am glad to see in his place. The committee carried out a very thorough scrutiny of the draft Bill against a pressing timetable. I consider that the Bill before the House today is now much improved as a result of the committee's invaluable work.

The law and lawyers will at some stage touch the lives of just about every member of our society. We have a duty to ensure that the regulatory arrangements are fit for purpose. Our analysis is clear. Three underlying issues have led us to conclude that change in this sector is long overdue. First, there is a lack of consumer confidence in the way in which complaints about lawyers are dealt with. This is rooted partly in the way in which complaints have historically been handled by the Law Society, with well documented problems over the speed and quality of complaints-handling dating back to the 1980s. But it is not the Law Society's problem alone. We hear a great deal about how much better the Bar is at handling complaints. One third of complaints dealt with by the Bar are referred to the Legal Services Ombudsman for reconsideration.

Consumers argue that the handling of complaints takes too long, focusing on technicalities rather than on providing quick and fair redress to the consumer. They argue that they can have no confidence in a system where complaints are dealt with by a lawyer's own professional body. These public perceptions can have a corrosive effect on the reputation of the sector more generally.

The second issue is the potentially restrictive effect of the way in which the professions operate. In March 2001, the Office of Fair Trading published a report,

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Competition in Professions, which argued that such restrictions had the potential to drive up costs and prices, limit access and choice, reduce value for money, and inhibit innovation in the supply of services. That is all to the ultimate detriment of the public.

The third issue is what some have called the "regulatory maze", under which we see a wide range of oversight regulators with overlapping responsibilities and few clear objectives. In July 2003, following an analysis of the regulatory framework, my department published a report which concluded that the current regulatory system was,

"outdated, inflexible, over complex and insufficiently transparent",

and we recommended that an independent review be carried out. Later that month, I appointed Sir David Clementi to carry out that review. Sir David published his final report in December 2004. In his foreword, he observed:

"Nothing that I have learnt during the 18 month period of my Review has caused me to doubt the broad validity of the Government's conclusion. The current system is flawed".

The problems are not restricted to oversight regulators. The legal professional bodies have contributed to the "maze" by failing to separate the exercise of their regulatory and representative functions until now. I congratulate both the Law Society and the Bar on their positive and proactive approach to this problem. They have already established separate regulatory boards to provide for a clear separation of these functions. I am very happy to see many members of those bodies watching in the Gallery today.

While our proposals are based largely on those of Sir David Clementi, a number of stakeholders saw a need for further analysis to underpin some of his main recommendations. The department therefore commissioned leading academics to carry out independent research in the following specific areas: how to make an oversight regulator an effective partner of front-line regulators; drivers for, and benefits of, external financing of law firms; internal incentives under various ownership structures; and the competition impact of restrictions on various forms of partnerships. The academics presented their work to the department in July 2005 and this informed the White Paper which we published in October of that year. As I have said, we have also had the benefit of pre-legislative scrutiny and have further refined our proposals in the light of the Joint Committee's very helpful consideration. I shall now try to summarise the Bill.

Part 1 sets out the statutory objectives. Regulators must have clear objectives to guide them in exercising their functions and to provide a basis on which consumers can hold them to account. Part 1 sets out these objectives and principles. They will apply to the LSB, approved regulators and the Office for Legal Complaints. Here we have moved further than Sir David's recommendation and have refined his suggested objective of,

“encouraging a confident, strong and effective legal profession”

so that the Bill refers to,

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“encouraging an independent, strong, diverse and effective legal profession”.

“Independent” was added at the suggestion of the Joint Committee. “Diverse” was added to ensure that the board and approved regulators work together to remove the barriers that exist in the recruitment, retention and progression of legal professionals. We have also included a specific duty for the LSB to have regard to the public interest, again at the suggestion of the Joint Committee.

Part 2 of the Bill makes provision for the new oversight regulator, the Legal Services Board, to provide independent oversight of legal regulatory bodies. While day-to-day regulation should remain with the professions, the LSB will have a range of powers available to oversee approved regulators. The Secretary of State will appoint the chair and members of the LSB, and will do so subject to oversight of the Commissioner for Public Appointments. The Secretary of State can also remove members of the LSB subject only to strict criteria set out at Schedule 1 to the Bill. The Joint Committee expressed concerns about this and suggested that such appointments and dismissals should be made only after full consultation with the Lord Chief Justice. While I can see why that would give comfort to members of the legal profession, I have to say it gives little comfort to consumers, who rightly see the Lord Chief Justice, although he is a man beyond reproach, as another lawyer in the process.

There is nothing unusual about the arrangement proposed in this Bill. The chair and board members of many other regulators may be appointed and dismissed by the relevant Secretary of State; for example, the chair of the Financial Services Authority

has been appointed since its creation by the Chancellor. I see no evidence that the financial sector is either not independent or suffering as a result of that. The chair and members of the boards of the Competition Commission and the Office of Fair Trading are appointed by the Secretary of State for Trade and Industry, without the requirement for external consultation. Again, I see no indication that the UK is any less competitive as a result of that. Of course the Lord Chief Justice himself has been appointed by the Prime Minister for many years. Nobody has suggested that the judiciary lacks independence as a result.

Part 3 of the Bill deals with activities described as “reserved legal activities”. These are the activities that will come under the regulatory control of the LSB such as the provision of advocacy and litigation services. It provides for the offences of offering or providing these services when not entitled to do so. It provides, too, for alterations to be made to the list of these activities by affirmative order. This is an important change because under the present arrangements additional activities cannot be brought under regulatory control without primary legislation. This involves a delay which can mean that consumers remain unprotected for months or even years.

Part 4 of the Bill sets out the arrangements under which the LSB will regulate “approved regulators” such as the Law Society and the Bar Council. This defines the regulatory and representative functions of

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approved regulators and importantly, at Clauses 28 and 29, provides for a proper separation in the exercise of these functions. While the LSB is prohibited from interfering in their representative functions it requires approved regulators to have internal governance arrangements that prevent regulatory decisions being unduly influenced by representative interests. The proper resourcing of regulatory boards is also required.

This part of the Bill also provides the LSB with its range of powers. These are that the LSB may set performance targets relating to the performance of approved regulators and that it may monitor their performance, in Clause 30; exercise a power of direction over approved regulators, in Clauses 31 to 33; publicly censure an approved regulator, in Clauses 34 and 35; fine approved regulators, in Clauses 36 to 39; take over a function or functions of an approved regulator, in Clauses 40 to 43; and remove the designation of an approved regulator, in Clauses 44 to 47. These are significant powers but I believe that the LSB must have available to it the widest range of powers possible. There must be safeguards in the exercise of these powers, and I believe that the Bill provides for this.

