RESEARCH PAPER 07/48
29 MAY 2007

Legal Services Bill [HL]

Bill 108 of 2006-07

This paper discusses the provisions of the *Legal Services Bill [HL]* which is due to have its second reading in the House of Commons on 4 June 2007.

The Bill would establish a new framework for the regulation of legal services in England and Wales. Key elements of the Bill include: a statement of the regulatory objectives of the regulators; the creation of the Legal Services Board intended to be an independent oversight regulator; and the creation of an independent Office for Legal Complaints. The Bill would also provide for arrangements to facilitate alternative business structures, which would enable lawyers and non-lawyers to work together to deliver legal and other services; legal disciplinary practices of different kinds of lawyers would also be allowed.

Catherine Fairbairn

HOME AFFAIRS SECTION

HOUSE OF COMMONS LIBRARY

Recent Library Research Papers include:

07/30	The *Local Government and Public Involvement in Health Bill* Committee Stage Report	22.03.07
07/31	Election timetables	22.03.07
07/32	The *Northern Ireland (St Andrews Agreement) (No 2) Bill* [Bill 84 of 2006-07]	27.03.07
07/33	The *Mental Health Bill* [HL] [Bill 76 of 2006-07]	30.03.07
07/34	The Funding of Political Parties	10.04.07
07/35	The *Further Education and Training Bill* [HL] [Bill 75 of 2006-07]	16.04.07
07/36	Unemployment by Constituency, March 2007	18.04.07
07/37	Direct taxes: rates and allowances 2007-08	18.04.07
07/38	Social Indicators [includes articles: Smoking in public places; the 2007 Census Test]	25.04.07
07/39	Economic Indicators, May 2007	01.05.07
07/40	An Economic Introduction to India	02.05.07
07/41	A Political Introduction to India	02.05.07
07/42	Energy Security	08.05.07
07/43	Unemployment by Constituency, April 2007	16.05.07
07/44	The *Parliament (Joint Department) Bill* [HL] [Bill 94 of 2006-07]	17.05.07
07/45	National Assembly for Wales Elections: 3 May 2007	21.05.07

Research Papers are available as PDF files:

- *to members of the general public on the Parliamentary web site, URL:* ***http://www.parliament.uk***
- *within Parliament to users of the Parliamentary Intranet, URL:* ***http://hcl1.hclibrary.parliament.uk***

ISSN 1368-8456

Summary of main points

The *Legal Services Bill [HL]* was introduced in the House of Lords on 23 November 2006 as HL Bill 9 of 2006-07 and completed its passage through the House of Lords on 15 May 2007. It had its first reading in the House of Commons on 16 May 2007 as Bill 108 of 2006-07. It is due to have its second reading in the House of Commons on 4 June 2007. The Bill follows a process of policy development and consultation proposing reform of the law governing regulation of the legal profession and the handling of complaints against lawyers. A draft *Legal Services Bill* was published on 24 May 2006, which was scrutinised by an ad hoc joint committee drawn from both Houses of Parliament.

The *Legal Services Bill* would establish a new framework for the regulation of legal services in England and Wales. Key elements of the Bill include:

- a statement of the regulatory objectives of the regulators
- the creation of the Legal Services Board (LSB), intended to be an independent oversight regulator
- arrangements to facilitate alternative business structures which would enable lawyers and non-lawyers to work together to deliver legal and other services; legal practices of different kinds of lawyers would also be allowed
- the creation of an independent Office for Legal Complaints

The Government has stated that the purpose of the proposed legislation is to put the consumer first and to address concerns about:

- the current "regulatory maze"
- complaints handling by legal professional bodies who, in the past, have generally both regulated their members and represented their interests
- the anti-competitive effects of some of the rules of the legal professional bodies

Consumer organisations have welcomed proposals to reform complaints handling and also the focus on the interests of consumers. Other interested parties, including the Law Society and Bar Council, supported some of the provisions in the Bill but raised concerns about others including, for example, a perceived threat to the independence of the legal profession resulting from the proposed regulatory structure and the role of the Government.

The Bill as introduced in the House of Lords incorporated a number of amendments designed to address concerns raised by the Joint Committee which scrutinised the draft Bill. It has since been amended considerably during its passage through the House of Lords. Many of the amendments made were Government amendments tabled to meet concerns expressed during the Lords stages of the Bill. For example, the Bill now includes a regulatory objective of protecting and promoting the public interest; and powers which would originally have been exercisable by the Secretary of State would now be exercisable by the Lord Chancellor (who is required under his oath of office to respect the rule of law). It would not be possible to transfer these functions to another Minister simply by a transfer of functions order.

The Government also suffered a number of defeats on other amendments which were successfully pressed. The Lord Chancellor's power to appoint the Chair and to appoint and

remove other members of the LSB would now have to be “with the concurrence of the Lord Chief Justice”. This was seen by supporters of the amendment as a means of bolstering the independence of the legal profession from Government. The threshold for intervention by the new LSB has been raised and the Bill would specify that statements of policy issued by the LSB must respect the principle that primary responsibility for regulation rests with the professional bodies. These amendments were designed to address the concerns of those who queried whether regulation by the LSB would be “light touch”.

Further successfully pressed amendments addressed concerns which had been raised about the alternative business structure (ABS) provisions and the potential impact on access to justice. The Bill now specifies that this is a factor which must be considered before any ABS licence could be granted. In addition, no order may be made to bring Part 5 into force until after consideration by both Houses of Parliament of a comprehensive report to be commissioned by the Lord Chancellor from an independent source analyzing the advantages and disadvantages which might be realistically expected to flow from the implementation of the ABS provisions.

The proposals relating to complaints handling were also the subject of Opposition amendments. The envisaged “polluter pays” levy was heavily criticised; this could have required a contribution to the cost of processing a complaint which was not upheld, from the person against whom the complaint was made. The Bill now provides that costs could be recovered in more limited circumstances. In addition, the Bill would now allow the delegation of customer service complaints handling to an approved regulator; the Bar, whose previous record in this area had been praised, had pressed particularly strongly for this.

This Bill extends only to England and Wales, except for the provisions of clauses 196 and 197(1) and Schedule 20 which extend to Scotland, and any amendments or repeals of legislation which extends to Scotland or Northern Ireland, which have the same extent as the enactment (or relevant part of the enactment) to which the amendment or repeal relates.

CONTENTS

I Introduction and background

Different parts of the legal services market have different professional bodies. For example, the Law Society is the professional body for solicitors and the Bar Council is the professional body for barristers. Other bodies, such as the Legal Services Ombudsman, oversee these primary regulators. There are restrictions on the types of business structures within which legal services may be provided. Further restrictions imposed by some existing regulators prohibit lawyers from entering into partnership with non-lawyers and prevent unregulated persons from being formally involved in the management or ownership of such businesses. Different regulators maintain their own complaints-handling and disciplinary arrangements.

The Bar Council and the Law Society have already implemented measures to separate the regulatory and representative elements of their work.

Reform of the regulation of the legal profession and other related issues have been under consideration for some time.

A. OFT report

The Office of Fair Trading (OFT) published a report, *Competition in professions*, in March 2001.[1] The report followed a review of restrictions on competition in professions conducted by the OFT under section 2 of the *Fair Trading Act 1973* which was announced in the 1999 pre-Budget Report. The OFT's report was accompanied by a report to the OFT by Law and Economics Consulting Group (LECG).

In a press release announcing publication of the Report, John Vickers, then Director General of Fair Trading, said that professions should be fully subject to competition law and unjustified restrictions on competition should be removed:

> Competition brings consumers lower prices, more choice and new services. The law to combat restrictions on competition should apply as widely as possible and the scope to exclude professional rules from competition law should be removed. There remain numerous restrictions on competition in the professions. Apart from those shown to be necessary for economic efficiency and consumer benefits, restrictions on competition should go.[2]

B. Government consultation and report

Following the OFT report, the Lord Chancellor's Department (subsequently the Department for Constitutional Affairs and now the Ministry of Justice) published a Consultation Paper, *In the Public Interest?*[3] This in turn was followed by a report which set out the Government's conclusions, *Competition and regulation in the legal services*

---

1 OFT 328, http://www.oft.gov.uk/shared_oft/reports/professional_bodies/oft328.pdf

2 Office of Fair Trading press release 10/01, *Reform for competition needed in professions,* 7 March 2001, http://www.gnn.gov.uk/content/detail.asp?ReleaseID=37863&NewsAreaID=2&NavigatedFromSearch=True

3 July 2002, http://www.dca.gov.uk/consult/general/oftrept.htm

market.[4] This report set out various proposals including the Government's support, in principle, for opening the legal services market to new business entities (such as multi-disciplinary practices and corporate entities). The report concluded that "the current framework is out-dated, inflexible, over-complex and insufficiently accountable or transparent... Government has therefore decided that a thorough and independent investigation without reservation is needed".[5]

C. The Legal Services Review

On 24 July 2003, Sir David Clementi was appointed by Lord Falconer of Thoroton, Lord Chancellor and then Secretary of State for Constitutional Affairs (now Secretary of State for Justice), to undertake a review of the regulation of legal services in England and Wales. Sir David consulted in March 2004[6] and published a final report on 15 December 2004.[7] The review body's own press notice announcing publication summarised the report as follows:

> 3. Sir David identifies three key issues arising from his review:
>
> > i) a concern about the current regulatory framework for legal services, in particular its complexity, inconsistency and insufficient regard for the consumer's interest;
> > ii) a concern about the current complaints systems, both as to how efficiently they are run, as well as the principle of lawyers examining complaints against other lawyers;
> > iii) a concern about the restrictive nature of current business structures which have changed little over a considerable period of time. They include a number of restrictive practices covering the way lawyers work.
>
> 4. To address these issues, Sir David makes 6 key recommendations. The key recommendations of the Report are:
>
> <u>The establishment of a new regulatory framework</u>
>
> i) The Legal Services Board, a new legal regulator to provide consistent oversight of the front-line bodies such as the Law Society and Bar Council.
> ii) The Legal Services Board to have statutory objectives to include promotion of the public and consumer interest.
> iii) Regulatory powers to be vested in the Legal Services Board, with powers to devolve regulatory functions to front-line bodies, subject to their competence and governance arrangements.
> iv) Front-line bodies to be required to make governance arrangements to separate their regulatory and representative functions.

---

4 July 2003, http://www.dca.gov.uk/consult/general/oftreptconc.htm

5 http://www.dca.gov.uk/consult/general/oftreptconc.htm#part2

6 *Consultation Paper on the Review of the Regulatory Framework for Legal Services in England and Wales,* March 2004, http://www.legal-services-review.org.uk/content/consult/review.htm

7 Sir David Clementi, *Review of the Regulatory Framework for Legal Services in England and Wales Final Report,* December 2004, http://www.legal-services-review.org.uk/content/report/report-chap.pdf

The establishment of new complaints systems

v) The Office for Legal Complaints, a single independent body to handle consumer complaints in respect of all members of frontline bodies subject to oversight by the Legal Services Board.
This should provide a complaints system which is easy to access and independent in dealing with consumer complaints.

The establishment of alternative business structures

vi) Legal Disciplinary Practices, law practices which bring together lawyers from different professional bodies, for example solicitors and barristers working together on an equal footing, and permit non-lawyers to be involved in management and ownership. The safeguards to be proposed by the Legal Services Board should include a 'fit to own' test. Such practices should encourage new capital and new ideas in promoting cost-effective consumer friendly legal services.

Summing up his Report, Sir David said:
On the regulatory framework: "The current regulatory system is focused on those who provide legal services. The new framework will place the interests of consumers at its centre."
"The current regulatory system is flawed. There are no clear objectives and principles which underlie the system, and it has insufficient regard to the interests of consumers. The current system of oversight of the front-line bodies such as the Law Society and Bar Council is confused."
"I believe that the current governance arrangements of the Law Society and the Bar Council are inappropriate for the regulatory tasks they face. I am recommending that these bodies should split their regulatory and representative functions."
On the complaints system: "I believe there is a strong case for independent handling of complaints against lawyers. The new system will be independent and easier for consumers to access."
On alternative business structures: "I do not believe that many of the restrictive practices under which lawyers work can still be justified as being in the public interest."
"The proposals I have made are facilitative; they are not mandatory. I accept that existing forms of business structures have strengths; I do not accept that other structures for the provision of legal services should not be permitted."
"LDPs should bring many advantages. New investment should increase capacity and exert a downward pressure on prices. New investment should also be accompanied by fresh ideas about how legal services might be provided in consumer-friendly ways."[8]

The Legal Services Review has its own website at:
http://www.legal-services-review.org.uk/index.htm.

[8] http://www.legal-services-review.org.uk/content/press/pn15dec04.pdf

D. The Government's White Paper

On 17 October 2005, the Government published a White Paper entitled *The Future of Legal Services: Putting Consumers First,* which set out proposals for the future of legal services in England and Wales.[9] Announcing the publication of the White Paper, Lord Falconer confirmed that the purpose of the changes was to put the consumer first.[10]

In the White Paper, the Government stated that it had accepted Sir David Clementi's recommendations and proposed:

- that the objectives of the regulatory framework and principles of the legal profession would be set out in legislation: "Consumers will be clear about the system, and will be able to hold all partners in the framework to account for delivering these commitments. Front Line Regulators will be required to separate their regulatory and representative functions. These steps will increase confidence in the regulatory system and in legal professionals"[11]

- the creation of a new Legal Services Board (LSB) to act as the oversight regulator: the board would authorise front line regulators to carry out day to day regulation provided they met its regulatory standards, including a requirement for the separation of their regulatory and representative functions

- the development of alternative business structures: "These will enable legal and certain other services to be provided to high standards and in ways that suit different consumers. The arrangements will ensure competition and innovation can continue to flourish"[12]

- that consumers would be protected by quickly putting into place safeguards where new gaps in protection open up

- the creation of a new Office for Legal Complaints (OLC) which would deal with all consumer complaints about legal service providers who are members of bodies or organisations regulated by the LSB. The OLC would be independent from Government and from providers of legal services. It would be accountable to the LSB and would be funded by the sector.

The Government stated that legislation would be needed to make most of these changes and that it intended to publish a draft Legal Services Bill for pre-legislative scrutiny with legislation to follow as soon as Parliamentary time allowed.[13]

---

9 Cm 6679, http://www.official-documents.gov.uk/document/cm66/6679/6679.pdf

10 Department for Constitutional Affairs Press Release 260/05, *Consumers at heart of legal reforms,* 17 October 2005, http://www.gnn.gov.uk/environment/fullDetail.asp?ReleaseID=173661&NewsAreaID=2&NavigatedFromDepartment=True

11 p8, *The Future of Legal Services: Putting Consumers First,* Cm 6679, http://www.dca.gov.uk/legalsys/folwp.pdf

12 *Ibid,* p9

13 *Ibid*

E. The draft *Legal Services Bill*

On 24 May 2006, the Government published the draft *Legal Services Bill* together with explanatory notes and a regulatory impact assessment.[14] The Government also commissioned PricewaterhouseCoopers to provide further financial analysis of the costs of the proposals set out in the draft Bill and their report is available on the Department for Constitutional Affairs website.[15]

The draft Bill was scrutinised by a Joint Committee of the two Houses of Parliament established for the purpose, which published its report on 25 July 2006.[16] The Committee made over 50 recommendations and drew particular attention to those parts of the draft Bill that departed from the recommendations made by Sir David Clementi. It raised various concerns including:

- that there appeared to have been a shift in emphasis in the Government's approach to reform from the "public interest" to the "consumer interest"

- that the independence of the legal profession was threatened by the proposed level of involvement of the Secretary of State in the regulation of legal services

- that the approach to liberalising business structures for providing legal services would go well beyond the recommendations of Sir David Clementi and was "most troubling"

- that the estimated cost of the reforms was "speculative at best"

- that the Joint Committee had not been given sufficient time to conduct their inquiry meaning that it had had to concentrate on what it considered to be the most important issues and not on other issues which might have been investigated further had there been time to so.

Commenting on the report, the Chairman of the Joint Committee, Lord Hunt of Wirral, said:

> We have some very real concerns about the proposals put forward in this Bill. The draft Legal Services Bill departs from the recommendations of Sir David Clementi in a number of important respects and it is essential the Government should explain each of those departures fully. Most of our substantive recommendations would come under a single heading, namely that of going back to the future – the future envisaged by Clementi.[17]

---

14 Cm 6839, *Draft Legal Services Bill, Explanatory Notes and Regulatory Impact Assessment,* http://www.official-documents.co.uk/document/cm68/6839/6839.pdf

15 http://www.dca.gov.uk/legalsys/pwc_finanalysis_060524.pdf

16 Joint Committee on the Draft Legal Services Bill, *Draft Legal Services Bill*, 25 July 2006, HC 1154, HL 232 2005-06, http://www.publications.parliament.uk/pa/jt200506/jtselect/jtlegal/232/232i.pdf

17 Joint Committee on the Draft Legal Services Bill Press Notice 2, *Joint Committee raise concern over proposals in the Legal Services Bill,* 25 May 2006, http://www.parliament.uk/parliamentary_committees/jcdlsb/jcdlsb_250706_pn2__.cfm

The Government published its response to the Joint Committee's report on 25 September 2006.[18] The Government stated its belief that it had "struck a sensible balance between early delivery and proper scrutiny".[19]

A separate Library standard note deals with the draft *Legal Services Bill.*[20]

II The Bill

The *Legal Services Bill [HL]* was introduced in the House of Lords on 23 November 2006 as HL Bill 9 of 2006-07. The Bill completed its passage through the House of Lords on 15 May 2007 and had its first reading in the House of Commons on 16 May 2007 as Bill 108 of 2006-07. It is due to have its second reading in the House of Commons on 4 June 2007. The Government has also published explanatory notes.[21] Information about the Bill is available via the Bill Gateway on the Library intranet.

The Bill covers the following main areas:

- a statement of the regulatory objectives of the regulators
- the creation of a new regulatory structure for legal services headed by a new Legal Services Board (LSB)
- arrangements to facilitate alternative business structures which would enable lawyers and non-lawyers to work together to deliver legal and other services; legal disciplinary practices of different kinds of lawyers would also be allowed
- the creation of a new statutory complaints body, the Office for Legal Complaints (OLC).

Introducing the second reading debate in the House of Lords, Lord Falconer of Thoroton, described the Bill as "an important landmark in the development, reform and modernisation of our framework for legal services regulation and provision" and said that the Bill would put consumers' interests at the heart of the regulatory arrangements.[22] He set out three underlying issues which had led the Government to conclude that change in this sector was long overdue:

- a lack of consumer confidence in the way in which complaints about lawyers are dealt with:

> Consumers argue that the handling of complaints takes too long, focusing on technicalities rather than on providing quick and fair redress to the consumer.

---

18 *Government Response to the Report by the Joint Committee on the Draft Legal Services Bill, Session 2005-06,* Cm 6090, 25 September 2006, http://www.official-documents.co.uk/document/cm69/6909/6909.pdf

19 *Ibid* p5

20 SN/HA/4047

21 http://www.publications.parliament.uk/pa/cm200607/cmbills/108/en/2007108en.pdf

22 HL Deb 6 December 2006 cc1161-2

> 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.[23]

- the potentially restrictive effect of the way in which the professions operate

- the 'regulatory maze' "with a wide range of oversight regulators with overlapping responsibilities and few clear objectives"

Lord Falconer summarised the intent of 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.[24]

The Bill is considerably longer than the draft bill (having grown from 159 clauses and 15 schedules to 215 clauses and 24 schedules), and is published in two volumes. Many of the changes address concerns raised by the Joint Committee which scrutinised the draft Bill. The Bill was debated extensively in the House of Lords: at second reading, six days in committee, three days on report and at third reading. The Bill was further amended in committee, on report and at third reading stage in the House of Lords.

A. Changes to the Bill in the House of Lords

A very large number of amendments were tabled: for example, over 700 were tabled for report. Many of the amendments were debated and passed. The main amendments are set out in an Appendix to this paper.

B. Clauses issues and debate

Many issues were raised by the Joint Committee which considered the draft Bill and in debate in the House of Lords. At second reading in the House of Lords, the Bill received a degree of cross party support, although some provisions were heavily criticised. The Conservative peer, Lord Lyell of Markyate, said that he thought the Bill had a "wide measure of support in the House and has been carefully prepared over some time".[25] Lord Hunt of Wirral, the Conservative peer who chaired the Joint Committee which scrutinised the draft Bill said "We all accept that the Bill is necessary".[26] Lord Maclennan of Rogart, Liberal Democrat Spokesperson for the Cabinet Office and Scotland said "The general welcome for the Bill is clear"[27].

---

23 HL Deb 6 December 2006 cc1162
24 HL Deb 6 December 2006 c1168
25 HL Deb 6 December 2006 cc1169
26 HL Deb 6 December 2006 cc1179
27 HL Deb 6 December 2006 cc1200

This part of this paper sets out a summary of the main areas covered by the Bill and includes, where appropriate, references to the Report of the Joint Committee on the draft Legal Services Bill, to the Government's response to that Report and to debate on the Bill. A very large number of proposed amendments were debated, sometimes on more than one occasion, and not all (and not all stages) are included in this paper. Instead, the paper focuses on areas which proved particularly contentious in debate in the Lords. The Explanatory Notes published by the Government with the Bill give a more detailed explanation of the clauses in the Bill.[28] In this paper, unless otherwise stated, all references to individual clauses use the numbering of the Bill as introduced in the House of Commons.

1. The regulatory objectives

a. The Bill

Clause 1 would set out seven **regulatory objectives** intended to guide the new Legal Services Board, the approved regulators (such as the Law Society and the Bar Council) and the new Office for Legal Complaints in exercising their functions:

1. protecting and promoting the public interest
2. supporting the constitutional principle of the rule of law
3. improving access to justice
4. protecting and promoting the interests of consumers
5. promoting competition in the provision of certain legal services
6. encouraging an independent, strong, diverse and effective legal profession
7. increasing public understanding of the citizen's legal rights and duties
8. promoting and maintaining adherence to the **professional principles** which are:

    i. that authorised persons should act with independence and integrity
    ii. that authorised persons should maintain proper standards of work
    iii. that authorised persons should act in the best interests of their clients
    iv. 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
    v. that the affairs of clients should be kept confidential.

"Authorised persons" means persons who are authorised in relation to "reserved legal activities": these are defined in Part 3 of the Bill and include the exercise of a right of audience before a court and the conduct of litigation.

The first objective was added by way of a Government amendment on report. The word "independent" in the fifth objective and the second and fourth professional principles were added at least partly in response to recommendations from the Joint Committee which scrutinised the draft bill.

---

[28] http://www.publications.parliament.uk/pa/ld200607/ldbills/009/en/07009x--.htm

b. Issues and debate

Public interest

The Joint Committee expressed concern that the focus on public interest had been replaced with a focus on consumer interest and recommended that the objective "protecting and promoting the interests of consumers" should be redrafted to read "protecting and promoting the public interest and the interests of consumers".[29] On report, a Government amendment was agreed which added a specific objective of protecting and promoting the public interest to the list of regulatory objectives. This was based on a similar amendment (subsequently withdrawn) moved in committee stage by Lord Thomas of Gresford, Liberal Democrat Shadow Attorney General, which attracted the support of a number of peers.[30]

Relative importance of the objectives

The Joint Committee recommended, and the Government agreed, that the Government's explanatory notes should clarify that the regulatory objectives are not listed in order of importance.[31]

In committee and again on report, there was some debate about the relative importance of the various regulatory objectives and in particular whether promoting competition should be subservient to the objectives of protecting and promoting the public interest, supporting the constitutional principle of the rule of law and improving access to justice. Baroness Ashton of Upholland said that the Government did not want to be unduly restrictive by putting in the Bill a duty on the regulatory bodies to consider one objective subject to another.[32] It would be for the regulator to determine in a particular set of circumstances which objective would be particularly important.[33]

2. The Legal Services Board

a. The Bill

The Bill would create a new regulatory structure for legal services headed by a new Legal Services Board (LSB): the Government has stated that it intends the LSB to be an oversight regulator, with day-to-day regulation left to front-line regulators. The LSB would have a duty to comply with the regulatory objectives and must have regard to the principles of best regulatory practice (Clause 3).

---

29 Paragraph 78, Joint Committee on the Draft Legal Services Bill, *Draft Legal Services Bill*, 25 July 2006, HC 1154, HL 232 2005-06, http://www.publications.parliament.uk/pa/jt200506/jtselect/jtlegal/232/232i.pdf

30 HL Deb 9 January 2007 c116

31 Paragraph 92, Joint Committee on the Draft Legal Services Bill, *Draft Legal Services Bill*, 25 July 2006, HC 1154, HL 232 2005-06, http://www.publications.parliament.uk/pa/jt200506/jtselect/jtlegal/232/232i.pdf and p7, *Government Response to the Report by the Joint Committee on the Draft Legal Services Bill, Session 2005-06,* Cm 6090, 25 September 2006, http://www.official-documents.co.uk/document/cm69/6909/6909.pdf

32 HL Deb 9 January 2007 c129

33 HL Deb 9 January 2007 c131

The Lord Chancellor would appoint the Chair and members (other than the Chief Executive) of the LSB with the concurrence of the Lord Chief Justice (Schedule 1 Paragraph 1). The Lord Chancellor would also have power to remove members of the LSB with the concurrence of the Lord Chief Justice (Schedule 1 Paragraph 7) and subject to criteria set out at Schedule 1 to the Bill. The LSB would have a non-lawyer majority (Schedule 1 Paragraph 2).

The Legal Services Board should not be confused with the Legal Services Commission (LSC) which replaced the Legal Aid Board and is a non-departmental public body, sponsored by the Ministry of Justice. The LSC has responsibility for two schemes – the civil scheme for funding civil cases as part of the Community Legal Service (CLS), and the Criminal Defence Service (CDS) which provides advice and representation for people facing criminal charges.

Clause 8 would require the establishment of a Consumer Panel whose task would be to represent the interests of consumers. The LSB would have to consider representations made by the Consumer Panel and to publish a notice giving reasons if it disagreed with any such representations.

The provisions relating to the LSB have been expanded since the draft Bill (at least partly in response to recommendations by the Joint Committee) and have also been amended during the Bill's passage through the House of Lords. New or amended provisions include:

- the requirement for the concurrence of the Lord Chief Justice to the Lord Chancellor's appointments to, and removals from, the LSB was added by way of an amendment passed on a division on report

- amendments moved by Lord Thomas of Gresford and agreed in committee, and consequential Government amendments passed on report, would transfer ministerial powers in the Bill from the Secretary of State to the Lord Chancellor (who is required under his oath of office to respect the rule of law); these functions would be entrenched and could not be transferred from the Lord Chancellor to another Minister simply through a transfer of functions order

- the LSB would be required to assist in the maintenance and development of standards in relation to the regulation by approved regulators of persons authorised by them to carry on reserved legal activities, and the education and training of persons so authorised (Clause 4)

- Clause 9 would deal with committees which could be established by the Consumer Panel and the procedure of the Consumer Panel

- the Consumer Panel would have power to publish information about any representations made by it to the LSB (Clause 10(3)

- there are now provisions relating to advice and research functions of the Consumer Panel (Clause 11)

b. Issues and debate: the independence of the legal profession

Concerns about the threat, or perceived threat, to the independence of the legal profession were raised on a number of occasions. Provisions giving rise to such concerns included those relating to the appointment and removal of members of the LSB by the Secretary of State (now Lord Chancellor). Several peers were also concerned that there should be "light touch" regulation by the LSB and about its relationship with the approved regulators.

At second reading, the Labour peer, Lord Bach disagreed that the Bill would undermine the independence of the legal profession:

> Critics should think carefully before attacking the Bill on the grounds that it threatens or removes the independence of the English legal system. In my view, it does no such thing. For example, the provisions for appointment are subject of course to Nolan principles. It is just going over the top for critics to claim that issues of independence are somehow at the forefront of this Bill. I would say to those who argue in this way, "Criticise the Bill. There are of course improvements that should and must be made to it, but just because you do not like it, do not exaggerate it or attack it for something that is not there".[34]

The Labour peer and Chair of the National Consumer Council, Lord Whitty, also considered that there had been an overreaction to the Bill:

> It may be true that the Bill could say a bit more about independence and could establish a few mechanisms to ensure that independence, but the reaction, including that in this debate, has been an overreaction. Most other industries and services are subject to some form of regulation, and where there is no formal statutory regulation, we rely on general trading standards enforcement or have forms of self-regulation that are more effective than those that appear to operate in the legal field. In others areas, we rely on effective competition to deliver consumer benefits and avoid consumer detriment. However, none of those applies in the legal profession. When self-regulation does not work for the consumer, the consumer has the right to demand that the Government intervene to impose independent scrutiny of the delivery of the service. In that sense, legal services are no different from any other service.[35]

<u>Appointments</u>

The Joint Committee expressed concern about the Secretary of State's (now Lord Chancellor's) powers in relation to the appointment the of Chair and members of the LSB and his powers to remove members of the LSB and recommended that such appointments and removals should be made only after full consultation with the Lord Chief Justice. The Government rejected this recommendation and also calls in the House of Lords for the appointment of the Chair to be made after consultation with the Lord Chief Justice. In the second reading debate in the House of Lords, Lord Falconer

---

[34] HL Deb 6 December 2006 cc1177
[35] HL Deb 6 December 2006 c1191

said that this would give "little comfort to consumers, who rightly see the Lord Chief Justice, although he is a man beyond reproach, as another lawyer in the process".[36]

The Crossbench peer, Baroness Butler-Sloss was among those who voiced concern about the level of involvement of the Lord Chancellor in the regulation of the legal profession, particularly in his appointment of the Chairman and members of the board. She considered that there should be a clear and open commitment to the Nolan principles for appointments to public bodies[37] together with a requirement for full consultation with the Lord Chief Justice in the appointment or removal of the Chairman. Baroness Butler-Sloss felt that that the public did not see the Lord Chief Justice as just another lawyer.[38]

The Conservative peer, Lord Hunt of Wirral also spoke of the need for the LSB to be demonstrably independent:

> This is all about balance; it would be quite wrong—indefensible, even—to establish an appointments process so self-evidently lacking in checks and balances. The Legal Services Board must not only be independent, it must be seen to be independent. Sir David Clementi made this one of the key points in his excellent report.[39]

Baroness Ashton of Upholland, junior minister in the then Department for Constitutional Affairs, resisted calls for the Lord Chancellor to be obliged to consult the Lord Chief Justice when exercising his power of appointment. At second reading she said that it was likely that the Lord Chancellor would wish to consult a number of people when doing so but she did not want to put this in the Bill:

> The reason is twofold.... First, however eminent and important the Lord Chief Justice is—I agree that he is both—the provision is about trying to develop consumer confidence and make people believe that we have tackled the issue effectively. To simply have a consultation with the head, if you like, of the judiciary and legal professions does not feel right to me. The argument could be ... that you balance that with consultation of consumer groups.
>
> ... we quickly get into the realms of making lists about which organisations should be consulted in particular circumstances. I am always deeply reluctant to do that. It is appropriate that my noble and learned friend consult where he feels appropriate, no doubt with good advice. That may or may not include a variety of people. We should hesitate to put that into the Bill.[40]

In committee an amendment was moved by Lord Kingsland, Shadow Lord Chancellor and Spokesperson for Constitutional and Legal Affairs, with considerable support, to include a requirement for the appointment of the Chair of the LSB to be made with the

---

36 HL Deb 6 December 2006 c1164
37 Selflessness, integrity, objectivity, accountability, openness, honesty and leadership
38 HL Deb 6 December 2006 c1194
39 HL Deb 6 December 2007 c1180
40 HL Deb 6 December 2006 c1209

concurrence of the Lord Chief Justice.[41] The Government resisted the amendment in committee and the Crossbench peer, Lord Neill of Bladon returned with a similar amendment on report.[42] Again the amendment received considerable support: it was seen by its supporters as a means of bolstering the independence of the legal profession from Government. Lord Woolf, the former Lord Chief Justice, said that "the independence of our judiciary is dependent on the independence of our legal profession".[43]

Lord Whitty disagreed with the amendment:

> I do not think that this would be seen as anything but the lawyers attempting to pull back the regulation of their profession to their own ...it is almost as if the chair of Ofcom were appointed subject to the concurrence of Rupert Murdoch, or the chair of the Competition Commission were appointed subject to the concurrence of the chair of Tesco. That is the public appearance. I am sorry, but legal services are, in that sense, no different from any other service to the public and to consumers.[44]

Baroness Ashton resisted the amendment stating that the procedure for appointments envisaged in the Bill was already independent:

> The Commissioner for Public Appointments, appointed by Her Majesty the Queen, is independent of government. We should be very proud of OCPA because it sets the standards for recruiting. It regulates the recruitment process for appointment to public bodies wherever government Ministers are involved. … There is no question of independence being relegated. Codes of practice have to be maintained. It is critical that there is equality of opportunity, probity, openness, transparency and proportionality. Those are essential elements in making sure that appointments are made properly and appropriately.
>
> We believe that we have an independent process that is absolutely clear and has worked extremely well. We believe that it is recognised as being of an extremely high standard and that it will not affect the independence of the legal profession, or indeed of the judiciary. We believe that it will stand us in good stead. In no circumstances does it prevent the Lord Chancellor from talking to and consulting the Lord Chief Justice or, indeed, anybody else. Noble Lords will remember that the board will have a majority of lay people sitting on it. Initially, for the first appointment, it will have a lay chair. There may well be other people that the Lord Chancellor would wish to consult in the process of appointments.[45]

The amendment was pressed to a division and was passed by 175 votes to 134.