This part also sets out the purposes for which a practising certificate fee may be levied by approved regulators and provides for the level of these fees to be approved by the LSB, in Clause 50. It requires approved regulators to have rules to prevent conflicts with the rules of other applicable regulators, in Clauses 51 to 53. It provides a power for the LSB to require information from approved regulators, in Clauses 54 and 55. And it provides for the Office of Fair Trading to make a report to the LSB where it is concerned about competition matters. In cases where the OFT and the LSB's views conflict, the Bill provides for the Secretary of State to decide the matter

after taking advice from the Competition Commission, in Clauses 56 to 60. There is also a provision for the LSB, where there is no suitable regulator and following an affirmative order by the Secretary of State, to act as an approved regulator, in Clauses 61 to 67. Finally, it provides a power, subject to affirmative order, for the Secretary of State to modify the functions of approved regulators in order that they may effectively discharge their regulatory responsibilities, in Clauses 68 and 69.

I move from regulation to alternative business structures. Part 5 provides a means of increasing competition and choice for the consumer. Companies and firms will now be permitted to have different types of lawyers and non-lawyers working together on an equal footing and will be able to do so with the benefit of external investment. In the Bill these alternative business structures are termed “licensed bodies”. The Bill requires any firm or company with non-lawyer owners or managers to be licensed under Part 5 if it wishes to carry out reserved legal activities. These firms and companies will have to seek a licence, either from the board or a designated licensing authority, which must be an approved regulator, and will be regulated by licensing rules and by the requirements of Part 5.

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It is important to note that the Bill also allows practices with different types of lawyers, but no external managers or owners, to emerge in advance of the Part 5 framework being commenced. These “legal disciplinary practices” are not alternative business structures under the Bill, and will not be regulated under Part 5, but the fact that we are allowing them to emerge in advance of alternative business structures answers a key recommendation from the Joint Committee chaired by the noble Lord, Lord Hunt of Wirral.

This also reflects the substance of Sir David Clementi’s proposals for alternative business structures. Mixed lawyer practices, a type of legal disciplinary practice, will come first. Alternative business structures, including multi-disciplinary practices, can then form the next step, but only where the board and licensing authorities judge that these can be regulated effectively. Sir David Clementi supported this approach in his evidence to the Joint Committee, saying:

“I think LDPs are walking and we should learn to walk before we get into the running and sprinting involved in MDPs, but I think it is right that the Bill does not preclude them and actually the Bill facilitates them”.

The Bill provides a number of important safeguards, which also answer the Joint Committee’s concerns about the impact of non-lawyer ownership and management on legal services. These safeguards include: a focus on the work and professional conduct standards of lawyers within alternative business structures, and a duty on non-lawyers to refrain from causing breaches of these standards; requirements for a head of legal practice and head of finance and administration; approval requirements that must be met in relation to external investors; a power for licensing authorities to apply financial penalties, including an appeals procedure and arrangements for recovery of any penalties; the referral of employees and managers to appropriate regulators; arrangements for the disqualification of persons from being involved with

alternative business structures; the suspension and revocation of licences; powers of intervention for licensing authorities; and arrangements for the avoidance of regulatory conflict.

Additionally, we have accepted the Joint Committee's advice that clients of alternative business structures firms should have the same rights to legal professional privilege in their communications with lawyers in these firms as they would if they retained traditional law firms. Clause 182(3) to (6) in Part 8 provide for this. Clause 182(1) and (2) maintain the privilege of certain authorised persons other than barristers or solicitors, currently provided for by Section 63 of the Courts and Legal Services Act 1990.

Clauses 103 to 106 also provide that special kinds of bodies that represent a lower regulatory risk may be treated differently for the purposes of some of the normal requirements of the licensing regime. Such bodies include trade unions, not-for-profit bodies, community interest companies, and other low risk bodies with less than 10 per cent external investment or management. The lesser regulatory impact on those bodies is consistent with the Joint Committee's recommendation. We should make it clear that we do

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not intend the Bill to regulate in any way lay trade union representation, whether whole or part-time in the workplace, nor to place additional burdens on those unions that provide legal advice or representation to their members.

Part 6 deals with legal complaints. This part of the Bill provides for the establishment of a new and independent Office for Legal Complaints. This will provide quick and fair redress and will improve consumer confidence in the system. It also provides that every authorised person must have internal complaints handling arrangements, and approved regulators must set standards for that. We have accepted the Joint Committee's advice that the OLC will operate a scheme with the word "ombudsman" in the title. There will be a chief ombudsman and assistant ombudsman making decisions on individual cases. The Bill provides for the OLC to levy an additional charge on respondents when a complaint is made; a "polluter pays" levy. That is an important measure. It will act as an incentive on providers to place more emphasis on client care and settling complaints "in house" before they reach a stage of no return for both parties.

The Bill provides that an ombudsman may make orders for redress of up to £20,000. While consumers have argued that the level of redress should be set at a higher level, the highest level of redress in the legal sector is currently £15,000; which is for the Law Society. Implementation of the proposals in the Bill will take some time. We have therefore set the level of redress for the OLC at £20,000, but the Bill allows the limit to be altered by negative order of the Secretary of State following a recommendation from the LSB, its consumer panel, or the Office for Legal Complaints. The Bill also recognises the importance of the legal professions in continuing to discipline their members and provides for any matters of professional misconduct to be referred by an ombudsman to the approved regulator concerned for consideration of disciplinary action. Some have argued that the OLC should have the power to delegate the handling of complaints to approved regulators. I do not

consider that would command consumer confidence. However, I do think it is right that an ombudsman should be able to seek expert assistance, and that is enabled by paragraph 15 of Schedule 15.

There have been concerns that there should be an appeal from decisions of an ombudsman. Our aim is to strike a balance between quick, informal redress on the one hand and the rights of the parties to challenge the result on the other. The model that we have chosen, based on the Financial Ombudsman Service, does just that. It combines both adequate protection for the parties' human rights with a swift and fair redress system. We envisage the scheme having an internal review mechanism, so that parties can challenge a caseworker's recommendation and request that an ombudsman reconsider that recommendation. We do not think that an external appeal mechanism is required—it is not required by Article 6(1) and it is not a feature of ombudsman scheme best practice. That approach is supported by *Which?*, which, in its evidence to the Joint Committee, said:

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“We support the view that there should be no external appeal body for decisions of the OLC, providing consumers still have the right to go to court”.

Consumers will have the right to go to court and judicial review will be available to both parties.