In committee, Lord Hunt of Wirral moved an amendment which would have implemented a Joint Committee recommendation that the Bill should specify that appointments to the LSB should be made on merit and according to the Nolan principles (although not by

---

41 HL Deb 9 January 2007 c148
42 HL Deb 16 April 2007 c 39
43 HL Deb 16 April 2007 c 52
44 HL Deb 16 April 2007 c 46
45 HL Deb 16 April 2007 cc55-6

name). Baroness Ashton considered that the amendment, which was subsequently withdrawn, was unnecessary because any appointment to a public body by a Minister would fall within the remit of the Commissioner for Public Appointments who would have the duty to scrutinise it. Lord Hunt returned with a similar amendment on report and restated the Joint Committee's strongly held view that the Bill should state that appointments should be made in accordance with the rules applicable at the relevant time. Baroness Ashton again resisted the amendment and said that if the Lord Chancellor and the Lord Chief Justice were required to have regard to principles appearing to them as best practice, there could be a potential conflict with the actual principles set out in the Commissioner's code of practice: "I fear that that could take us in a very different direction because it would then be a subjective judgment on the part of those making the appointments about what they thought was best practice, as opposed to clearly laid down codes of practice and deliberations by the commissioner".[46] She reiterated the Government's reluctance to amend the Bill in this way:

> We do not think it is right to put anything further on the face of legislation. It is important that we use the current procedures and allow them to develop and grow and not be tied by legislation that could eventually be out of date or not relevant. I have already made it clear that we would make sure that these appointments were made according to the principles of merit, probity, openness and transparency that apply to all other public appointments.[47]

Lord Hunt pressed for a division and the amendment was defeated by 124 votes to 98.

Size of the LSB

In committee, Lord Kingsland moved an amendment which would have removed the Lord Chancellor's power to increase the size of the LSB, saying that this power would enable the size of the board to be manipulated in order to produce quite different decisions.[48] Baroness Ashton replied that, in the future, if the Board were to take on new areas of regulation it might also wish to add on new members with expertise in those professions, which might lead to the lay members becoming a minority. In those circumstances, the Lord Chancellor would, by order, be able to amend the size so that the lay members remained in the majority. Baroness Ashton also said that one way of dealing with this concern would be to make the relevant power exercisable by affirmative rather than negative resolution.[49]

Accordingly, on report Lord Kingsland moved an amendment to provide for an affirmative resolution.[50] However, on that occasion, Baroness Ashton resisted the amendment pointing to the difficulty of finding Parliamentary time for debate and also stating that she did not want to break with the tradition of complying with the Delegated Powers Committee (which had not recommended an affirmative resolution).[51] Lord Kingsland

---

46 HL Deb 16 April 2007 cc 67
47 HL Deb 16 April 2007 c 69
48 HL Deb 9 January 2007 c162
49 HL Deb 9 January 2007 c163
50 HL Deb 16 April 2007 cc 61
51 HL Deb 16 April 2007 cc 62

stated that he found these reasons "exceedingly unconvincing" but nevertheless withdrew the amendment.

However, Lord Kingsland returned with a further similar amendment at third reading.[52] Baroness Ashton again resisted and said that she did not accept that an order could not be debated if it was laid under the negative procedure.[53]

Lord Kingsland spoke of both the substance of the amendment and also the sequence of events giving rise to the amendment he had moved. He considered that the power proposed for the Lord Chancellor to expand or contract the size of the Legal Services Board was "extremely wide and uncontrolled. ... This is another part of the Bill that goes to the heart of the independence of the board". He also said that Baroness Ashton's statement in committee had affected subsequent decisions:

> It is now stated in the Bill that the noble and learned Lord the Lord Chancellor must have the concurrence of the Lord Chief Justice on the appointment and dismissal of the chairman and members of the board. We have not sought that kind of guarantee in relation to Schedule 1(3) because we felt that the reasons given by the noble Baroness for the retention of that power and the commitment to an affirmative resolution were enough. Without the affirmative resolution, the Government are given dangerously uncontrolled power.
>
> However, the core issue is the one to which I referred in Amendment No. 1. The statement was made on the face of the Bill. As a consequence, noble Lords on both the official Opposition and Liberal Democrat Benches did not table amendments to this part of the Bill which they otherwise would have tabled. Although I shall not press this amendment to a vote, I say again to the noble Baroness: just think of the convention on undertakings given by Ministers on the Floor of the House. When the Bill reaches another place, I suggest that the correct thing to do would be for the Government to put the requirement for an affirmative resolution in the Bill. Constitutionally, that is the only proper way to proceed. [54]

The amendment was withdrawn.

Partnership with approved regulators

The Joint Committee recommended that the draft Bill should ensure that the LSB would act in partnership with the approved regulators, seeking to resolve differences by agreement wherever possible, and that the LSB should be allowed to intervene to take over the functions of an approved regulator if, and only if, there was clear evidence that serious damage might otherwise be caused to the regulatory objectives.[55] The Government agreed with the principle that the LSB should work in partnership with authorised regulators, leaving them with the responsibility for day-to-day regulation, and that the LSB should exercise its powers only where approved regulators were clearly

---

52 HL Deb 15 May 2007 c148
53 HL Deb 15 May 2007 c151
54 HL Debate 15 May 2007 c 152
55 Paragraph 178

failing.[56] In committee Lord Kingsland moved an amendment which would have specified on the face of the Bill that the LSB should act in partnership with the approved regulators. He said that: "the Bill appears to say nothing about the way in which the Legal Services Board should approach its task".[57] The proposed amendment was supported by a number of peers who viewed it as a means of incorporating the concept of "light touch" regulation.

Baroness Ashton replied that although she accepted the principle of the LSB working together with the approved regulators, she did not want to put an undefined duty of partnership in the Bill. The amendment was withdrawn at committee stage but Lord Kingsland returned with a similar amendment on report.[58] He stressed that he considered it important that the Bill should set out the limits of the LSB's regulatory powers because the LSB would inform itself on the basis of the words of the statute itself.[59]

The Liberal Democrat Spokesperson, Lord Maclennan of Rogart was among those who supported the amendment:

> I am very concerned that the lead regulators may see their positions being progressively eroded by a Legal Services Board with imperial ambitions. The Government and the noble Baroness have spoken about the lead responsibility resting with the approved regulators, but that is not provided for. Nothing in the Bill will ensure that that will happen.[60]

Baroness Ashton again confirmed that the Government intended the LSB to be an overview regulator working with frontline regulators.[61] However, she resisted the amendment saying that it could restrict the Board's ability to take any action it considered necessary to correct failure in an approved regulator.[62] Baroness Ashton stressed that in any event, the LSB would have to follow best regulatory practice. The LSB would be required to issue policy statements about how it would use its powers, publish a draft of statements and consider any subsequent representations. She felt that the Bill would already achieve what the amendment was seeking. The amendment was withdrawn.

Role of LSB

In committee, Lord Kingsland moved a further amendment (later withdrawn) which he said would make "absolutely clear" that the LSB should be a supervisory regulator only.[63] He, and other peers, linked this to the question of costs and said that if it transpired that the LSB became more than just a supervisory body, the cost estimates would be inaccurate. Baroness Ashton again confirmed that the Government intended that day-to-day regulation should remain with the approved regulators and that it was not intended

---

56 p14
57 HL Deb 9 January 2007 c174
58 HL Deb 16 April 2007 c 91
59 HL Deb 16 April 2007 c 92
60 HL Deb 16 April 2007 c 93
61 HL Deb 16 April 2007 c 94
62 HL Deb 16 April 2007 c 95
63 HL Deb 22 January 2007 c 904

that the LSB would be a "micromanaging regulator".[64] However, she considered that the position was sufficiently clear in the Bill. Furthermore, the LSB would need to be able to take action where acts or omissions on the part of an approved regulator were having or were likely to have an adverse impact on the regulatory objectives.

Lord Hunt of Wirral agreed with Lord Kingsland and pressed the Minister further. He considered that there was nothing in the Bill to indicate that the Legal Services Board was intended to act as a supervisory regulator, leaving day-to-day responsibility with the approved regulators and exercising its powers only where they were clearly failing.[65]

Baroness Ashton replied that the proposed amendment would actually give the LSB a more positive role, in making it check that things were being done, rather than acting only where there was a problem.[66]

The role of the LSB was also considered in relation to Part 4 and an Opposition amendment was passed which sets out the relative roles of the LSB and approved regulators in relation to the LSB's statements of policy.[67]

Duty to consider practitioners' representations?

The Government rejected a call by the Joint Committee for there to be a Practitioner Panel (to include representation of legal academics) alongside the Consumer Panel.[68] Baroness Ashton also initially resisted an amendment moved in committee by Lord Kingsland, with considerable support, which would have required the LSB to consider representations made by approved regulators. Lord Kingsland said that the LSB should be obliged to "hear both sides of the story to make informed and proportionate decisions".[69] Baroness Ashton considered that the legal professional bodies were already well established and, after separating their regulatory and representative functions, would be able to lobby the LSB even more effectively. Furthermore, there were a number of provisions which would require the LSB to consider representations. This contrasted with the position relating to consumers: the Government considered that a Consumer Panel was needed in order to ensure that the consumer's voice was heard.[70]

However, after further debate, and when pressed by Lord Kingsland for an explanation as to why there should be an obligation for the LSB to consider what the Consumer Panel proposed but no corresponding obligation to consider the representations of the representative practitioner bodies, Baroness Ashton said that she was "prepared to accept the ... amendment in principle".[71] She then resisted a further amendment moved

---

64 HL Deb 22 January 2007 c 907
65 HL Deb 22 January 2007 c 908
66 HL Deb 22 January 2007 c 909
67 See pages 33-4 below
68 Paragraph 185
69 HL Deb 22 January 2007 c 929
70 HL Deb 22 January 2007 c933
71 HL Deb 22 January 2007 c937

by Lord Hunt to establish a Practitioner Panel in similar terms to the Consumer Panel.[72] At a later stage of committee debate, Baroness Ashton confirmed her position in relation to the amendment:

> I remind noble Lords that we have already accepted Amendment No. 38 in the name of the noble Lord, Lord Kingsland, which required that Clause 10 will apply mutatis mutandis to representations by proposed regulators, whether in the regulatory or representative capacities.[73]

However, the Government did not subsequently bring forward any amendment on this point and accordingly, on report, Lord Kingsland again moved an amendment requiring the LSB to consult with practitioners.[74] Lord Hunt of Wirral pointed out that it was on the basis that Baroness Ashton had agreed in principle to the earlier amendment that he had not brought back his amendment to establish a practitioner panel.

Baroness Ashton explained her position:

> I accept the principle that there should be equality of representation on behalf of consumers and professionals, but I do not accept that the amendments before us achieve that. We need to have a Consumer Panel for the reasons that I have given, but giving general rights to approved regulators to have their representations heard in addition to their rights to make representations on the large number of provisions in the Bill and their ability to set out regulatory arrangements that are in the interests of authorised persons would unbalance the system again. As I say, noble Lords can disagree with my conclusions. I accept the principle of making sure that we have equality and consultation. When I looked at how to produce an amendment that might achieve that, I was strongly advised that we had already achieved it. Therefore, I did not table any further amendments. Noble Lords may agree or disagree with that but I did it in good faith.
>
> We have well established, well organised and possibly well funded bodies that represent the interests of authorised persons. They will be unshackled from their regulatory responsibilities so that their representative arms can lobby the board more effectively and freely than they do at present. The board will want to ensure that it takes on board all sides of the argument before coming to a decision or taking action; indeed, it is in its interests to do so as it can be judicially reviewed if it comes to an unreasonable conclusion.
>
> If the board fails to consult a body that could be directly affected by its action, that would be inconsistent with the principles of best regulatory practice which Clause 3 requires the board to have regard to. The board must listen to and consult the bodies under good regulatory practice. It also knows that it can be judicially reviewed if its decisions are arrived at unreasonably.
>
> In addition, throughout the Bill there are specific ways in which the board must consult. Added together and weighed against the formation of a Consumer Panel,

---

72 HL Deb 22 January 2007 cc937-942
73 HL Deb 21 February 2007 c 1117
74 HL Deb 18 April 2007 c230

> it is our view that we have achieved what your Lordships desired and the principle, which I completely accept, of equality of representation. Although the noble Lord, Lord Kingsland, may feel that I have not fulfilled my obligations, I took away the principle in good faith and believe that we have achieved it. Noble Lords will reach their own decisions on that accordingly.[75]

Lord Kingsland withdrew the amendment but returned with it at third reading.[76] He said that "there is a clear convention in your Lordships' House that having made such a statement, whether she regrets it or not on reflection, the Minister must accept it". However Baroness Ashton continued to resist the amendment and to defend her position:

> I do not accept the idea that, because of our discussions in Committee, noble Lords felt that they did not need or were unable to bring back amendments. I made it clear in my discussions with noble Lords between Committee and Report that I would not be bringing this amendment forward. I made that clear at Report, so there was always the opportunity to come back at this stage. ... Anyway, if noble Lords had felt that they had been misled, I would have been perfectly happy to see amendments today that addressed the issue. ...
>
> My Lords, I always consult my colleagues. But, most important, I take legal advice and parliamentary counsel advice that goes alongside that. I would be distraught were there any suggestion that I misled the House. I have thought about that a lot.
>
> This is what I believe I did. I accept completely that the noble Lords, Lord Kingsland and Lord Hunt of Wirral, and other noble Lords were seeking to ensure that this Bill was even-handed in its approach to the Consumer Panel and the role of the professions. I think that noble Lords accepted, after our lengthy and helpful debates in Committee, that there was a need to create a Consumer Panel. There was no such body; therefore, for the Consumer Panel to be able either to take judicial review or make proper representations, it needed to be set up properly. The concern that was expressed was whether that shifted the weight of representation away from the professions and the legal services to the point at which the Bill was in a sense up-ended. That we did not wish to do.
>
> I took away Amendment No. 38. I did not accept it on the Floor, which is what you do if you are an accepting an amendment there and then—but it is reasonable to say that I might not have done that in any event, because I would have had to consult. I took it back and took legal and parliamentary counsel advice on whether the principle behind even-handedness was already in the Bill or not.
>
> I have been back several times and the advice that I have received consistently is that scattered throughout the Bill ...is a provision that allows for consultation with the professions. The principal way in which the professions can make representations, by the nature of the organisations that they are, and in which they have traditionally sought to make representations, secures them mutatis

---

75 HL Deb 18 April 2007 c234-5
76 HL Deb 15 May 2007 c 129

> mutandis. Therefore, my advice was that, were we to insert anything further, we would be in danger of moving the Bill in the other direction.[77]

Lord Kingsland did not press for a division but set out his view of the importance of the constitutional convention:

> The substance of this issue is secondary to the constitutional convention. What matters is that the undertaking was given unequivocally to your Lordships' House. I am really disappointed that any Government could resile from such a clear-cut undertaking. I am not going to press this amendment because I believe that the Government ought to be ashamed of themselves. When they conclude that they are and this Bill has been to the Commons, I am confident that by the time it comes back to the Lords we will find this amendment in it. We do not need to vote on this matter. The convention ought to be strong enough.[78]

LSB's duty to act in accordance with the regulatory objectives

The Government resisted an amendment moved by Lord Kingsland which sought to remove the words "so far as is reasonably practicable" from the LSB's duty to act in accordance with the regulatory objectives.[79] Lord Maclennan of Rogart referred to this as "an escape clause".[80]

Baroness Ashton said that the amendment had been resisted because it would impose an absolute requirement on the LSB to act in a way that was compatible with all the regulatory objectives in respect of every regulatory decision that it took. This would be impractical and would make it difficult to balance the objectives according to the circumstances.[81] The amendment was withdrawn.

Proportionality

Lord Kingsland said that "regulation should be risk-based and proportionate" and sought to include a non-exhaustive list of key factors that the LSB should take into account when exercising its regulatory function.[82] He considered that the LSB should consider, in particular, the resources and viability of the regulators that would be affected by its decisions and actions.[83] This would require the Board to act proportionately in respect of the smaller regulators.

Baroness Ashton agreed that the LSB should behave appropriately and take into account relevant factors but said that it was difficult to define "proportionality". She also considered this to be unnecessary: "It is clear that behaving in a proportionate manner is very well defined. It can be challenged in law. It is very clear what people are expected to

---

77 HL Deb 15 May 2007 c131
78 HL Deb 15 May 2007 c132
79 HL Deb 16 April 2007 c 100
80 HL Deb 9 January 2007 c177
81 HL Deb 16 April 2007 c 102
82 HL Deb 16 April 2007 c 104
83 HL Deb 22 January 2007 c897

do. It is essential for sworn regulators to feel confident about that".[84] The amendment was withdrawn.

3. Reserved legal activities

a. The Bill

Part 3 of the Bill would set out a definition of activities referred to as "reserved legal activities" which would come under the regulatory control of the LSB (such as the exercise of a right of audience in the courts and the conduct of litigation) (Clause 12). These are activities which are already regulated under current legislation. The list of these activities could be extended by affirmative order (Clause 24). The Bill also sets out those who would be entitled to carry out reserved legal activities: authorised persons and exempt persons (Clause 13). There would also be offences of offering or carrying on reserved legal activities when not entitled to do so and of pretending to be entitled (with increased penalties since the draft Bill) (Clauses 14 to 17). Approved regulators are the bodies that would authorise and regulate persons to carry on reserved legal activities (Clause 20). The existing regulators such as the Law Society and the Bar Council would be recognised as approved regulators and other bodies could apply to be designated as such (Schedule 4). Alterations to the regulatory arrangements of an approved regulator would have to be approved in accordance with the provisions in the Bill (Schedule 4 Part 3).

b. Issues and debate

Issues debated included whether will-writing should be included as a reserved legal activity, the power to amend the category of exempt persons and the alteration of regulatory arrangements.

Will-writing

The Joint Committee's report commented specifically on the omission of will-drafting from the list of reserved legal activities and recommended that will-writing for fee, gain or reward should be included within the new regulatory framework.[85]

The Government replied that that there did not appear, at present, to be a compelling argument for the statutory regulation of will-drafting. However, the Government would expect the LSB to consider whether the activity should be brought under its regulatory control in the future.[86]

Lord Kingsland returned to this issue in committee and moved an amendment to add will-writing for fee, gain or reward to the list of reserved legal activities saying: "Our view is that the absence of regulation of will-writing combined with the fact that a defect in a

---

84 HL Deb 16 April 2007 c 106
85 Paragraphs 216-221
86 p17

will is normally identified only when it is too late to do anything about it provide a particularly strong need for regulation in this sector".[87]

Baroness Ashton replied that, unlike the listed reserved legal activities, will-writing was not at present controlled. She felt that it could only be added if there was evidence of a need for regulation and this had not so far been proved. However, this area could be added in the future if evidence showed that this was necessary.[88]

The amendment was withdrawn and an amendment in the same terms moved by Lord Hunt on report was also resisted and withdrawn.[89]

Power to amend category of exempt persons

Schedule 3 paragraph 9 would enable the Lord Chancellor, by affirmative order, to amend the category of exempt persons. The Delegated Powers and Regulatory Reform Committee drew the matter to the attention of the House so that the House might seek a fuller justification for this power.[90] Lord Thomas of Gresford moved an amendment which sought an explanation of the power. Baroness Ashton gave the following explanation:

> paragraph [9](1)(b) allows for the person to cease to be exempt. This is required, ... to enable us to bring people within the regulatory framework in appropriate cases. It might, for example, be necessary to regulate the conduct of someone whose conduct of reserved legal activities is giving rise to concern. This is an important power for ensuring that public confidence in those providing legal services is maintained, and the board can respond when problems arise. The power in paragraph [9](1)(c) may be required to enable the Secretary of State to amend any existing provision made in Schedule 3 in respect of exempt persons. That power is necessary to effect the changes to Schedule 3 where there is a need to modify the provision. For example, the reference to the European Communities (Services of Lawyers) Order 1978 in paragraph 7 may need to be updated when a new order is made. Paragraph [9](1)(c) would allow the Secretary of State in such circumstances to revisit the drafting of the exemption in paragraph 7 to reflect the relevant changes and ensure that the provision is fit for purpose. It is an entirely technical provision, which, I hope noble Lords will accept, is necessarily broad to ensure that any appropriate changes can be made in the future.
>
> Let me further clarify the purposes of the power at Schedule 3([9]), in line with the response of the Select Committee on Delegated Powers and Regulatory Reform, ... As the committee mentioned in its report, the power to exempt is not without precedent. ...
>
> The power in paragraph [9](1)(a) of Schedule 3 serves a similar purpose to that in Section 6 of the Compensation Act, in that it provides a mechanism by which specific persons can be exempted, subject to parliamentary oversight.

---

87 HL Deb 22 January 2007 c 943
88 HL Deb 22 January 2007 c 946
89 HL Deb 18 April 2007 c 236
90 Delegated Powers and Regulatory Reform Committee, *3rd Report of Session 2006-07,* 14 December 2006, HL 19, http://www.publications.parliament.uk/pa/ld200607/ldselect/lddelreg/19/19.pdf

> As we highlighted in the government response, under the existing regime there are already a number of exempt persons who are able to carry out reserved legal activities by virtue of their office without committing an offence. For instance, officials working for local authorities have limited rights of audience in specified circumstances; for example, under Section 60 of the County Courts Act 1984. Under the Bill, such persons are exempt under paragraph 1(6) of Schedule 3. Those people represent a low regulatory risk and it would not be appropriate to require them to be regulated by an approved regulator.
>
> It is also reasonable to assume that there will be similar persons, or classes of persons, who might need to be exempted from regulation in the future where a new reserved service has been brought under the regime.[91]

Alteration of regulatory arrangements

Schedule 4 paragraph 19 provides that an alteration of regulatory arrangements would be treated as an exempt alteration (not requiring LSB approval) if the LSB has directed that it is to be treated as exempt. In committee, Lord Kingsland moved an amendment designed to alter the presumption and to make any alterations exempt unless the LSB had directed that they should not to be treated as such. He said that the effect of the amendment should contribute to a more cost-efficient system as well as reinforcing the supervisory character of the LSB.[92]

Baroness Ashton resisted the amendment because of the burden it would place on the LSB to find out what all the approved regulators were doing:

> My concern is that the Legal Services Board will be required to think about every aspect of how changes could be made and how alterations could be dealt with. It will require quite a lot of resource to do that and will need to work out for the different regulators precisely what might be altered, and when and how it might be altered. In addition, it will need to decide, by looking very carefully and thinking very hard, what to and what not to exempt, how to make sure that it does not miss something by accident and how to know what might or might not be covered. It would have to span the entire spectrum of what might or might not be put forward.[93]

Lord Thomas of Gresford supported the amendment pointing to the potential for an enormous bureaucracy to emerge. However, Baroness Ashton replied that, precisely for this reason, the LSB would be able to exempt certain areas and add to those exempt areas so that they would not necessarily be involved in small alterations. Proposed changes would be sent to the LSB which would be able to determine, either in the course of receiving those changes or in advance, that it does not wish to receive certain proposals, that some could be exempt and that some would require minimal approval.[94]

---

91 HL Deb 22 January 2007 cc 950-1
92 HL Deb 22 January 2007 cc 952
93 HL Deb 22 January 2007 c 953
94 HL Deb 18 April 2007 c 245

The amendment was withdrawn as was a similar amendment moved by Lord Kingsland on report.[95]

4. Regulation of approved regulators

a. The Bill

Part 4 would set out the duties of approved regulators including a requirement for a separation of their regulatory and representative functions, and would empower the LSB to ensure that approved regulators are carrying out their duties appropriately. When discharging its regulatory functions, an approved regulator would be under a duty to act in a way that is compatible with the regulatory objectives so far as it is reasonably practicable to do so. In addition, the approved regulator would have to have regard to principles of best regulatory practice (Clause 28).

The LSB's powers would include target-setting, a power of direction, censure, financial penalties, direct intervention in the approved regulator's regulation of its members and the power to recommend to the Lord Chancellor that an order be made cancelling an approved regulator's designation (Clauses 31 to 46). As a result of an Opposition amendment passed on report, the threshold for intervention by the LSB in relation to certain powers has been raised: it is now provided that there would have to be an act or omission of an approved regulator which would have, or would be likely to have, "a significant adverse impact on the regulatory objectives taken as a whole" (rather than, as originally provided, an adverse impact on one or more of the regulatory objectives).

The LSB would have a duty to prepare and issue statements of policy regarding the exercise of its functions. Following another successful Opposition amendment, the Bill now specifically provides for the relative roles of the LSB and approved regulators in relation to such statements of policy which must now "a) respect the principle that primary responsibility for regulation rests with the approved regulators; (b) ensure that the Board exercises its powers only where it considers that the action or inaction of an approved regulator is not an approach which the approved regulator could reasonably have taken; (c) provide that, save where there is an imminent risk of significant damage to the regulatory objectives, the Board will seek to resolve matters informally with the approved regulator before seeking its powers" (Clause 49).

The Lord Chancellor would have power, by order, to designate the LSB itself as an approved regulator where an approved regulator's designation has been cancelled or in relation to a new reserved legal activity. The order designating the Board must also ensure that the Board, acting as approved regulator, is separate from the Board acting in its "general" capacity. (Clauses 62 to 66).

Some of the provisions in this part have been amended since the draft Bill and also during the Bill's passage through the House of Lords. New or amended provisions include:

---

[95] HL Deb 18 April 2007 c 243

- the LSB would not be able to interfere in the representative functions of approved regulators but would be able to require approved regulators to have internal governance arrangements that would prevent regulatory decisions being unduly influenced by representative interests (Clause 29)

- the circumstances in which the LSB might exercise its power to fine approved regulators would be limited to those instances where an approved regulator has failed to separate its regulatory and representative functions, failed to comply with a direction, or failed to comply with rules relating to practising certificate fees (Clause 37) (Baroness Ashton referred to these as "issues over which the approved regulator has both the responsibility for the issue and the ability to control outcomes"[96])

- the time within which an approved regulator could appeal a financial penalty has been lengthened from 42 days to three months to reflect the timeframe for judicial review (Clause 39)

- there would be new powers, in limited circumstances, for the LSB to apply for a warrant to enter and search the premises of an approved regulator or former regulator and to take possession of any written or electronic records found on the premises following intervention directions or cancellation of designation (Clauses 42 and 48)

- there would be a requirement for approved regulators to have rules to prevent conflicts with the rules of other applicable regulators (Clause 52).

b. Issues and debate

Issues debated in the House of Lords included whether the regulatory process envisaged in the bill would amount to light touch regulation; the LSB's power to fine approved regulators; the relationship between the LSB and the approved regulators and rights of appeal.

The regulatory process – light touch regulation?

The Joint Committee agreed with evidence given by Sir David Clementi that, under the draft Bill, the Secretary of State would have too much involvement in the regulatory process. Appendix 9 to the Committee's report set out a list, covering seven pages, of powers of the Secretary of State specified in the draft Bill. The Committee recommended that the Government should reconsider whether each of the powers proposed for the Secretary of State was necessary. It cautioned against creating a perception that the Government was seeking in any way to exert long-term day-to-day control over the legal profession. It urged the Government to adhere to the recommendations of Sir David Clementi, which were that that the involvement of the Secretary of State should be restricted to important points of public policy where it could be demonstrated that Government involvement was absolutely necessary.[97]

---

96 HL Deb 18 April 2007 c257

97 Paragraph 155

Lord Hunt also questioned the extent of the powers given to the Secretary of State: at second reading he said that in the draft bill there had been 111 references to the Secretary of State but that this had increased to 288 references in the Bill.[98] However, Baroness Ashton of Upholland subsequently commented on the figure quoted by Lord Hunt saying: "there is no doubt that we are not equating the 288 references to 288 separate powers. Clause 61 is one power with six references. Clause 136 has eight references but one power...I know that the noble Lord would not wish your Lordships to go away with the assumption that everything had increased; the references have increased, which is a positive move because it gives greater clarity".[99]

The Crossbencher Lord Neill of Bladen was concerned at the extent of the powers to intervene to be conferred on the LSB, considering it to be the "direct opposite of the light touch".[100] Baroness Butler-Sloss agreed with this concern, saying that there was a lack of guidance on when it would be appropriate for the LSB to intervene in the work of approved regulators. She also considered that a regulator exercising discretion in balancing the objectives and deciding that one objective took precedence over another might be penalised.[101]

Baroness Ashton resisted a suggestion that the LSB should be able to intervene only where there was a "substantial" adverse impact on the objectives:

> "Substantial" would also be difficult because it might mean that the board could not take action where it was required. If you have a regulator regulating a small number of people, the impact may not be substantial even where they are not meeting the regulatory standards. So by requiring the board to act in accordance with the principles of proportionality and accountability, we will get to the same point that noble Lords seek.[102]

In committee, the question of the threshold for intervention by the LSB was debated at length. On report, Lord Kingsland moved an amendment which, together with others in the group, was designed to raise this threshold in two ways: the power of the LSB to intervene would be triggered by an assessment of adverse impact on the eight regulatory objectives considered as a whole rather than individually; and there would be a requirement for "significant" adverse impact. He considered that the LSB should trust the judgment of the approved regulator, unless it had good reason not to do so and that the LSB should not exercise its powers simply because it would have reached a different decision on the same matter.[103] He also said that a balanced view should be taken about whether the importance of one regulatory objective outweighed others. The amendment was supported by a number of peers. Lord Carlile of Berriew expressed the support of the Liberal Democrats for the notion that the Bill contained too light a trigger for "what, on

98 HL Deb 6 December 2006 c1180
99 HL Deb 6 December 2006 cc1208-9 (The Clause numbers are those in the Bill as presented in the House of Lords)
100 HL Deb 6 December 2006 c1184
101 HL Deb 6 December 2006 cc1194-5
102 HL Deb 6 December 2006 c 1210
103 HL Deb 18 April 2007 c 249

the face of it, are draconian powers that could lead to an approved regulator ceasing to be so approved".[104]

Baroness Butler-Sloss agreed that for the trigger to involve a single adverse impact would not constitute the "light touch" that was needed.[105] Similarly, Lord Hunt of Wirral, Lord Campbell of Alloway (Conservative), Lord Brennan (Labour) and Viscount Bledisloe (Crossbench) also spoke in support of the amendment.

Similar amendments moved in committee had been opposed by Lord Whitty who considered it "important that the intervention of the LSB is subject to its judgment and not to undue restraint in the Bill".[106]

Baroness Ashton said that she considered that the amendment would prevent the LSB from acting where, for example, there was an issue about access to justice simply because it could not be shown that the other objectives were being damaged. She also said that there could be difficulty interpreting the meaning of "significant". In any event, she considered the Bill would already achieve what was being sought.

On report, Lord Kingsland pressed for a division and the amendment was agreed by 184 votes to 132.[107]

The relationship between the LSB and approved regulators

Following a lengthy debate on the subject in committee, on report, Lord Kingsland again returned to his view that the Bill did not make it clear that the lead responsibility for regulation should be with the professional bodies, with the Legal Services Board exercising its powers only in the event of significant regulatory failure. He considered that the Bill would enable the LSB to "set out detailed templates for the way in which it considers that approved regulators should discharge their functions, to micromanage them and to substitute the board's view for that of an approved regulator, even where the approved regulator's approach is plainly within the range of reasonable decisions". Clause 49 would require the LSB to issue policy statements with respect to the exercise of its functions. Lord Kingsland moved an amendment to this clause intended to confirm what he considered the relationship between the Legal Services Board and the approved regulators should be.[108] Lord Carlile agreed that this was the clause to which the approved regulators would look in order to understand their relationship with the Legal Services Board and that therefore it should clarify the policy of light-touch regulation.[109] Lord Hunt also strongly supported the amendment.