Part 7 provides for the LSB to publish guidance about the operation of the Bill or the regulatory arrangements generally. It provides for the LSB to enter into voluntary arrangements with the intention of improving standards of service and promoting best practice in connection with the carrying on of any legal activity. It is right that those who are subject to regulation should pay the cost of that regulation, as in Clauses 166 and 167. The alternative, that the changes should be funded through general taxation, does not seem appropriate. The Bill therefore provides for the LSB to make rules providing for the imposition of a levy on approved regulators, bodies designated under Section 5(1) of the Compensation Act 2006, or any other persons prescribed by the Secretary of State by order.

Parts 8 and 9 provide for amendments to existing legislation to align it with the provisions of this Bill. The rules of the Solicitors Disciplinary Tribunal are to be subject to oversight of the LSB. The courts will be able to make a costs order in civil cases in favour of a party whose legal representation has been provided on a pro bono basis. Any such awards will be at the discretion of the court and will be paid directly to a designated charitable body established to administer moneys to organisations who undertake pro bono work. Also, the Bill will give effect to the Legal Profession and Legal Aid (Scotland) Act 2006, once enacted, which provides for new arrangements for handling complaints about lawyers in Scotland and removes functions from the existing Scottish legal services ombudsman. Those parts contain arrangements for the parliamentary control of orders and regulations made under the Bill.

Overall, these measures will help to restore consumer confidence in the handling of complaints and regulation generally. They will enhance competition by enabling lawyers to provide services in new ways. They will sweep away the decades of piecemeal reform, putting in its place a new regulatory system with clear statutory objectives and a single and independent regulator which is fully and publicly accountable.

I realise that the proposals I have set out represent significant reforms. But I believe they are essential to ensure that consumers can have confidence that there is a modern, flexible, transparent and independent system of regulation in place that can and will act to protect their interests.

I apologise for taking so long, but the provisions of the Bill are complicated. While it is right that over the coming months we should consider the detail of these proposals, I hope we can agree that there is a compelling case for change. I commend the Bill to the House.

Moved, That the Bill be now read a second time.—(*Lord Falconer of Thoroton.*)

Appendix 9

Report of the Review of the Regulatory Framework for Legal Services in England and Wales, Chapter B

Source: <http://www.legal-services-review.org.uk/content/report/chapter-b.htm>

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

Chapter B

Regulatory Models

Introduction

1. This Chapter looks at the strengths and weaknesses of different models for the regulation of legal services. It also looks at what powers should rest with each party in the regulatory structure.
2. The regulatory system was described in the Scoping Study annexed to the Government's report published in July 2003 entitled 'Competition and regulation in the legal services market'. Some of the bodies described in the Scoping Study are front-line regulators, some are oversight or superregulators.
3. Among the front-line practitioner bodies, five combine regulatory and representative functions: the Law Society, the Bar Council, the Institute of Legal Executives, the Chartered Institute of Patent Agents and the Institute of Trade Mark Attorneys.
4. Among the oversight regulators, the Secretary of State has significant powers over many areas of practice and rules. In particular, under the Courts and Legal Services Act 1990 as amended, he has the right to approve (following proper consultation with the judiciary, the competition authorities and an advisory panel) applications from professional bodies seeking to become authorised to grant rights of audience or rights to conduct litigation to their members. Currently four professional bodies are authorised to grant general or limited rights to their members:-
 - the Bar Council;
 - the Law Society;
 - the Institute of Legal Executives; and
 - the Chartered Institute of Patent Agents.

The Secretary of State has the power to 'call-in' rules relating to the grant or exercise of rights to conduct litigation and rights of audience if he considers that they are unduly restrictive. He also has powers (under the Administration of Justice Act 1985 as amended) concerning the rules made by the Council for Licensed Conveyancers. The Master of the Rolls has broad regulatory oversight powers over the Law Society, including the right of admission to the Roll.

5. The Consultation Paper set out two main regulatory models. The first, referred to as Model A, involves stripping out all regulatory functions from the front-line practitioner bodies. All these functions would be vested in, and carried out by, a Legal Services Authority (LSA), which would interface directly with the providers of legal services. Model B gives responsibility for the regulatory functions to front-line practitioner bodies, but creates a Legal Services Board (LSB), which provides consistent oversight in respect of all the bodies.

6. The Consultation Paper made clear that these two Models are polarised constructs and on either model there could be a number of variants. The variants arise because it is possible to take a different view about each of the regulatory functions; it is not necessary that all should be given to the new regulator, under Model A, or all given to front-line practitioner bodies, subject to oversight, as envisaged under Model B. One important variant, labelled as B+, would be to require each of the front-line bodies to separate their regulatory functions from their representative functions.

7. The Paper identified five core functions of regulation:-

- entry standards and training;
- rule making;
- monitoring and enforcement;
- complaints; and
- discipline.

As in the Consultation Paper, this Chapter deals with the first three functions. Chapter C deals with complaints and discipline.

8. The key functions of a body with representative powers would include representation in areas such as rates of pay for legal work, practising rights internationally, policy issues for government and other interested parties, information services for members and information for prospective members and clients.

9. Against this background the Chapter takes the issues in the following order:-

- paragraphs 10 to 25 examine the case for bodies splitting their regulatory and representative functions;
- paragraphs 26 to 32 look at the advantages and disadvantages of Model A and Model B+;
- paragraphs 33 to 40 look at governance issues for front-line bodies with regulatory powers, concentrating on the Bar Council and the Law Society;
- paragraphs 41 to 52 look at the position of other front-line regulatory bodies;
- paragraphs 53 to 60 look at issues around the powers of the Legal Services Board, and the application of international law to the regulation of legal services;
- paragraphs 61 to 69 examine the issue of costs in respect of different regulatory models; and

- paragraphs 70 and 71 set out broad conclusions.

Regulatory and representative functions

10. As noted above five of the legal professional bodies (the Law Society, the Bar Council, the Institute of Legal Executives, the Chartered Institute of Patent Agents and the Institute of Trade Mark Attorneys) combine both regulatory and representative functions. The Consultation Paper made clear that one of the central issues of this Review is to explore whether this hybridity meets the Terms of Reference.

11. The distinction between regulatory and representative functions of a professional body is not a theoretical concept incapable of being applied in practice. Under the Access to Justice Act 1999 professional bodies are required to distinguish between the two functions and to break them out separately in the annual practising certificate fee, and they have done so.

12. In determining whether regulatory and representative functions need to be separated, I judge that four aspects of the Terms of Reference have particular relevance:-

- i. that the regulatory arrangement chosen should promote the public and consumer interest;
- ii. that it should promote competition;
- iii. that it should promote innovation; and
- iv. that the regulatory arrangement should be transparent.

Each of these is dealt with in turn.