Baroness Ashton replied that the Bill created the LSB as an oversight regulator, and made it supervisory in nature but that the LSB should also be able to take effective action when necessary. She pointed out that that Clause 49 already obliged the LSB to

---

[104] HL Deb 18 April 2007 cc 249-50
[105] HL Deb 18 April 2007 c250
[106] HL Deb 22 January 2007 c981
[107] HL Deb 18 April 2007 c 254
[108] HL Deb 18 April 2007 cc 262
[109] HL Deb 18 April 2007 c 264

make policy statements in respect of how it would exercise its powers under the Bill, and that these would have to be consistent with the regulatory principles in Clause 3 (transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed). Baroness Ashton confirmed that she supported the principle of having a light touch regulator but felt that the Bill already achieved that.

On a division, the amendment was passed by 169 votes to 130.[110] Accordingly the Bill would now provide that statements of policy issued by the LSB must "a) respect the principle that primary responsibility for regulation rests with the approved regulators; (b) ensure that the Board exercises its powers only where it considers that the action or inaction of an approved regulator is not an approach which the approved regulator could reasonably have taken; (c) provide that, save where there is an imminent risk of significant damage to the regulatory objectives, the Board will seek to resolve matters informally with the approved regulator before seeking its powers."

LSB's power to fine approved regulators[111]

On report, Lord Kingsland argued that fines should be used only where no lesser sanction would suffice.[112] Baroness Ashton resisted his proposed amendment saying that it would reduce the LSB's ability to make a flexible response to a regulatory failure. In addition, she did not want the power to fine to assume the same magnitude as the powers to intervene directly with approved regulators or to cancel an approved regulator's designation (where such a condition would apply). Lord Kingsland withdrew his amendment.

Appeal against regulatory decisions

The Joint Committee recommended that the Bill should include a right of appeal to the High Court against regulatory decisions of the LSB—supporting a proposal made by the House of Lords Constitution Committee.[113] The Government disagreed saying that the Bill would provide sufficient safeguards, including consultation, in respect of the making of the LSB's regulatory decisions. It considered that the inclusion of a right of appeal could lead to a high number of challenges, and, in turn, to increased costs and a weakening of the LSB's authority as an oversight regulator. Judicial review would still be available to challenge the lawfulness of an LSB regulatory decision.[114]

This contrasts with the position relating to the fining power, against which there is a specific right of appeal but no right to judicial review. The Government's explanation of the difference is that it believes that the fining power is a stronger measure.[115]

---

[110] HL Deb 18 April 2007 c 266
[111] Clauses 37 to 40
[112] HL Deb 18 April 2007 cc 258
[113] Paragraph 191
[114] p15
[115] HL Deb 23 January 2007 c 1013

Unsuccessful attempts were made in committee to introduce further rights of appeal. Baroness Ashton set out why the Government had provided no general appeals mechanism in the Bill:

> First, the board will be independent in its composition and decision-making, which is of great importance. Secondly, there are statutory safeguards in the Bill to ensure that fair and transparent procedures must at all times be followed if the board sees fit to sanction an approved regulator. ... Thirdly ... recourse to judicial review will be available in appropriate cases, ensuring that the board may be held to account without the need for a separate appeals procedure.[116]

Lord Kingsland pointed to what he considered to be an important distinction between a statutory right of appeal and judicial review: leave of the court must be obtained to bring an action for judicial review but this obstacle would not be present if there were a statutory right of appeal.[117]

5. Alternative business structures (ABSs)

a. The Bill

Part 5, Clauses 71 to 111 and Schedules 10 to 14 relate to what has sometimes been referred to by commentators as "Tesco law". Bridget Prentice has been quoted as saying "I don't see why consumers should not be able to get legal services as easily as they can buy a tin of beans".[118] However, in committee, Baroness Ashton confirmed her understanding that Tesco has no desire to be involved in ABSs and apologised to Tesco, through the committee.[119]

The Bill would facilitate alternative business structures which would enable lawyers and non-lawyers to work together to deliver legal and other services. External investment would also be possible.

At third reading in the House of Lords, the way in which the ABS provisions would be implemented was amended considerably by way of successfully pressed amendments. It is now provided that licensing authorities would be required to consider the likely impact of a proposed application on access to justice when considering an application (Clause 83(5)). A licensing authority would be either an approved regulator which is designated as such or the LSB (Clause 73). This had been a recurring concern at all stages. In addition, no order may be made to bring Part 5 into force until after consideration by both Houses of Parliament of a comprehensive report to be commissioned by the Lord Chancellor from an independent source analyzing the advantages and disadvantages which might be realistically expected to flow from the implementation of Part 5 (Clause 212).

An order to implement Part 5 would be subject to the affirmative procedure.

---

[116] HL Deb 23 January 2007 c 1017
[117] HL Deb 23 January 2007 c 1018
[118] "Legal advice will be 'just like buying a tin of beans", *Daily Telegraph,* 18 October 2005, p7
[119] HL Deb 23 January 2007 c 1062

The Bill would require any firm or company with at least one non-lawyer owner or manager to be licensed (by a licensing authority) in order to carry out reserved legal activities (Clause 72). Following a Government amendment, it is now provided that the LSB would have to make licensing rules for ABS firms only when it was established that the board needed to act ie when there was no other licensing authority with suitable arrangements in place for a particular type of body, or in the case of non-commercial bodies, when there was no licensing authority able to offer appropriate terms. (Previously the LSB had been required to make licensing rules within 12 months of a date set by the Lord Chancellor). Baroness Ashton said that this would reinforce the role of the LSB as a licensing authority of last resort and avoided requiring the board automatically to make licensing rules[120] (Clause 83 and Schedule 12).

The Bill includes detailed provisions relating to licensing rules and procedures for the regulation of alternative business structures (Schedule 11). All licensed bodies would have to have at least one manager who is an authorised person, and must have a Head of Legal Practice and a Head of Finance and Administration. Schedule 11 sets out provisions about who could be designated as such.

A new clause inserted since the draft Bill would ensure that clients of ABS firms would have the same rights to legal professional privilege[121] in their communications with lawyers in these firms as they would if they retained traditional law firms (Clause 191).

Schedule 13 is a new schedule since the draft Bill and deals with the ownership requirements of licensed bodies: approval requirements would have to be met in relation to external investors. The licensing authority would have to be satisfied that the external investor would not compromise the regulatory objectives or compliance with them by authorised persons. The licensing authority would also have to be satisfied that the person was a fit and proper person to hold the interest. Licensing rules must include criteria and procedure for making this decision.

In the second reading debate in the House of Lords, Lord Falconer summarised the safeguards in the Bill, which he said would answer the Joint Committee's concerns about the impact of non-lawyer ownership and management on legal services, including:

> 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.[122]

---

120 HL Deb 18 April 2007 c306

121 Legal professional privilege is the right to withhold documents and communications in certain situations because they relate to the giving or receiving of legal advice

122 HL Deb 6 December 2006 c1166

The Labour peer, Lord Borrie hoped that the extensive number of clauses including safeguards would not "be so off-putting that some of the desirable objectives and multidisciplinary firms, which would be for the benefit of clients, will not be obtained".[123]

Bodies deemed to represent a lower regulatory risk, such as trade unions and not-for-profit bodies, would be treated differently for the purposes of some of the requirements of the licensing regime for alternative business structures: Lord Falconer has confirmed that the Government does 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.[124] A body with less than 10 per cent management and/or ownership by non-lawyers could also be treated as a low-risk body (Clause 108).

The Bill would also allow practices with different types of lawyers, but no external managers or owners, to be established: these legal disciplinary practices (LDPs) would not be regarded as alternative business structures under the Bill, and so would not be regulated under Part 5 (the licensing provisions). The Law Society would be able to regulate LDPs under changes made to the *Administration of Justice Act 1985*.

b. Issues and debate

In the second reading debate in the House of Lords, Lord Falconer referred to this part of the Bill as providing "a means of increasing competition and choice for the consumer".[125] The White Paper identified potential benefits for consumers and legal services providers:

> Potential benefits for consumers:
>
> - more choice: consumers will have greater flexibility in deciding from where to obtain legal and some non-legal services
>
> - reduced prices: consumers should be able to purchase some legal services more cheaply. This should arise where ABS firms realise savings through economies of scale and reduce transaction costs where different types of legal professionals are part of the same firm
>
> - better access to justice: ABS firms might find it easier to provide services in rural areas or to less mobile consumers
> - improved consumer service: consumers may benefit from a better service where ABS firms are able to access external finance and specialist non-legal expertise
>
> - greater convenience: ABS firms can provide one-stop-shopping for related services, for example car insurance and legal services for accident claims
>
> - increased consumer confidence: higher consumer protection levels and an increase in the quality of legal services could flow from ABS firms which have

[123] HL Deb 6 December 2006 c1188
[124] HL Deb 6 December 2006 c1167
[125] HL Deb 6 December 2006 c1165

a good reputation in providing non-legal services. These firms will have a strong incentive to keep that reputation when providing legal services.

Potential benefits for legal service providers:

- increased access to finance: at present, providers can face constraints on the amount of equity, mainly debt equity, they can raise. Allowing alternative business structures will facilitate expansion by firms (including into international markets) and investment in large-scale capital projects that increase efficiency

- better spread of risk: a firm could spread its risk more effectively among shareholders. This will lower the required rate of return on any investment, facilitate investment and could deliver lower prices

- increased flexibility: non-legal firms such as insurance companies, banks and estate agents will have the freedom to realise synergies with legal firms by forming ABS firms and offering integrated legal and associated services

- easier to hire and retain high-quality non-legal staff: ABS firms will be able to reward non-legal staff in the same way as lawyers

- more choice for new legal professionals: ABS firms could contribute to greater diversity by offering those who are currently under-represented more opportunities to enter and remain within the profession.[126].

The Joint Committee noted that the Part 5 provisions represented the greatest departure from Sir David Clementi's recommendations and said that it should be an over-riding consideration in licensing ABS firms that nothing in the proposed ABS structure would have an adverse effect on the quality of legal advice given by the legal professional to the client.[127] The Government agreed with the principle that ABS firms should not create an adverse effect on the quality of legal advice.[128]

Peers debated a range of issues relating to the ABS provisions including whether ABS firms should be allowed at all; if so, the timetable for implementation of the provisions; the potential impact on competition and access to justice; what monitoring and research should be put into place; the ownership provisions; and which bodies should qualify as being of low risk.

Should ABS be allowed at all?

There was considerable debate about whether Part 5 should be removed in its entirety.

---

126 pp 40-41, *The Future of Legal Services: Putting Consumers First,* Cm 6679, http://www.dca.gov.uk/legalsys/folwp.pdf

127 Paragraph 253, Joint Committee on the Draft Legal Services Bill, *Draft Legal Services Bill*, 25 July 2006, HC 1154, HL 232 2005-06, http://www.publications.parliament.uk/pa/jt200506/jtselect/jtlegal/232/232i.pdf

128 p22

Lord Thomas of Gresford considered that the ABS provisions might benefit professionals, but he doubted whether there would be benefits for the consumer. He thought that the scope for conflicts of interest would be considerably widened and might cause serious problems.[129] He also considered that high street firms, unable to compete, would close down and then the fees of the large firms would go up.[130] In committee he moved a stand part amendment (later withdrawn).[131]

Lord Whitty considered that "for the vast bulk of people ... it must be better that the range of services that they normally need in any complex legal transaction could be made available in one place".[132]

Baroness Ashton pointed out that there was already legislation allowing alternative business structures[133] but as yet no rules and regulators so that removing Part 5 would not remove alternative business structures, but rather the opportunity to create the structures in the way designed by the Government.[134] She also cautioned against making assumptions about the detriment to the high street or that the high street always provided all the services that people want at the quality and price they want.[135]

On report, a further attempt to remove Part 5, this time by Lord Carlile of Berriew, was defeated on a division by 116 votes to 48.[136] He considered that the provisions would stifle competition for people of poorer means and those in rural areas, and also that the introduction of alternative business structures would directly contradict the regulatory objective of the encouragement of, an independent, strong, diverse and effective legal profession. He also considered that the attractions of ABSs would be for large corporations and the lawyers who might want to deal only with certain types of case and not, for example, with small cases. He felt that the public would be directed to call centres, "which will offer unqualified persons giving poor-quality advice".

Lord Whitty acknowledged some of the concerns which had been expressed but said that consumer organisations considered that there should be some flexibility in how legal services were provided. He thought that solicitors in small towns would be able to expand into providing multiple services to consumers in a one-stop shop.[137]

Lord Kingsland agreed that there were serious concerns about the impact that the licensing provisions might have on the provision of legal services in rural areas and in many large industrial towns. However he did not favour removing Part 5 in its entirety, rather that amendments should be made to address the concerns.[138] Similarly, Lord Campbell of Alloway did not wish to expunge the clauses but did want an effective

---

129 HL Deb 6 December 2006 cc1175
130 HL Deb 23 January 2007 c1078
131 HL Deb 23 January 2007 c1077
132 HL Deb 23 January 2007 c1080
133 Section 66 of the *Courts and Legal Services Act 1990*
134 HL Deb 23 January 2007 c1081
135 HL Deb 23 January 2007 c1083
136 HL Deb 18 April 2007 cc 272-280
137 HL Deb 18 April 2007 cc 274-5
138 HL Deb 18 April 2007 cc 276

monitoring system and, perhaps a pilot scheme. Lord Neill of Bladen considered that "we are rushing into this on an inadequate basis of fact, testing and research" but favoured a sunrise clause.[139]

Baroness Ashton said that the Government wanted to achieve a better quality of legal service and that removing Part 5 could stifle innovation and prevent change.

Timing of introduction of Part 5

The Joint Committee recommended that the Government should consider moving more slowly and cautiously towards implementation of the ABS proposals and that the LSB should be required to take a step-by-step approach to ABSs, initially allowing only partnerships of different types of lawyers without outside ownership or management.

The Government agreed with the principle behind the Committee's recommendation but not with the idea of having a prescribed timetable. It said that the LSB would decide whether a regulator had appropriate arrangements in place to regulate and address the risks of various kinds of ABSs, and those ABSs would emerge only once this regulatory framework existed. The Government did not see any reason to delay implementation and 'the benefits to clients'.

Following on from the Joint Committee's recommendation, in committee, Lord Kingsland moved a probing amendment designed to ensure that Part 5 would be introduced on an "incremental basis". Lord Kingsland spoke of the concerns about the effect that ABS firms might have on the market and in particular, on access to justice.[140]

Lord Hunt considered that a more cautious approach had been recommended by Sir David Clementi than that now in the Bill:

> In his 2004 report, Sir David Clementi recommended the facilitation of what he described as "legal disciplinary practices", known as LDPs, allowing different kinds of lawyers to work together, with or without external ownership or management. He drew a clear distinction between LDPs and MDPs—multi-disciplinary practices—which bring together lawyers and other professionals to provide legal and other services to third parties. He concluded that the creation of LDPs would represent a major step towards MDPs if, at a subsequent juncture, the regulatory authorities considered that sufficient safeguards could be put in place. Those are such important words. I think I speak for most noble Lords when I say that we are not yet persuaded that sufficient safeguards have been put in place.[141]

Lord Whitty strongly supported the principle of ABS firms but was also concerned about the potential impact on rural areas. He thought that, when individual applications were being considered, it would be important for the wider impact to be taken into account.[142]

---

139 HL Deb 18 April 2007 cc 277 A sunrise clause would mean delayed implementation in this case pending further study
140 HL Deb 23 January 2007 c1055
141 HL Deb 23 January 2007 cc1057-8
142 HL Deb 23 January 2007 c1058

Baroness Ashton did not consider it necessary to impose specific constraints in the Bill, She said that ABS firms would be licensed only when rules compatible with the regulatory objectives and meeting the safeguards in the Bill, were in place.

She considered that an incremental approach might have problems with regard to competition "either by going for various sectors or by being unrealistic about constraining geographically the way in which firms, companies and organisations now work, not least because of the internet".[143] She also considered that it would be wholly inappropriate and wrong to pick a few companies and give them, and nobody else, the chance to pilot the scheme.[144]

In committee, Lord Maclennan of Rogart moved a probing amendment proposing the establishment of a pilot scheme, in order to question the Government on its plans to implement the ABS provisions.[145]

Lord Borrie questioned the value of a scheme involving one kind of alternative business structure when many other structures might be so different that it would not tell very much.[146] Lord Clinton-Davis was similarly unconvinced about the value of a pilot scheme. Lord Kingsland, whilst sympathetic to the concerns behind the amendment, also had reservations about the appropriateness of a pilot scheme.