13. The first consideration relates to the **public and consumer interest**. The majority of respondents to the Consultation Paper argued that on these grounds the regulatory and representative roles of professional bodies should be split. For example the Council for Licensed Conveyancers stated in their response to the Consultation Paper: *“It is difficult to understand how one body can effectively both regulate a profession and also represent and lobby for its interests without prejudice to either its regulatory or representative functions.”* There is a conflict of interest between the two roles which should be tackled.

In a regulatory body the public interest should have primacy. Issues such as changes in practice rules should be examined, not against the wishes of the membership, but against the test of the public interest. In a representative body the interests of the membership should have primacy. It is hard to conclude that the decision by the leadership of the Law Society in the mid 1990s to restrict funds to its complaints handling operation was anything other than a body placing its representative interests ahead of its regulatory responsibilities, to the detriment of the public and consumer interest.

14. Even where a body does place the public interest ahead of that of its members, there remains an issue of perception. For example, it may be that each of the restrictive practices to be found in the practice rules within the Law Society or at the Bar has operated in the public interest. But, perhaps because many senior lawyers

have been conditioned by the system that they grew up with, there is a perception that the issues have not historically been addressed with the vigour and independence to be expected of a regulatory body.

15. Just as there can be criticism that professional bodies give insufficient weight to the public interest, so there can be criticism from members of professional bodies that their respective bodies give insufficient attention to representative needs. For example, many high street solicitors have argued in the past that the Law Society has not represented their interests sufficiently in areas of the law which have been opened up to competition.

16. There has also historically been criticism from employed barristers and non-practising barristers that the Bar Council has not given sufficient weight to regulatory issues which affect them. Professional bodies carrying out regulatory functions in the public interest should deal with their members in an even-handed way. But on the basis of the evidence collected in this Review, I formed the view that the Bar Council places the interests of the employed Bar second. Indeed this position was in part acknowledged by the then Chairman of the Bar who wrote in the Bar Council's Annual Report published in April 2003 that "it is no longer acceptable, in the twenty-first century, for the employed Bar to be treated as second-class citizens".

17. In terms of the public interest, the potential conflict between regulatory and representative issues is most clear in those issues which deal with the negotiation of fees for lawyers. Both the Law Society and the Bar Council have fought hard in recent years on behalf of their members in connection with rates for legal aid work. It is reasonable that a representative body should use its influence in the interests of its members to raise remuneration levels funded by the State; but the function of representing members in such matters sits uneasily with the regulatory responsibility to act in the public interest.

18. The Terms of Reference require that the regulatory framework should promote **competition**. It is, however, particularly difficult for professional bodies who combine both regulatory and representative roles to deal with competition issues. Regulatory bodies should be expected to encourage open competition, subject to maintaining quality standards; representative bodies have a legitimate right to fight their corner, warning that the public may suffer if the market is opened too widely. This is a difficult set of conflicting issues for one body to balance. The dual role caused difficulty for the Law Society in its consideration of the extension of conveyancing rights beyond its own monopoly in this area. It also caused difficulty for the Bar Council which fought hard to protect the monopoly rights of its members in higher courts, and to prevent their extension to solicitors, under the Courts and Legal Services Act 1990.

19. In addition to competition, the Terms of Reference refer to the regulatory system encouraging **innovation**. The Law Society has sought to carry through reforms to its practice rules. But it has been clear that, in some cases where change has been proposed by the leadership, it has been held back by the difficulty of getting it through its large representative Council. The Bar Council has argued that it regularly reviews its own practices and makes changes where it considers it appropriate. But there is little evidence that the Bar has been a force for innovation in customs and practice. It fought hard against the extension of higher court rights to solicitors, referred to above. It did introduce changes to the rules on direct access under the 'Bar Direct' proposals; but the more recent proposed change to direct access, set out

in the Kentridge Report [[Endnote 10](#)], was not a proactive step by the Bar, but a reactive response to the Office of Fair Trading's challenge in its report 'Competition in professions'. [[Endnote 11](#)]

20. There is a further complication, and one which touches upon **transparency**, in connection with the Bar. It is that the Bar Council shares regulatory responsibility in respect of some functions with the Inns of Court. These shared regulatory functions include education, entry standards and disciplinary issues. The four Inns (Middle, Inner, Gray's, Lincoln's) have responsibilities for training students, for the granting of scholarships and for admission (individuals must be called to the Bar by one of the four Inns) and they also have an important role in the disciplinary process.

21. The Inns are run by benchers, new benchers being elected by existing ones from among the distinguished members of their respective Inn. Under an Agreement reached in 1987, updated in August 2001 [[Endnote 12](#)], the Inns agreed "to accept and to implement the general policies laid down from time to time by the Bar Council" subject to certain conditions. The document states that the Agreement has no force in law and that any Inn may cancel the understanding with 12 months notice. The Agreement followed the report written by Lord Rawlinson dealing with uncertainties in the relationship between the Bar Council and the Inns.

22. The Agreement, including the right of cancellation, has allowed some to argue that the Inns have real power, underlined by the fact that at the head of each Inn is often a senior judge (this year there are three Court of Appeal judges and one retired Law Lord) with precedence over the barristers who run the Bar Council; and that this position of strength is further underlined by the fact that, through their property interests, the Inns have wealth and contribute significantly to the Bar Council's finances. By contrast others argue that, whatever may be said in the Agreement and whatever may be the financial arrangements, regulatory power has now irreversibly transferred to the Bar Council. The truth probably rests somewhere in between. The Agreement contains a complex formula for dealing with deadlock between the parties. This has never been used and in practice it appears that matters of particular concern to the Inns, for example the issue of deferral of call, proceed in a consensual manner, often at the speed of the slowest. A key body, and at the centre of determining the consensus between the Bar Council and the four Inns, appears to be the Council of the Inns of Court. A number of people at the Bar, and almost everybody outside the Bar, seem to be unaware of the existence of this important body.

23. In my discussions with the Bar Council and with the Inns there was a recognition from some that the Agreement should be revisited. As things stand, it would be hard for any Reviewer to conclude that it is clear where regulatory authority, and hence responsibility, lies as between the Bar Council and the Inns.

24. As noted, my Terms of Reference include a requirement to propose a framework that promotes the public and consumer interest, promotes competition, promotes innovation and is transparent. The framework needs to meet these criteria, and be seen clearly to do so. For the reasons set out 32 above, I do not believe that the current combination of regulatory and representative powers, in particular within the Law Society and the Bar Council, permit a framework that gets close to meeting this requirement. I do not believe that the combination of functions results in the public interest being consistently placed first. I do not believe that the combination provides

the right incentives to encourage competition. I do not believe that it provides a framework for promoting innovation. Finally, I do not believe that at the Bar the arrangements between the Bar Council and the Inns are satisfactory, and they are plainly not transparent.

25. A key recommendation of this Review is that the regulatory and representative functions of front-line regulatory bodies should be clearly split.

The relative advantages of Model A and Model B+

26. The Consultation Paper argued that a split between regulatory and representative functions could be achieved in a number of different ways. Model A provides the clearest split since all regulatory functions are removed to the Legal Services Authority. Model B+ leaves the front-line regulatory functions at practitioner body level, subject to consistent oversight by the Legal Services Board, but requires the bodies to split their regulatory arm from their representative arm, with separate governance arrangements.

27. The broad arguments for Model A are that:-

(a) the principle that the regulatory framework should be independent of those being regulated is better achieved by Model A since it removes one of the self-regulatory elements within the framework;

(b) the creation of a single regulator simplifies the system, involving far fewer regulatory bodies. In turn this is likely to lead to clearer lines of responsibility and greater accountability for the objectives of the regulatory system set out in Chapter A;

(c) a single regulator provides a clear forum for dealing with any conflicts in objectives within the regulatory regime. It is better that resolution of such conflicts rests within one accountable body, rather than in separate bodies where deadlock may arise;

(d) a single regulator is likely to give rise to greater consistency, providing a single coherent system of authorisation, supervision and investigation. This arises in part because Model A takes a more service driven approach to regulation. It would be possible to divide the rule-making body so that it was able to make rules for different services such as, for example, advocacy, conveyancing and immigration; and this might lead to a more even 'playing field' and in turn to increased competition. Such a shift to service driven regulation, away from professionally driven regulation, might be accompanied by a more consumer driven approach, one that emphasised the need to satisfy the consumer rather than sustain the standing of the professional provider;

(e) a single regulator should permit significant flexibility in the system. New services to regulate would not require new bodies to deal with them, as the decision in 1999 to regulate immigration services led to the creation of the Office of the Immigration Services Commissioner. Similarly it would make it easier to regulate Legal Disciplinary Practices which bring together lawyers from different professional backgrounds; and

(f) a single regulator should facilitate more consistency in training and entry standards, permitting common training between different legal service providers and making it easier to transfer between them.

28. Many of the strengths of Model A can be preserved within Model B+. Model B+ rationalises the oversight function that is currently disparately held by, among others, the Secretary of State for Constitutional Affairs and the Master of the Rolls into one regulatory Board. That Board will have clear objectives against which it will be held accountable; and the front-line regulators to whom regulatory functions may be delegated will act in support, being part of one regulatory system.

29. The specific arguments for Model B+ are that:-

(a) leaving day-to-day regulatory rule-making and oversight as far as possible at the practitioner level is more likely to increase the commitment of practitioners to high standards; such commitment is important, particularly in the area of professional conduct rules, where rules of behaviour and ethical standards should be seen as an aid to raise standards, not as a constraint to be circumvented;

(b) whilst the principle that the legal profession should be independent of Government can be met under Model A, it is more clearly demonstrated in Model B+, where front-line regulatory powers can be exercised at practitioner level. It is a point stressed in most submissions from lawyers, but by others as well;

(c) the consistency promoted by Model A can also be achieved in Model B+, with the LSB setting minimum standards to which front-line regulators would need to adhere in order to be recognised to carry out regulatory functions. Contrary to the argument in paragraph 27(d) above, precise uniformity in standards that a single regulator might lead to may not always be in the public interest or lead to greater competition. Some degree of choice in the type of provider, and the regulatory rules under which they operate, is to be welcomed, subject to a minimum standard being met. It is a point that is made in the submission of the Council for Licensed Conveyancers who argue that not all providers of this reserved service need follow the same rules. The Bar Council makes a similar point in its submission: that the need for consistency in the regulatory regime should not be equated with uniformity, the requirement that an identical set of rules should apply to all lawyers. The Office of Fair Trading also draws attention to the possibility of regulatory choice and competition which Model B+ allows for, putting the LSB "in a position to both encourage such competition, but also to step in if it appeared that such competition was weakening regulation to the point where this was endangering consumer protection";

(d) whilst, as noted in paragraph 27(e), Model A provides significant flexibility in respect of new services, Model B+ does provide a degree of flexibility for an oversight regulator. The LSB could be empowered in respect of such new services: (i) to authorise new bodies to regulate their members offering these services; and (ii) to allow existing bodies to take on regulation of these services. As noted in paragraph 54 below, the LSB would have power to regulate direct, although the intention is that it should be an oversight regulator; and

(e) putting all regulatory functions into one body guarantees that it would become a large organisation; it runs the risk that it might become a large and unwieldy organisation. Model B+, which leaves much of the work with front-line bodies, is less vulnerable to this.

30. A further argument in favour of Model B+ is that the practical transitional arrangements would be much easier to organise than for Model A. Only a small

number of jobs involved in oversight functions would need to move to the new oversight regulator; the great majority of positions would remain as they are, in the front-line regulatory bodies. The risk of losing regulatory expertise during any transitional period would be much reduced.

31. It could be argued that the B+ proposal is reminiscent of the financial services industry before the Financial Services and Markets Act 2000 (FSMA), with a large number of front-line regulatory organisations (some under the oversight regime of the Securities and Investments Board) overlapping in their responsibilities; and that this is a discredited model. It should be recognised, however, that the backgrounds of the financial services industry and of the legal services industry are quite different. In the financial services industry the big players had no real history of self-regulation: prior to the FSMA the banks were regulated by the Bank of England and the insurance companies by the Department of Trade and Industry (and for a few years by HM Treasury). For these large players the issue of regulatory independence did not arise. It should be recognised also that wider issues about systemic stability, which can be addressed more easily in a Model A framework with a single regulator, do not arise to anything like the same degree in the legal services as in the financial services industry.

32. In judging the strength of the arguments between different models, it is clear that a B+ model would build on the current system to a greater extent than Model A. It is true that, if one started from scratch, with no history of professional bodies with strong roots, one might conclude that Model A should be preferred for its clarity and flexibility. But even those who are critical of what they see as the self-serving nature of the current professionally based arrangements would recognise strengths. The current system has produced a strong and independently minded profession, operating in most cases to high standards, able to compete successfully internationally. These strengths would suggest that the failings of the system, identified in the Scoping Study and covered in this Review, should be tackled by reform starting from where we are, rather than from scratch.

Governance issues for front-line regulatory bodies

33. If regulatory functions, subject to oversight, were to be given to front-line bodies along the lines of Model B+, there would remain the issue of how the split between regulatory and representative functions should be achieved and appropriate governance arrangements. Currently both the Law Society and the Bar Council fall well short of good governance practice for a regulatory body. Regulatory bodies should have lay involvement in their decision making functions. The Law Society has some lay involvement in certain sub-committees; and its main Council of 105 includes 5 lay members. The Bar Council again has some lay involvement in sub-committees, but the Council itself, with around 120 members, has no lay content. The size and make up of both the Law Society Council and the Bar Council are representative in nature. They are inappropriate for a decision making regulatory body.