Baroness Ashton said that she understood the concerns behind the amendment but that any approach considered would put serious constraints on providers, consumers or both and there might be anti-competitive results as well. She set out the Government's proposed timetable:

> From Royal Assent onwards, the Law Society can start to regulate lawyer-controlled legal disciplinary practices (LDPs). Smaller regulatory bodies—for example the Council for Licensed Conveyancers, the Chartered Institute of Patent Agents and the Institute of Trade Mark Attorneys—already allow LDPs to operate but will be granted enhanced powers.
>
> Professional bodies intending to regulate alternative business structures can start to develop their licensing rules. Legal services providers and investors can investigate options for alternative business structure status and develop business plans for change. Certain existing ABS firms—for example, as we discussed earlier, some conveyancing and patent trade mark practices—can continue under transitional arrangements and adapt themselves to prepare for licensing. ...there is an issue to be resolved about the length of the transitional arrangements.
>
> Between February 2008 and November 2009, the LSB chair would be appointed, followed by the LSB board members and the interim chief executive. The LSB would work with approved regulators, helping them to prepare for designation as licensing authorities. In 2010-11, the LSB can process applications from regulators for designation as licensing authorities. As the Committee will know,

---

[143] HL Deb 23 January 2007 c1059
[144] HL Deb 23 January 2007 c1088
[145] HL Deb 6 February 2007 c653
[146] HL Deb 6 February 2007 c655

> professional bodies can become authorised to license ABS firms, but only where the rules are fit for purpose. From 2011 onwards, ABS licences can be granted in accordance with licensing rules and the statutory safeguards that we have set out. I hope that that gives a sense of the time frame to which we are working.[147]

At third reading an amendment moved by Lord Neill of Bladen was passed.[148] (This amendment was discussed in the same debate as Lord Kingsland's "access to justice" amendment (see below) and there was no separate vote on this provision: it was carried by agreement.) A similar amendment had been debated in committee and received much support.[149] The effect of the amendment would be that no order may be made to bring Part 5 into force until after consideration by both Houses of Parliament of a comprehensive report to be commissioned by the Lord Chancellor from an independent source analyzing the advantages and disadvantages which may be realistically expected to flow from the implementation of Part 5. An order to implement Part 5 would be subject to the affirmative procedure.

In committee, Lord Neill said that he felt that there was an absence of material evidence on certain key features in relation to Part 5. He queried three areas: the effect on small firms of solicitors; the question of who would aspire to own law firms; and what has been happening in other countries.[150]

On report, Baroness Ashton had earlier commented that there were practical difficulties with the amendment:

> It would require us to get as much information as possible about alternative business structures before setting off down this path. The trouble is that, unless we do so, we cannot get the information. It is rather a Catch-22 proposition within the noble Lord's amendment.
>
> I agree wholeheartedly that we need to be cautious and to do this in a measured way. Indeed, everything that we have suggested about the way we are setting it out, the safeguards, the way we would wish to license the professions and so on is designed to do precisely that. ...
>
> But we have all the information that there is to be had.[151]

<u>The effect of ABS firms on competition and access to justice</u>

The Joint Committee recommended that the Government should amend the draft Bill to ensure that the impact of ABSs on access to justice, particularly in rural areas, would inform the decision-making process for licensing an ABS firm.[152] This was also a matter of concern to peers.

---

147 HL Deb 6 February 2007 c 658
148 HL Deb 15 May 2007 c 148
149 HL Deb 6 March 2007 cc207-214
150 HL Deb 6 March 2007 c208
151 HL Deb 15 May 2007 cc 142-3
152 Paragraph 324

At second reading, Lord Kingsland said that there were some important competition issues:

> for example, the issue of cross-subsidisation. You might get a very powerful ABS deciding to try to drive a legal firm out of a particular market by predatory pricing; by subsidising from profitable legal activities in the other part of a firm a particular section of a firm that would sell its legal services below cost to gain a competitive advantage and probably drive several of its competitors out of the market. Those are the sort of problems that will need very careful handling by the Legal Services Board if we are not to have a whole range of competition problems, which seem to me so far to have been unforeseen.[153]

Baroness Ashton commented on concerns raised that commercial interests might conflict with consumer protection:

> These firms will be subject to robust safeguards to protect the consumer and will be accountable to the licensing authority. They will also have specific duties to maintain ethical and financial standards and have monitored compliance. We think that in the Bill and the regulations which will follow we have the ability to ensure that consumer protection is taken forward and that commercial interests and conflicts of interest are dealt with appropriately.[154]

Lord Thomas of Gresford was concerned about the potential effect of the ABS provisions on high street practices:

> If you bring in outside money, it will enable partners in a large legal firm to sell out to shareholders and realise the value of their stake in the business. The Government can expect support from that quarter. As for the client, the consumer, he will lose out. If there is national marketing by a large concern with special offers to kill off local competition, the high street firm...cannot survive. The large organisations will concentrate on the profitable side of the business. You can forget about legal aid, access to justice and pro bono work. The Tescos and insurance companies of this nation are not interested in working for nothing.[155]

However, the Labour peer, Baroness Henig, thought consumers would benefit:

> The Law Society gives alternative business structures a cautious welcome, but is worried that the outcome might be to create legal deserts, especially in rural areas, and rightly emphasises that it is important to preserve access to justice on people's doorsteps. I agree with that view, but I would argue that under the new proposals, access to legal services will be enhanced for the vast majority of people. We will see a greater variety and diversity of legal services being provided, probably at a lower price, and no doubt including the use of the internet. This could indeed lead to a significant shift in the way legal services are provided, and will certainly have implications for many firms of high street solicitors. In future, they will neglect the needs of their clients at their peril, because providing a high quality of service and satisfaction will be the only way to make sure that

---

[153] HL Deb 6 December 2006 c1206
[154] HL Deb 6 December 2006 c1213
[155] HL Deb 6 December 2006 c1175

> clients do not vote with their feet for a perhaps more impersonal but certainly more accessible service provided by Tesco or the Co-op.[156]

In committee, Lord Whitty agreed that the consumer interest is not always served by greater competition, that some competition can drive out the best and reduce standards. However, he considered that, in general, consumer interest had been served by increased competition.[157]

Further concerns were raised in committee about the potential effect of ABS firms on access to justice. For example, Lord Lyell of Markyate spoke of the risk that large businesses looking for volume might "cream off" some of the more standard work and consequently remove the legitimate earning power of those who provided a wider service.[158]

Baroness Ashton said that access to justice might be protected by the imposition of conditions on an ABS firm, for example that it must continue to do a certain type of work.

Lord Hunt pointed to the possibility that the LSB might choose to give greater weighting to other objectives such as promoting competition.[159] Baroness Ashton stressed the importance of the LSB being able to look at ABS firms and the regulatory objectives in the round.[160]

On report, a Government amendment was passed which would require licensing authorities for alternative business structures to issue policy statements, with the approval of the LSB, setting out how they would comply with the duty to promote the regulatory objectives when exercising their functions. Baroness Ashton said that, rather than impose a duty specific to access to justice, the Government had sought to look at the interaction between access to justice and the other regulatory objectives.[161]

However, Lord Kingsland did not agree that this dealt with the issue as it failed to direct licensing authorities' attention to the particular risks to access to justice posed by alternative business structures.[162] He moved a further amendment designed to ensure that the impact on access to justice should be fully considered when decisions on licensing prospective alternative business structures were taken.[163] He insisted that this would not create access to justice as the overarching objective, a fear expressed by Baroness Ashton in relation to a similar proposed amendment in committee.[164] He said that the amendment was intended to ensure that the licensing authorities considered the possible effect of access to justice and gave the issue full weight when determining

---

156 HL Deb 6 December 2006 cc1189
157 HL Deb 23 January 2007 cc 1079-80
158 HL Deb 6 February 2007 c628
159 HL Deb 23 January 2007 c1060
160 HL Deb 23 January 2007 c 1061
161 HL Deb 18 April 2007 c 305
162 HL Deb 18 April 2007 c 305
163 HL Deb 18 April 2007 c 306
164 HL Deb 6 February 2007 c 634

applications. Lord Carlile of Berriew and Baroness Butler-Sloss both spoke in support of the amendment.

Baroness Ashton said she fully agreed with the importance of access to justice. However she said that all the objectives should be considered effectively and properly which her amendment sought to achieve. Lord Kingsland withdrew his amendment but brought it back again at third reading. He set out again what the amendment was intended to achieve:

> First, all the amendment obliges the licensing authority to do is to conduct a thorough investigation into the access to justice implications of the proposal. The obligation is for the licensor to put itself in the picture as thoroughly as possible before testing the proposal against all eight objectives. Within the scope of the amendment, the licensor is perfectly entitled to investigate in as much detail as it thinks appropriate any of the other seven objectives. Secondly, even if I am wrong about my understanding of my own amendment, there is, in my submission, nothing wrong or unprecedented in Governments requiring decision-makers to give particular or significant weight to a relevant consideration, and, in this case, there is a powerful a priori reason for doing so.[165]

Lord Kingsland insisted that the obligation in the amendment was to investigate, not to distort the weighting system.

The amendment had widespread support amongst peers from both major opposition parties, and from Crossbenchers. The Government continued to resist because it felt it would inappropriately give access to justice a priority over the other regulatory objectives.

The amendment was passed by 213 votes to 145.

Monitoring and research

On report, Lord Hunt of Wirral moved an amendment which would have required the Lord Chancellor to commission a study into the operation of Part 5 with a report to be laid before Parliament within three years of Part 5 coming into force.[166] A similar amendment had also been moved in committee.[167]

The Government tabled its own amendment dealing with monitoring ABSs which would impose on the LSB a duty to report on the development of ABSs in the Board's annual report. This would be a permanent duty. Lord Evans of Temple Guiting, Government Spokesperson for the then Department for Constitutional Affairs, explained the Government's approach:

> The report is, of course, laid before Parliament, so this will reinforce parliamentary scrutiny of ABS ... Placing the monitoring duty on the board keeps

[165] HL Deb 15 May 2007 c 136
[166] HL Deb 18 April 2007 c313
[167] HL Deb 6 February 2007 c 660

> all oversight of ABS in one place, which gives a more joined-up approach to checking how the regulatory objectives are being met. The reporting duty covers licensing authorities and licensed bodies. This means that the board will be monitoring not only the decisions of licensing authorities, which it would anyway in its oversight role, but also the practical effects of those decisions.[168]

Lord Hunt remained convinced that the two amendments were compatible: his to cover the immediate position and the Government amendment to provide a way for the study under his amendment to be followed up regularly through the mechanism of the annual report. However, on report, Lord Hunt's amendment was defeated on division by 38 votes to 36. The Government amendment was agreed on question.[169]

Ownership of ABS and low risk bodies

On report, Lord Hunt of Wirral returned to concerns expressed in committee and moved an amendment designed to enable legal disciplinary practices to exist without having to be licensed if three quarters of the partners were lawyers and there was no external ownership. His intention was to allow a non-legally qualified person who plays a significant part in the running of a legal practice, for example, a finance director, to be a partner without invoking all the licensing provisions.[170] He envisaged that the Law Society would need power to establish a register of permitted non-lawyer partner-managers of firms and to set requirements for eligibility to the register.

Baroness Ashton resisted the amendment saying that the Government wished to create, as far as possible, a level playing field between regulators, offering all the potential to become licensing authorities. She would not want to give one regulator a potential competitive advantage, "first, by virtue of reaching part of the alternative business structure market before other regulators and, secondly, by avoiding the additional statutory requirements that would otherwise apply to these practices".[171] She went on to say that if a body had non-lawyers in positions of control it would be a licensable body. The framework already provided for "low-risk bodies" but the Government had set the maximum limit for non-lawyer ownership at 10 per cent: anything above this would need full scrutiny. The amendment was withdrawn.

An amendment was moved by Lord Kingsland in committee which would have raised the level of non-lawyer ownership for low risk bodies from 10% to 25% where the non-lawyer managers and owners were members of a recognised professional body (including chartered surveyors and accountants). The Government resisted this amendment, which was then withdrawn, saying that it would be necessary to have effective safeguards to ensure that legal professional principles and ethical practices were maintained: the requirements for a head of legal practice and head of finance and administration and the tests that Part 5 created for external owners were important in this regard.[172]

---

168 HL Deb 18 April 2007 cc 314-5
169 HL Deb 18 April 2007 cc 315-6
170 HL Deb 18 April 2007 cc 297
171 HL Deb 18 April 2007 cc 300
172 HL Deb 6 February 2007 c647

Potential conflict with duty to shareholders

The Joint Committee considered that LDPs and MDPs with outside ownership might create an undesirable conflict between shareholders and lawyers and the benefits of outside ownership would need to be weighed against the merits.[173]

On report, Lord Kingsland moved an amendment (which was subsequently withdrawn) which sought to ensure that, in the context of ABS firms, lawyers' duties to comply with their professional conduct obligations would override any other obligations, including their directors' duties to shareholders.

At third reading Baroness Ashton said that she had received advice from the Department of Trade and Industry about Lord Kingsland's amendment and said that she would try to clarify the matter:

> I understand the concern regarding directors' duties to a company and its shareholders, yet we emphasise that those duties are intended to be cumulative with any other duties to which the director may be subject, not in conflict with them. The duties owed by directors in Part 10 of the 2006 Act do not require directors to break the law and could never form a defence to a breach of another legal obligation. Instead, they must be understood in the context of the wider legal framework. Section 172 of that Act, which requires directors to promote the success of the company for the benefit of the members as a whole, is flexible enough to allow for directors' duties and the duties arising under other law to operate harmoniously without any need for specific provision in other legislation.
>
> As noble Lords will know, we have just completed a codification of company law, including directors' duties, in the Companies Act 2006. The DTI is concerned that an override provision in relation to lawyers' duties, such as that proposed by the noble Lord, would risk creating uncertainty in company law and other law to which companies are subject, because it would be unclear as to how directors' duties would interact with regulatory obligations in areas other than legal services.
>
> In other words, the Companies Act recognises that in fulfilling their duties to shareholders, directors of companies must have the flexibility to have regard to a wide range of objectives and to act in furtherance of purposes other than the benefit of the company members, where applicable. It may be taken as read that directors are required to comply with other legal obligations. We do not wish to state that explicitly, because we risk negative inferences for other regulatory legislation.[174]

6. Legal complaints

a. Current position

At present, anyone wishing to complain about a lawyer should usually complain directly to the lawyer or firm concerned, and then, if they are still dissatisfied, refer their

---

[173] Paragraph 281
[174] HL Deb 15 May 2007 c135

complaint to the relevant legal professional body. Each of the legal professional bodies maintains its own complaints and disciplinary procedures. Anyone who is dissatisfied with any investigation undertaken by the professional body can refer the matter to the Legal Services Ombudsman (LSO) who will investigate the way that a complaint was handled.

The Legal Services Complaints Commissioner (an independent Government appointed regulator) has responsibility for working with the Law Society to improve its complaints handling. The Commissioner sets performance targets for the Law Society, can make recommendations for improving complaints handling and has power to levy a penalty of up to £1,000,000 against the Law Society in certain circumstances. In 2006, the Law Society was fined £250,000 (later reduced to £220,000) over proposed 2006-07 targets for complaints handling.