34. There is a further governance difficulty that both bodies face in their regulatory role and it is the requirement that their Chairman should change on an annual basis, in office long enough for the incumbent to want to ensure that no damage is sustained 'during his watch' but not long enough to see through difficult change. Such a short term of office might be appropriate for a representative role, but not for

a senior regulatory position. Nobody could seriously suggest that the Chairman of the FSA, or the President of the General Medical Council, should change annually. It may be that it would be more difficult to find suitable candidates, but this is an issue that the professional bodies must face if they wish to retain serious involvement in regulatory matters.

35. A key question, asked in the Consultation Paper, is how a separation under Model B+ might be achieved. There are two broad options. One possibility would be institutional separation to create separate bodies for regulation and representation, similar to the split within the medical profession between the General Medical Council and the British Medical Association. The other option would be to ring-fence the regulatory function from the representative function within a single body.

36. The argument in favour of separate institutions is that it makes the split transparent. Against this it would add to the number of bodies which form part of the legal system and is likely to increase costs. Whilst it would be expected that ring-fencing, within a single institution, of regulatory functions away from representative functions would require separate executive and policy teams, it would be possible for a number of common services to be provided under a single senior administrative officer.

37. The Bar Council's response to this specific issue, and to the broader issue of its governance arrangements, is that there is scope for reform. In a letter to me of 21st September 2004 the Chairman of the Bar Council states:-

"We do consider that there is scope for achieving greater transparency and independence of our regulatory functions and that, in particular, the role of the Inns, the role of lay people and some ring-fencing could be considered."

38. The Law Society's response has gone beyond recognition of the scope for reform to consideration of some of the detail. It argues in its response to the Consultation Paper that:-

"The Society also agrees that, in order to retain public confidence, regulatory and representational functions must be - and must be seen to be - clearly separated in any governing body's work."

Last year the Law Society set up a Governance Review Group chaired by Baroness Prashar, First Civil Service Commissioner. Key points of the interim report [[Endnote 13](#)] included the proposals that:-

(i) to deliver greater effectiveness, integrity and transparency, the governance of the Society's regulatory and representative functions should be clearly separated;

(ii) there should be a new Regulatory Board responsible for the Society's regulatory functions;

(iii) to be effective, the Regulatory Board should have 15 to 20 members; (iv) to deliver better public accountability, half of the Regulatory Board should be independent members;

(v) to deliver fairness and inclusiveness, all members of the Regulatory Board should be appointed on merit through a transparent and independent procedure; and

(vi) the Chair (who could be either a solicitor or independent member) should be elected by and from the Regulatory Board.

39. The Law Society has considered these interim proposals and in principle accepted the case for ring-fencing its regulatory from its representative functions; but it has not agreed on the details of how it might be implemented. The recommendation of this Review is that it should be a statutory requirement for a front-line regulatory body to separate out its regulatory and representative functions, but that in regard to detailed governance arrangements the body would need to satisfy criteria laid down by the LSB. There needs to be consistency of criteria, which would not necessarily require uniformity of structure. The recommendations of the interim report by the Governance Review Group represent a good check-list of criteria which the LSB might take into account. In addition to requiring a body to take steps to ensure that the regulatory functions are kept separate from, and not subject to, the representative body, the report calls, as noted above:-

- for a much smaller Regulatory Board;
- for half of the members to be independent; and
- for members to be selected through an independent process based on merit.

Where the LSB was not satisfied that the governance arrangements for a front-line regulator were sufficient, it should be empowered to call for further measures, including the right finally to insist upon institutional separation. If the LSB is to remain an oversight regulator, and have only a small staff itself, it needs to have confidence that the underlying regulatory boards are satisfactorily constituted. The powers of the LSB are discussed further in paragraphs 53 to 60.

40. The B+ Model described above relates to the regulation of members that each front-line body admits to membership. It cannot automatically extend to regulation of others. The question of who should regulate Legal Disciplinary Practices, which are legal practices that bring together lawyers admitted by different bodies, as well as permitting as principals others who are not lawyers at all, is discussed in Chapter F.

Other front-line regulatory bodies

41. The arguments above relate primarily to the position of the Law Society and the Bar Council. The regulatory model chosen needs also to accommodate other bodies with front-line regulatory responsibilities.

42. The **Institute of Legal Executives** (ILEX) carries out both regulatory and representative functions. However, most of its members work for solicitors' firms and are, in practice, regulated by the Law Society. The LSB would need to be satisfied that the representative functions of ILEX did not influence the regulatory side.

43. The **Chartered Institute of Patent Agents** (CIPA) carries out both regulatory and representative functions and would need to take the necessary steps to satisfy the LSB that a proper separation had been made. The broad activity of patent work is an unreserved activity [\[Endnote 14\]](#) and is not the preserve of members of the Institute. However, CIPA is a recognised body under the Courts and Legal Services Act 1990 and is able to grant to its members rights of audience in court and rights to

litigate. It is this part of Institute members' work which brings it within the regulatory net (see Chapter E).

44. A degree of oversight of CIPA's work is provided by the Patent Office, which is an agency under the Department of Trade and Industry. In particular the Patent Office has oversight of qualifying examinations. It is proposed that oversight powers should move to the LSB, removing the Patent Office from a regulatory role, although it would be expected that the LSB and CIPA would wish to consult with the Patent Office in respect of relevant changes to regulatory arrangements.

45. The position of the **Institute of Trade Mark Attorneys** (ITMA) is broadly similar to CIPA, except that it is not at present a recognised body under the Courts and Legal Services Act 1990. However it has applied for such recognised body status. In principle Ministers have approved the application and it remains subject to an Order in Council to be laid and debated in Parliament over the next few weeks. If Parliamentary approval is obtained, this would place ITMA on the same footing as CIPA.

46. The **Council for Licensed Conveyancers** is solely a regulatory body, and there should be no difficulty in it fitting into a Model B+ framework. In its response, as already noted, the Council argues strongly that there needs to be clear separation between regulatory and representative functions; and it argues also for improved oversight arrangements.

47. The **Notarial Profession** also already distinguishes between regulatory and representative functions. It is distinctive amongst legal providers in England and Wales because the profession is primarily concerned with documents which are to take effect abroad and not in this country. Front-line regulatory powers are exercised by the Master of the Faculties through the Faculty Office. Under ecclesiastical law [Endnote 15], the Master of the Faculties is also Dean of the Arches and Auditor [Endnote 16], and this joint role must be held by one person, who must be a senior lawyer and a member of the Church of England. Under the Ecclesiastical Licences Act 1533 the Archbishop of Canterbury is effectively the oversight regulator. The Faculty Office's response to the Consultation Paper noted that I had found the system "somewhat anachronistic". [Endnote 17]

48. The majority of notaries are also solicitors and it would be better in my view if the oversight function of this secular legal activity moved from the Archbishop to the LSB. In its response to the Consultation Paper, the Faculty Office argues that this might be difficult since the international recognition of notaries in England and Wales rests in part on the independence of the Archbishop. But the LSB will also need to be able to demonstrate independence from Government (as discussed in Chapter D). It should be emphasised that the proposed changes relate solely to the secular legal activities of concern to the Master of the Faculties.

49. The position of the **Immigration Services Commissioner** (ISC) is complicated by two issues. The first is that the ISC is both a front-line regulator and an oversight regulator. The ISC has told me that approximately 80% of his resources are spent on direct regulatory functions and 20% on oversight functions. The second issue is that his jurisdiction covers not only England and Wales but also Scotland and Northern Ireland.

50. The ISC directly regulates those immigration advisers and immigration service providers who are not members of designated professional bodies (DPBs) and decides if they are 'fit and competent'. The ISC has oversight powers in respect of DPBs (where members provide similar services). The professional bodies designated by the Immigration and Asylum Act 1999 are: the Law Societies of England and Wales, of Scotland, and of Northern Ireland; the Bars of England and Wales, and of Northern Ireland; the Faculty of Advocates in Scotland; and ILEX. The ISC reports annually to the Secretary of State at the Home Office. He keeps under review the list of DPBs and must notify the Secretary of State at the Home Office if he considers that a body is failing to provide effective regulation in this field.

51. So far as England and Wales are concerned, it is proposed that the dual role of the ISC should cease, and the oversight function in respect of the designated bodies within England and Wales (the Law Society, the Bar Council and ILEX) moved to the LSB. This would leave the ISC as a frontline regulatory body, in turn answering to the LSB. In respect of England and Wales he would no longer report directly to the Secretary of State at the Home Office, although the ISC and the LSB would want to consult carefully with the Home Office in respect of any proposed changes in rules or standards.

52. In respect of Northern Ireland and Scotland, in the absence of any further change, the ISC would remain as he is, retaining his dual role. I would regard this as an unsatisfactory position but issues in respect of these jurisdictions are outside my remit.

Powers of the Legal Services Board and the application of international law to the regulation of the legal profession

53. Under the Courts and Legal Services Act 1990, the Secretary of State has powers to authorise bodies who wish to grant rights of audience or rights to conduct litigation, or to revoke such designation. He also has power over the rule-making process in relation to those two areas; authorised front-line bodies have to submit such rules or changes thereto to him for approval, and he can also 'call-in' any such rules that he believes to be unduly restrictive.

54. The recommendation in this Review is that these oversight powers of recognition and 'call-in', presently held by Government, should be vested in the Legal Services Board. In addition, and to provide the LSB with the maximum regulatory flexibility, I consider that these powers, which currently include only certain practice rules, should be extended to include all rules of those bodies regulated by the LSB. Indeed, as far as is practicable, I recommend that all regulatory powers be vested in the LSB, with the LSB required to delegate day-to-day regulatory operations (subject to its oversight) to recognised front-line bodies, where such bodies satisfy the LSB that they are competent to handle regulatory functions and have set appropriate governance arrangements to deal with such functions without conflict. The LSB would retain the right to carry out regulatory functions direct, in the absence of a recognised front-line body. But it is intended that as far as possible the LSB should be a small oversight body, so delegation should be expected, subject to the LSB's satisfaction about competence and governance arrangements as set out above.

55. As noted, it is recommended that the LSB, consistent with the delegation of day-to-day regulatory matters to front-line recognised regulatory bodies, would have the

power to approve rule changes by recognised front-line bodies, and the power of 'call-in' in respect of existing rules. It would exercise its powers against the stated objectives of the regulatory regime discussed in Chapter A. This would include a public interest test and a competition test.

56. It is for consideration whether, as suggested by the Office of Fair Trading in their response, the LSB should have an obligation to seek competition advice from the OFT when exercising its powers to approve professional rules or applications from professional bodies to be recognised "for the purposes of qualifying and supervising members to provide services". I would favour such an obligation on the LSB; and it would mirror the current obligation within the Courts and Legal Services Act on the Secretary of State to consult when exercising his powers in this area.

57. I recommend against primary legislation vesting regulatory powers direct with front-line practitioner bodies. In the first place it could introduce significant inflexibility. The Law Society's regulatory powers derive primarily from statute, and this has created problems, including the inability to introduce the liberalisation reforms within the 'Legal Practice Plus' proposals, because of the inflexibility of the statutory framework. It might also inhibit mergers and de-mergers of front-line bodies if they take their regulatory powers from statute. Further, vesting the regulatory powers in the LSB makes clear that the front-line bodies take their regulatory powers from the Board; and it reduces the prospect of regulatory deadlock. These arrangements would give the LSB significant powers as an oversight regulator; but its powers would be circumscribed by transparency and accountability arrangements to be expected of a regulator, as discussed in Chapter D; and there would remain the safety net of judicial review.

58. The arrangements set out in this Chapter would require primary legislation, not least because the current arrangements are in large part statutory and would have to be repealed. Any new arrangements would need to be consistent with European Community law. Additionally they ought to take into account what the United Nations has said about the role of lawyers; and also take into account standards and conventions in other international jurisdictions, particularly within the European Community. These issues are important, self-evidently because the proposed regulatory system would need to be consistent with any applicable international law, but also because any arrangements which ignored international standards and conventions might affect the ability of lawyers in England and Wales to continue to compete successfully overseas. The latter point is particularly stressed in the submission from the City of London Law Society.

59. European Community law does not mandate required structures for the regulation of lawyers. The Bar Council draws attention to a resolution of the European Parliament which supports self-regulation as having a necessary role to play in the regulation of the liberal professions. But recent case law of the European Court of Justice if anything confirms that Member States retain the power to regulate the legal profession to a very considerable degree, even down to setting fee rates. In Case C-35/99 *Arduino*, the Court confirmed that the Italian system for regulating the legal profession was not an agreement between undertakings - which would fall within Article 81 of the Treaty which prohibits agreements which appreciably restrict competition - but a state measure, given that the Government retained substantial decisionmaking power and controls. Although the Italian Government was bound

under Article 3(1)(g) of the Treaty not to introduce measures which would unduly distort competition, it was entitled to take proportionate measures for regulating the profession in the public interest, including setting fee levels for the Italian Bar. There was no suggestion that Government intervention of this kind infringed Community principles. Commissioner Monti, commenting on that judgment in a speech to the Bundesanwaltskammer in March 2003, said:-

“The Arduino judgment clarifies that Member States have the right to regulate a profession. This is no surprise as in the absence of harmonisation at the European level, Member States have the primary responsibility for defining the framework in which professions operate. It went on to say that Member States can associate professional bodies in this task as long as they retain the decision-making powers and establish sufficient control mechanisms. They must not abdicate their powers to professional bodies without clear instruction and control.”