The Joint Committee report includes information about the relative level of complaints made against different legal professionals:

> 346. Currently, there is considerable variation in the level of complaints about legal services received in different professional areas. PricewaterhouseCooper's financial analysis of the draft Bill put the current cost of legal complaints handling at £33 million. The Law Society represents 116,000 members. In 2004/5, the Law Society, which handles complaints against its members, received 17,074 new complaints. Complaints about solicitors account for around 86 percent of the total cost of legal complaints handling, to the value of around £28 million. The Bar Standards Board (BSB), which has handled complaints against members of the Bar since January 2006, deals with between 600 and 900 complaints each year. Around 500 come from lay clients or other external sources; the remainder are raised by BSB against barristers who fail to meet their own standards and requirements. It estimates its complaints handling costs to be £512,000 a year and expects complaints against members of the Bar to account for about three percent of the cases referred to the new Office for Legal Complaints. The Council for Licensed Conveyancers received 190 complaints in the year ending 2005. The Chartered Institute of Patent Attorneys (CIPA) and Institute of Trade Mark Attorneys (ITMA) together represent about 2300 legal professionals. CIPA told us that they typically receive less than ten complaints per year, while ITMA has received three client complaints since 2001. They consider it to be extremely rare that these are not settled by amicable means through conciliation.[175]

Information about the current system for making complaints against solicitors is set out in a Library standard note, *Complaints against solicitors.*[176]

Concerns have been raised about the system of making legal complaints. Sir David Clementi concluded:

> There is a considerable concern about how complaints are dealt with. The concern arises at a number of levels: at an operating level there is an issue about the efficiency with which the systems are run; at an oversight level there is a

[175] Paragraph 346 (footnotes omitted)
[176] SN/HA/3762

> concern about the overlapping powers of the oversight bodies; and at a level of principle, there is an issue about whether systems for complaints against lawyers, run by lawyers themselves, can achieve consumer confidence. A large number of the responses to the Consultation Paper expressed dissatisfaction with the current arrangements. [177]

b. The Bill

The Bill would establish a new independent complaints handling body, the Office for Legal Complaints (OLC). The OLC would be accountable to the LSB which would be able to set and monitor performance targets (Clause 121). The OLC would appoint lay ombudsmen to deal with complaints[178] (Clause 122). Handling of complaints about service, which would, in general, be undertaken by the OLC, would be separated from handling of complaints about conduct, which would be undertaken by the relevant approved regulator (Clause 113). Approved regulators would no longer have power to provide redress to complainants and this power would instead be given to the OLC (although in certain circumstances, the LSB would be able to delegate this power back to approved regulators) (Clause 158). The OLC would be able to award redress in respect of a complaint of up to £20,000 (Clause 138). The Explanatory Notes include further information about how the OLC would operate including:

> 296. The OLC will have clearly defined powers. Under its ombudsman scheme it will deal with consumer complaints about advice or services provided by authorised persons - persons (including bodies) regulated by approved regulators in the provision of legal services. The ombudsman will investigate complaints, and may refer any indication or allegation of misconduct to the relevant approved regulator (which will retain power to take disciplinary action). The OLC will monitor the decisions that are made in respect of the alleged misconduct, but it will not be able to take any disciplinary action itself. If necessary, the OLC will report any concerns to the Board for its consideration.
>
> 297. All authorised persons will be required to maintain in-house complaints handling arrangements. These will continue to be the first port of call for a consumer, and the OLC will not consider complaints that have not been considered in-house in the first instance, except in very limited circumstances. If the complaint is not resolved satisfactorily in-house, the consumer will be able to bring complaints to the OLC free of charge.
>
> 298. The handling of complaints will be the responsibility of the ombudsmen (headed by the Chief Ombudsman), although the Bill enables functions of investigation, etc. short of determination of complaints to be delegated to members of staff who are not ombudsmen. The OLC will be responsible for making rules ("scheme rules") by which the complaints handling scheme is to operate, but the Bill generally envisages a model similar to that established for the Financial Ombudsman Service under powers in the Financial Services and Markets Act 2000, so that it is anticipated that, in the first instance, a complaint

---

[177] Sir David Clementi, *Review of the Regulatory Framework for Legal Services in England and Wales Final Report,* December 2004, p2, http://www.legal-services-review.org.uk/content/report/report-chap.pdf

[178] A lay person is defined in Schedule 15 paragraph 2. Assistant ombudsmen are not required to be lay but must not during their appointment carry on any reserved legal activity for or in expectation of any fee gain or reward

will be allocated to a case worker who will investigate and attempt to mediate the complaint.

299. The Chief Ombudsman and assistant ombudsmen would become involved where mediation by a caseworker has not been successful, in which case, an ombudsman will be responsible for making a final determination which, if accepted by the complainant, would become binding on all parties to the complaint.

300. The Bill also provides that should any indication or allegation of misconduct be revealed at any stage in the process of considering a complaint, the matter should be referred to the relevant approved regulator for consideration of possible disciplinary action.

301. When determining a complaint, the ombudsman may direct the respondent to do one or more of the following:

- apologise to the complainant;
- forego all or part of the respondent's fee;
- pay the complainant a determined amount to compensate for any loss, inconvenience or distress;
- correct or redo any work responsible for any error, omission or deficiency at their own expense (with no charge to the complainant); or
- at their own expense do whatever is set out by the Chief Ombudsman or assistant ombudsman, in determining a complaint, deemed necessary in the interests of the complaint.

302. The "total value" of the orders together cannot exceed more than £20,000 (not including any amount by way of repayment of fees, or any interest, the rates for which will be set out in scheme rules).

303. The costs of the OLC and the ombudsman scheme are to be recouped from the legal professions by a combination of a general levy on approved regulators, and case fees payable in circumstances specified in scheme rules by individual respondents to complaints.

304. The detail of the way in which complaints will be dealt with under the ombudsman scheme is to be provided in scheme rules (the power to make those rule is set out at clause 133). The OLC must obtain the consent of the Board before making rules.[179]

The OLC would be chaired by a lay person and would have a lay majority.

The Government accepted a recommendation by the Joint Committee that the OLC should operate a scheme with the word “ombudsman” in the title (Clause 115). It accepted a further recommendation and included a provision that a complaint would be excluded from the jurisdiction of the ombudsman’s scheme if the complainant had not first used the in-house complaints procedure (Clause 126) The provisions relating to legal complaints have been extended to include those providing claims management services (Clause 162).

---

[179] Bill 108-EN, http://www.publications.parliament.uk/pa/cm200607/cmbills/108/en/07108x-e.htm

A number of Government amendments were agreed during the Bill's passage through the House of Lords, at least in part in order to address concerns raised at earlier stages, including:

- OLC scheme rules would have to make provision permitting specified persons to continue a complaint following the death or incapacitation of the original complainant (Clause 132)

- the power of the OLC to award costs against a complainant in favour of the OLC has been amended. An ombudsman would have power to make such an award if, in the ombudsman's opinion, the complainant acted so unreasonably that it is appropriate in all the circumstances of the case to make such an award (Clause 133(3)(j)). Baroness Ashton explained the rationale:

  > it is important to strike a balance between allowing on the one hand the Office for Legal Complaints to be able to call to account complainants who, although they may have a genuine complaint, add disproportionately to the costs of determining it by utterly unreasonable behaviour, and preventing members of the legal profession from abusing this provision by deterring well founded complaints by suggesting that the complainant might have to contribute to the costs. … Noble Lords agreed in Committee that it is enormously important that the ombudsman scheme should not deter in any way genuine complainants from complaining, and therefore this amendment sets a high threshold for the award of costs against a complainant[180]

- only an ombudsman would have power to dismiss a complaint summarily (Clause 134)

- where a respondent fails or refuses to comply with an ombudsman's determination, ombudsmen would have power to take enforcement action on a complainant's behalf (details would be in the scheme rules) (Clause 141)

- an approved regulator would be able to make provisions in their regulatory arrangements requiring an authorised person to take certain action (Clause 159); the Explanatory Notes sets out the intention behind the clause:

  > The intention behind the clause is to ensure that approved regulators are not prevented by clause 158 from making provisions – subject to the Board's approval - requiring authorised persons to take proactive steps in cases where a number of clients may have been affected by the relevant authorised persons' acts or omissions and may have a claim for redress against them.[181]

Considerable concern was voiced about the envisaged "polluter pays" levy, which could have required a contribution to the cost of processing a complaint which was not upheld, from the person against whom the complaint was made. Following a successfully

---

[180] HL Deb 8 May 2007 c1276
[181] Bill 108-EN, p74

pressed Opposition amendment, the Bill now provides that the scheme rules may make provision for costs to be awarded against a practitioner if a complaint is determined or otherwise resolved substantially in favour of the complainant, or if, in the ombudsman's opinion, the respondent practitioner failed to deal with the complaint in accordance with the relevant regulatory arrangements (Clause 133 (3) (i).

The Bill retains the distinction between the handling of consumer complaints by the OLC and issues of misconduct which would be dealt with by the approved regulators. However, a further Opposition amendment passed on report would enable the LSB to make a direction allowing an approved regulator to determine such complaints as are specified in the direction (which would otherwise fall within the jurisdiction of the ombudsman scheme). Where such a direction is given, the approved regulator would be able to award redress to the complainant. The LSB would have power subsequently to vary or withdraw a direction. In deciding whether to give, vary or withdraw a direction, the Legal Services Board would be bound by Clause 3 to act compatibly with the regulatory objectives and the other regulatory principles of the Bill (Clause 143).

Other provisions in this Part would include requirements as to the membership of the OLC, and appointment as an ombudsman, and the regulatory arrangements of approved regulators under the scheme.

c. Issues and debate

Two main issues dominated the debates on this part: the "polluter pays" mechanism and the delegation of service complaints handling to the Bar. Both issues were eventually the subject of successfully pressed Opposition amendments. Other issues considered included the power to alter the number of members of the OLC, appeals, the redress limit and the LSB's role.

The "polluter pays" mechanism

As originally drafted, the Bill envisaged a "polluter pays" mechanism. This was explained in the Explanatory Notes published with the Bill when it was introduced in the House of Lords:

> 318. It is envisaged that the ombudsman scheme rules (to be approved by the Board) will apply a combination of periodic (annual) fees for approved regulators and a "polluter pays" mechanism to fund legal complaints handling. The "polluter pays" mechanism will mean that the respondent of a complaint, whether the complaint is upheld or not so long as it is not firstly excluded from the scheme, is charged for the handling of the complaint. This is similar to the Financial Ombudsman Service scheme.[182]

On report, an amendment moved by Lord Kingsland, with considerable support, designed to remove the possibility of this "polluter pays" levy against a respondent found to be blameless, was passed by 183 votes to 127.[183] Lord Maclennan of Rogart said "I

[182] HL Bill 9 – EN, http://www.publications.parliament.uk/pa/ld200607/ldbills/009/en/2007009en.pdf
[183] HL Deb 8 May 2007 cc 1277-1283

venture to say that no provision in the Bill has aroused stronger or more carefully argued opposition than this one".[184]

Lord Kingsland thought that those exonerated following investigation or litigation should not be penalised for being found blameless.[185] He and others felt that such a provision would be wholly unjust and would also have the effect of deterring practitioners from acting in those fields of law, such as criminal and family law, where unjustified complaints are disproportionately likely.

The Bill now provides that costs could be awarded against a practitioner if the complaint is determined or otherwise resolved substantially in favour of the complainant, or if, in the ombudsman's opinion, the respondent practitioner failed to deal with the complaint in accordance with the relevant regulatory arrangements.

Lord Kingsland agreed that the power to award costs should not be confined only to cases where the complaint is upheld after a determination by an ombudsman as this might mean that authorised persons could avoid liability to pay simply by settling the matter shortly before a determination would have to be made.[186] He also felt that the amendment would encourage practitioners to operate proper in-house complaints resolution systems.

Baroness Ashton had argued that it was more appropriate to leave it to the OLC to define how a charging regime might operate in consultation with the approved regulators, with the consent of the Legal Services Board and of the Lord Chancellor and in line with the regulatory objectives.[187] She said that this would allow for flexibility and ensure that the charging system could change and adapt over time based on experience and good practice. She also said that the Bill already included constraints designed to ensure that the system of case fees would operate fairly and that the Bill provided that the scheme rules would set out how charges against lawyers were to operate: this did not mean that there would be a system under which every lawyer would have to pay regardless. The OLC might decide that it would be unfair to charge a fee for complaints that were not upheld:

> We cannot argue that the rules are unfair, because they have not been made. Nothing in the Bill suggests that there must be a blanket charge for any lawyer, whether or not they have fulfilled their obligations under an in-house complaints system, or have been taken to the Office for Legal Complaints in a vexatious way. Quite the opposite: the Office for Legal Complaints must draw up rules and, in doing so, consult the professions and the Legal Services Board, and consult and deal with the noble and learned Lord the Lord Chancellor. There are currently no rules, and it is important that we let the Office for Legal Complaints design the rules within the process and constraints I have identified.[188]

---

184 HL Deb 8 May 2007 cc 1280
185 HL Deb 8 May 2007 cc 1277
186 HL Deb 8 May 2007 cc 1278
187 HL Deb 8 May 2007 cc 1281
188 HL Deb 8 May 2007 cc 1282

However Lord Kingsland considered that the Bill should enshrine the principle that an authorised person should not be penalised for being found blameless.

Delegation of complaints handling

The Joint Committee expressed concern that a "one-size-fits-all" approach to complaints handling might not be suitable for all complaints, particularly where issues of conduct and service were effectively inseparable. It recommended that the OLC should have power to refer service complaints, as well as conduct complaints, to an approved regulator where it considered this appropriate. The LSB and the OLC would have to be satisfied that an approved regulator had an approved mechanism to handle service or "hybrid" complaints. The OLC should remain the single access point to which consumers take their complaint.[189]

The Government believed there to be clear practical benefits in separating consideration of redress from regulatory action. It set out a number of reasons for disagreeing with the Committee's recommendation:

> The great majority of complaints do not require regulatory action and where they do it is not right that the consumer should have to wait for that to be resolved before getting redress. Whilst the Government appreciates the Committee's concern that this is not necessarily the case for every type of legal services provider, it does not seem defensible from the perspective of consumer confidence to make an exception to this principle in the case of a single type of provider. Allowing different processes for different types of provider would be inconsistent with key objectives such as clarity for consumers and consistency of outcomes. Consumers would be uncertain about who was handling their complaint, or the criteria against which it was being measured.[190]

At all stages, peers distinguished the Bar's handling of complaints against barristers, which had been praised by the Legal Services Ombudsman, from the Law Society's handling of complaints against solicitors, which had been criticised. They also spoke of the difficulty of separating matters of professional discipline (to be dealt with by approved regulators) from matters of consumer redress (to be dealt with by the new OLC). At second reading, Lord Lyell of Markyate said that it seemed "clumsy and unnecessary to divide the two" and asked the Government to consider giving the OLC the opportunity and power to delegate both discipline and redress to the Bar, "provided that it continues to carry that out as satisfactorily as it does at present":

> The Bar is fortunate as the number of complaints is not massive and it can draw on a great deal of pro bono work that is freely provided by senior members of the profession. They provide a good service at low cost. That is something of value which should be maintained if possible.[191]

Lord Neill of Bladen also spoke of the need to have flexibility in the handling of mixed complaints:

---

189 Paragraph 365
190 p29
191 HL Deb 6 December 2006 c1170

> The Bar's evidence to us is that 70 per cent [of complaints] are hybrid, with allegations of bad service and bad conduct. It would be absurd to have two different bodies; to have an ombudsman looking at part of it and the Bar conduct regulator people looking at something else. Some flexibility is required, as is a power to hand over to the Bar the combined issue that arises on a case, if it is thought appropriate.[192]

Similarly, the Labour peer Lord Borrie wanted to retain "the many advantages that have been provided by the Bar's handling of complaints, including the free time at present given by members of the Bar in analysing complaints". He said that it would seem a great pity to treat the Bar in the same way as the solicitors' profession.[193]

However, Lord Whitty disagreed:

> I disagree with my noble friend Lord Borrie on the point about delegation back to the Bar Council. Even though I recognise that its past performance has been somewhat better than that of the Law Society, I think that we are then back into the judge and jury territory.[194]

Baroness Ashton defended the Bill's provisions pointing out that a third of complaints against the Bar were forwarded to the Legal Services Ombudsman indicating that one third of complainants were not happy with the way that the Bar dealt with their complaints. She also spoke of the importance of consistency and clarity for the public and that the proposed system should not involve delays.[195]

On report, Lord Kingsland moved amendments designed to provide for the delegation of complaints handling to an approved regulator by a direction of the Legal Services Board and, where such a direction was given, to empower the approved regulator to award redress to the complainant. The Legal Services Board would have power subsequently to vary or withdraw a direction. In deciding whether to give, vary or withdraw a direction, the Legal Services Board would be bound by Clause 3 to act compatibly with the regulatory objectives and the other regulatory principles of the Bill.[196]

Lord Kingsland spoke of the potential inconvenience and confusion for consumers having to deal with two different bodies about different aspects of their complaints, especially if one body accepted the facts to which the complaint related but the other did not. He also considered that there was likely to be duplication of work and unnecessary expense and that the proposed new complaints-handling system would involve decision making "by salaried non-lawyers who are unlikely to be able to supply the level of analysis and expertise currently provided free of charge".[197]

Lord Kingsland pointed out that the Bar Standards Board, the approved regulator for the Bar, already dealt with both service and conduct complaints and had a significant lay

---

[192] HL Deb 6 December 2006 c1185
[193] HL Deb 6 December 2006 c1186
[194] HL Deb 6 December 2006 c1193
[195] HL Deb 6 December 2006 c1211-12
[196] HL Deb 8 May 2007 c1288
[197] HL Deb 8 May 2007 c1289

element, with its decisions being subject to a lay veto: "This is emphatically not a case of lawyers deciding on complaints against lawyers".[198]

A number of peers spoke in support of this amendment and a similar amendment moved in committee.