60. I have looked carefully at what the United Nations basic principles say about the role of lawyers. I have also looked at how the legal profession is organised in a number of different European states. The legal advice I have received on these and related issues is set out in Appendix 2. The conclusion I draw is that none of these considerations would prevent a Model B+ arrangement and practice of the type I propose, established under UK primary legislation. EU law recognises that law societies and bar associations may be subject to oversight. International bodies should welcome a model where the oversight function would come from an Independent Regulator with clear objectives, rather than as at present a model where much of the oversight rests with Government Departments. The analysis does not suggest that a Model A arrangement is precluded either. But the detailed governance arrangements for a Legal Services Authority, its relationship with the professions and its independence from Government, would require further consideration.

Costs

61. The Consultation Paper commented that the issue of costs would be an important one to look at before reaching a conclusion on the preferred model for a regulatory framework. A number of respondents said that Model A would be more expensive. They provided no data to support this assertion. Ernst & Young were commissioned to report on the costs of the current system and on the possible costs of the changes discussed in this Review. Their Report is set out in Appendix 3.

62. The Ernst & Young Report indicates that the cost of the regulatory system for 2003/04 was of the order of £81 million (up from approximately £69 million in the previous year). The total revenue of the industry is estimated to be over £18 billion [[Endnote 18](#)] (the legal aid budget itself is £2.0 billion) and, based on this estimate, the rough cost of the regulatory system is well below 1%. It is recognised that this is the external cost, and that the full cost would need to include the internal costs which practitioners bear in areas such as compliance.

63. The total estimated system cost of around £81 million in 2003/04 may be broken down between, on the one hand, the regulatory costs of entry standards and training, rule making, and monitoring and enforcement, and on the other, the costs of complaints and discipline. Consistent with paragraph 7 this Chapter deals with the first three functions (in total £46 million); Chapter C deals with complaints and discipline (in total £35 million).

64. The cost attributable to the first three regulatory functions of £46 million is an estimate, and subject to a number of points. Of these, one of the most important is that members of professional bodies, in particular the Law Society and Bar Council, and their sub-committees, give much of their time free. This is not included in the above costs. A further complication arises from judging the time cost of oversight regulators such as the Master of the Rolls and Government Ministers.

65. Of the cost of the first three regulatory functions, the largest constituent part is unsurprisingly the Law Society. The Bar Council is the next largest element. In reaching a judgment about the optimal structure, however, it is the aggregate cost of the system that matters, rather than the cost of any individual part. The Bar Council in its submission refers to the costeffectiveness of their system. But, of course, they are regulating a branch of the legal profession which is primarily dealing with referred work. It is not the cost of their system which is critical to reaching conclusions, but the total cost of the regulatory framework.

66. The Ernst & Young Report attempts to judge how the costs might look if either Model A or Model B+ were adopted. The key assumptions on which the estimates have been based are set out in their Report and it should be recognised that there is a significant element of judgment in the analysis. In practice a good deal would depend upon how the regulatory body chose to interpret its role under either model.

67. The broad estimate of the costs of Model A is around £47 million, similar to the cost of the current system. In the case of Model A it has been assumed that costs would rise, if regulatory functions were moved to a single regulator, from less uncostered practitioner time. Against this, there would be certain economies through collapsing various front-line regulators into one body.

68. The broad estimate of the costs of Model B+ is around £50.5 million. The main additional cost is that of the new Legal Services Board, estimated at around £4.5 million. The Board needs to have the resources to deal with its oversight functions in an efficient manner. It is a point made by the Council for Licensed Conveyancers who write:-

“Changes to statutory rules proposed by the current regulators have been delayed because of the lack of clear guidelines and procedures for their approval by the DCA. Whatever model is adopted the processes for the future scrutiny and amendment of Rules must be both speedy and efficient.”

Relative to the current system, some savings would arise under Model B+ from bringing existing oversight regulators together. The additional cost of Model B+ would be less if a higher cost were attributed in the costing of the current system to the time of Ministers and the Master of the Rolls.

69. On the assumptions set out in the Report, the costs of Model B+ would be more than those of Model A. But the transitional costs and risks of moving to Model A, referred to in paragraph 30 above, are likely to be greater. Overall I do not believe, notwithstanding the element of estimate this exercise has involved, that the issue of differential cost should be a key determining factor in the choice between Model A and Model B+.

Conclusion

70. I conclude that regulatory functions (other than complaints and discipline which are the subject of Chapter C) are best dealt with by what the Consultation Paper referred to as Model B+. It provides for the setting up of an oversight regulator, the Legal Services Board, and separation of regulatory from representative functions within the front-line regulatory bodies. I believe that this builds on the existing system. There are good arguments for preferring this arrangement, and the discussion on international issues suggests nothing that is incompatible with international law and practice. I think that the issues around costs are not decisive in the choice of regulatory models.

71. I conclude that the way to give effect to the proposals is to vest regulatory powers with the Legal Services Board, with powers to delegate to front-line regulators where it is satisfied as to competence and satisfied also that appropriate arrangements, in connection with governance issues and the split between regulatory and representative functions, have been made. At present the governance arrangements made by the Law Society and the Bar Council (together with the Inns) are inappropriate for their regulatory functions.

Endnotes

10. Report of the Committee to the Bar Council, under the chairmanship of Sir Sydney Kentridge QC, 18 January 2002
11. Competition in professions, A report by the Director General of Fair Trading, March 2001
12. Introduction and Constitutions of the General Council of the Bar and of the Council of the Inns of Court and of the Inns of Court and the Bar Educational Trust, 31 August 2001
13. Governance Review Group: Interim Report to the Law Society's Main Board and Council, May 2004
14. Copyright Designs and Patents Act 1988
15. Ecclesiastical Jurisdiction Measure 1963, s.13(i).
16. Dean of the Arches and Auditor has no regulatory responsibilities for notaries.
17. In Scotland the link between notaries and the Church ceased in 1560.
18. External survey data: ONS 2002, EUROMONITOR 2004

Appendix 10

The Law Society's Corporate Structure

Source: www.lawsociety.org.uk/aboutlawsociety/how/governance



Corporate structure January 2008