However, in committee, Lord Whitty had tabled amendments designed to prevent any delegation of the powers of the OLC back to either the Bar Council or the other organisations that were operating well. His reasoning was advanced, in his absence, by Lord Thomas of Gresford:

> The noble Lord, Lord Whitty has spotted the flaw in the Government's position: if they allow the amendment of the noble Lord, Lord Kingsland, and the OLC can devolve its disciplinary procedures and complaints system back to the Bar, and if they allow that to happen with the patent agents, who have a very successful system, the trademark people and so on, what will they be left with? They will be left with the OLC and probably a rebadged Law Society complaints system. They will have abolished the Legal Services Ombudsman and the Legal Services Complaints Commissioner, who monitored what that failed organisation did and imposed discipline upon it. …Rebadge the Law Society complaints system, call it something else, delegate the powers back to the Bar Council's Bar Standards Board, which is doing a very good job, and so on, and you have spent £35 million only to have achieved the abolition of the ombudsman and the services commissioner, who exercised some discipline over the Law Society.[199]

On report, Baroness Ashton spoke of her high regard for the way in which the Bar had handled complaints but also of the issue of public confidence and of the confusion for some people about where to bring forward complaints. She referred to a letter from the National Consumer Council, Citizens Advice and Which? which stated: "Consumers will not trust a regulatory system that allows lawyers to judge their own".[200]

Lord Kingsland disagreed with Baroness Ashton's arguments:

> I find it difficult to understand how the noble Baroness can in one breath say that she absolutely accepts everything that has been said about the high quality of the Bar Standards Board and the way the Bar deals with complaints, and yet, in another breath, say that, even if in reality these standards are high, the public have doubts—that there is a public perception that somehow these standards, which she knows are met, are not being met. Where does this perception come from? What evidence does the noble Baroness have that there is a public perception that, despite all the evidence, the Bar Standards Board falls below requirements that have been tested over a long period? There is no such perception.[201]

The amendment was passed on a division by 185 votes to 135.

---

198 HL Deb 8 May 2007 c1289
199 HL Deb 6 February 2007 cc 688-9
200 HL Deb 8 May 2007 c1292
201 HL Deb 8 May 2007 c1294

The Law Society's Gazette has reported that although the Law Society did not oppose this move, it would not seek such a delegation for itself and that the Legal Complaints Service (which handles complaints against solicitors) is strongly against delegation.[202]

Power to alter number of members of the OLC

On report, Lord Kingsland moved an amendment which would have removed the Lord Chancellor's power to alter the number of members of the OLC. He considered that this function should be undertaken by the LSB to whom the OLC would be answerable. Lord Kingsland said that if the Lord Chancellor were to disagree with the LSB on either the chairmanship or the number of members, it would be more appropriate for him to take up the issue with the board, rather than to have the power to act on his own behalf.[203]

Baroness Ashton of Upholland disagreed that the Lord Chancellor would have undue influence over the Office for Legal Complaints:

> The role of the Lord Chancellor in setting the size of the board or in consenting to the removal of the chairman of the OLC is non-interventionist. He will not change the size of the OLC of his own volition nor can he remove the chairman of the OLC. The OLC is a non-departmental body and as such is ultimately accountable to Parliament. It therefore must be right that the Lord Chancellor have the minimum of involvement in how the OLC is constituted. But when I say "minimum", I mean exactly that. The Lord Chancellor has no role in approving any of the rules that the OLC makes in setting out how complaints can be handled, with only one exception: the rules on case-handling fees. He certainly has no role in appointing ombudsmen to determine complaints or in handling individual complaints. Therefore, any concern that he would have undue influence over the OLC is not substantiated.

The amendment was defeated on division by 40 votes to 33.

Appeals

The Bill does not provide for an appeals procedure against OLC decisions, although they would be open to judicial review. The Joint Committee considered that there should also be a right of appeal based on the merits of the case (which is not provided for by judicial review) and so recommended that the Bill should include provision for a final internal appeals mechanism within the OLC.[204]

The Government stated that it was envisaged that the OLC would operate some form of internal review mechanism but did not believe that the details of this mechanism ought to be set out in legislation.[205]

---

[202] "Cost of reform hits £32m", *Law Gazette,* 17 May 2007, http://www.lawgazette.co.uk/news/general/view=newsarticle.law?GAZETTENEWSID=336173
[203] HL Deb 18 April 2007 cc 317-8
[204] Paragraph 385
[205] p30

On report, Lord Maclennan of Rogart moved an amendment designed to provide for an independent review of decisions taken by either the ombudsman or the approved regulator.[206] In reply, Baroness Ashton said that an ombudsman's determination would become final and binding if accepted by a complainant and that this would provide complainants and respondents with certainty and a clear end to the complaints process; the amendment would remove these features. She pointed out that complainants would not have to accept the determination of the ombudsman: they could reject it and institute court proceedings. Baroness Ashton said that she envisaged that there would be several internal reviews of a complaint before it was passed to an ombudsman for a final determination. However, she did not consider it necessary to replace the position of the current Legal Services Complaints Commissioner and of the Legal Services Ombudsman because the new ombudsman scheme would be independent.

The amendment was withdrawn.

LSB's functions in relation to complaints

On report, Lord Maclennan of Rogart moved an amendment designed to transfer to the Legal Services Board the current powers enjoyed by the Legal Services Complaints Commissioner in order to allow the LSB to look strategically at the operation of the Office for Legal Complaints and to intervene if it appeared to the board that the OLC was not handling complaints efficiently and effectively.[207]

In committee, in relation to a similar proposed amendment, Baroness Ashton had said that there would be a very different kind of relationship between the OLC and the LSB from that which exists currently for the LSO or the LSCC in terms of their relationships with the approved regulators because there would be an entirely new and independent system.[208]

On report, Baroness Ashton set out the various ways in which the Bill already provided the board with an appropriate range of controls over the OLC: the OLC would operate through a series of rules which the LSB must agree and could amend; the OLC would be accountable through its annual report to the LSB, which must deal with any matter that the board had directed; the LSB would have power to require the OLC to prepare a report on any matter relating to its functions; the power for the LSB to set performance targets would allow it to impose conditions on how those targets were met and to monitor performance against targets; the LSB would have power to remove members of the OLC; and also, as a non-departmental public body, the OLC would be accountable to Parliament for the efficient use of resources and the discharge of its statutory responsibilities in a way that the current complaints-handling and regulatory bodies are not.[209]

The amendment was withdrawn.

---

[206] HL Deb 8 May 2007 c 1312
[207] HL Deb 8 May 2007 cc1272-3
[208] HL Deb 21 February 2007 c1100
[209] HL Deb 8 May 2007 cc1273-4

Redress limit

The Joint Committee recommended that the £20,000 redress limit should be explained and regularly reviewed.[210] The Government agreed that the redress limit should be reviewed regularly and offered the following explanation of the initial proposed limit:

> The Government is concerned that if the OLC were permitted to make an award for an unlimited or very high level of redress, it could have implications for indemnity insurance and lead to increased costs to the consumer. Most consumer complaints involve relatively small amounts. The Law Society's average award for redress in 2004/05 was £405.53; the Bar Council's was £427.78.
>
> On the advice of its Independent Complaints Commissioner, Sir Stephen Lander, in April 2003, the Law Society has recently accepted that the limit which it applies to redress should be increased from £5,000 to £15,000. This is the highest level of redress in the legal sector. To allow for the fact that the implementation of the proposals in the Bill will take some time, the Government proposes that under the new system, awards made by the OLC should be subject to an upper limit of £20,000.[211]

An amendment moved by Lord Kingsland in committee to raise the limit to £25,000 was resisted and subsequently withdrawn, as was a proposal by Lord Whitty to raise the limit to £50,000.[212]

Staffing at the OLC

At second reading, Lord Thomas of Gresford queried whether the OLC would truly be a new organisation:

> the Law Society consumer complaints service was not a success. It was therefore surprising to discover that the proposal for the new office is that it be in the same town as the current Law Society consumer complaints service. That suggests that what is happening is merely a re-badging of a failing service.[213]

Baroness Ashton confirmed that the OLC would not be "just a re-badged consumer complaints service" saying that it would "take advantage of a good existing skills base but will be very different".[214]

In committee, Baroness Ashton set out further information about how the new organization might be staffed:

> The noble Lord, Lord Thomas of Gresford, was particularly concerned about the fact that the West Midlands decision would be a replication of the Leamington

---

[210] Paragraph 410
[211] p31
[212] HL Deb 21 February 2007 cc1128-32
[213] HL Deb 6 December 2006 cc1173-4
[214] HL Deb 6 December 2006 c1211

> Spa experience in a different location. First, no guarantee has been given that 100 per cent of the staff will transfer; TUPE's application does not guarantee that. A number of factors will come into play with regard to how that works, including whether there are roles for staff to transfer to. We want to make sure that the Office for Legal Complaints is built from the ground up, so it will be an entirely new organisation. It would be a foolish Government who, when looking at how to deal with a new organisation, did not look at what had happened before. Almost inevitably there will be high-quality staff who are able to perform functions in the new organisation.
>
> The reason behind the West Midlands proposal is to recognise that there will be people—and I am sure that they exist and are doing a good job—in the current operation who could transfer across and continue to offer a high-quality service. That does not suggest anything other than that we buy in appropriate expertise from those individuals; it does not suggest that we do not need to think structurally very differently about the new organisation in management and process terms and so on. But the idea that nobody should be made available from the previous organisation would be wrong. Given the cost-benefit analysis that has to be done, it is appropriate to consider the West Midlands as a location, but that does not mean that we are simply replicating an organisation that is not seen to be successful in a new one.[215]

7. Costs of regulation

a. The Bill

Part 7 of the Bill includes further provisions relating to the LSB and the OLC, including provisions relating to the funding of regulation. It would enable the LSB to make rules providing for the payment by approved regulators of a levy by which the LSB and OLC would be funded. This part would also provide for the type of guidance the LSB might give. In addition there are provisions which would enable the OLC to administer a voluntary complaints handling scheme for the purpose of improving standards and promoting best practice in the provision of legal services (Clauses 164 to 167)

b. Issues and debate

Who should pay the costs?

The Bill would provide that the cost of regulation should be borne by the legal profession. Lord Falconer explained the Government's position:

> It is right that those who are subject to regulation should pay the cost of that regulation... The alternative, that the changes should be funded through general taxation, does not seem appropriate.[216]

Lord Lyell of Markyate was among those who questioned this approach:

---

[215] HL Deb 6 February 2007 cc691-2
[216] HL Deb 6 December 2006 c1168

> As for the cost of setting up these proceedings, the importance of an independent and strong legal profession is a matter of very strong public interest. The Bill is intended to further that public interest. But it is heaping considerably more costs on the profession. I ask the Government to think charitably and kindly on the idea that they should pay at least a proportion of those costs, which are for the public benefit and not for the benefit of the profession and will not increase the fees that the profession can properly charge. Otherwise the means of paying the costs will come from the professionals themselves, some of whom are not highly paid although their work is very important, as is that of those who do publicly funded work. Consequently, either they will suffer loss or the public will suffer loss of service. I hope that the Government might reflect a little further on that.[217]

Lord Hunt of Wirral also criticised the Government's approach:

> There are clear parallels with other bodies such as the Financial Reporting Council, whose running costs are one-third funded by the taxpayer. In paragraphs 35 and 36 of his report, Clementi agrees and reinforces the precedent that I have given by stating:
>
> "There is an interesting precedent in the proposed funding of the Financial Reporting Council. Its funding is to be split, two thirds falling to the private sector and one third to Government".
>
> I hope that the Government will think again on that. It would surely be more sensible, fairer and more balanced for the start-up costs of the Legal Services Board and a proportion of its ongoing costs to be borne by the taxpayer. How else will it be seen to be independent and not merely a creature of the Government or the legal profession?[218]

On report, Lord Kingsland moved an amendment designed to ensure that the Government should meet the start-up costs of the Legal Services Board and a proportion of its running costs. He accepted that the profession should meet the full cost of the first tier of regulation, the approved regulators and the Office for Legal Complaints, but disagreed that the profession should pay for the LSB.[219] Sir David Clementi had pointed out that the Government meet the full cost of the supervisory tier of healthcare regulation, the Council for Healthcare Regulatory Excellence. Lord Kingsland said that one of the LSB's functions would be to consider whether additional legal services should come within the regulatory net, a function currently carried out within Government:

> It does not form part of the regulation of legal services and is carried out entirely in the public interest, rather than in the interest of providers of legal services. It is particularly unreasonable for the Government to expect those costs to be borne by the legal profession. The Joint Committee considered this issue and concluded that the legal profession should not be expected to finance public policy considerations currently funded by the Government.

---

[217] HL Deb 6 December 2006 c1169
[218] HL Deb 6 December 2006 c1181
[219] HL Deb 8 May 2007 c1320

> The Government's proposals would, in effect, transfer cost from the Government to the legal profession. The Government currently meet the costs of the Legal Services Ombudsman, whose functions will be absorbed in the Office for Legal Complaints, which will be funded exclusively by the legal profession, and part of the costs of the Legal Services Complaints Commissioner, whose post is also abolished by the Bill. The Government also meet the costs associated with the Legal Services Consultancy Panel, and the costs of the work in relation to legal services regulation of the Lord Chancellor and the senior judiciary. Continuing to contribute towards the cost of regulation would thus maintain the existing position, rather than represent a new spending commitment from the Government. The examples that the Government gave for regulators funded entirely by regulatees—the FSA, the FOS and the Pensions Regulator—are entirely beside the point. They are frontline regulators. We have no quarrel about that. [220]

Lord Kingsland also considered that ensuring a continuing contribution from the Government might also act as a brake on any tendency of the Legal Services Board to expand its activities unjustifiably.

Lord Maclennan of Rogart strongly supported the amendments and considered that "the public interest in the Legal Services Board's operating economically and effectively will be best discharged by the Government's direct interest being continued through the financial mechanism. If the body is established and passes its costs on to the consumers of legal services, the Government's continuing interest in maintaining the body in the form in which it has been described from the beginning will be put at grave risk".[221] He further considered that there was a risk that ever more people would find that legal assistance and access to the courts and advice were beyond their means.

Lord Hunt of Wirral also supported the amendment and pointed out that Sir David Clementi had said that to have a contribution from other than just the regulated would enable the regulator to demonstrate its independence from those it was regulating.[222]

Baroness Ashton said that she remained convinced that it was appropriate for the legal service providers to bear the costs of the reforms. She considered that the legal profession would benefit from increased confidence in the system as a result of the independent regulation and complaints handling procedures, and also from alternative business structures. Baroness Ashton acknowledged that the Government would make some savings as a result of the reforms, but said that it was for the Government to decide its priorities and where to invest. She said that there were cases where the Government funded establishment or running costs and cases where they did not and that decisions were taken on a case-by-case basis, "but the Government's starting principle is that there should be no increase in public expenditure unless there is a compelling case for public funding. In this instance we do not believe that there is any such compelling argument".[223]

---

[220] HL Deb 8 May 2007 c1321
[221] HL Deb 8 May 2007 c1322
[222] HL Deb 8 May 2007 c1324-5
[223] HL Deb 8 May 2007 cc1327

The amendment was withdrawn.

The costs involved

On report, Baroness Ashton updated the position on costs:

> Noble Lords will recall that the original forecast by PricewaterhouseCoopers was £26.8 million. Following our further analysis, the figure now stands at £32 million, which takes into account inflation—that is, the costs are restated at 2007-08 prices—and includes VAT. It also reflects other adjustments which have led to decreases in costs in some areas and increases in others. In addition, in relation to the Office for Legal Complaints, we have assumed a year-on-year increase in the volume of complaints. That is based on an analysis of the compound annual growth rate of Law Society complaints, which account for approximately 96 per cent of the total annual volume of complaints. Building in this annual growth rate has impacted on both implementation and running costs, with the result that it is predicted that in 2007-08 the running costs are now predicted to be £19.9 million compared with the PricewaterhouseCoopers estimate of £16.8 million. ... However, the revised figure still represents a saving on the current complaints handling arrangements, costed by PricewaterhouseCoopers at £32.5 million in 2005.
>
> While the analysis we have carried out is robust and based on sound assumptions, any operation of this size involves risks, no matter how carefully planned and managed it may be, so we have put together a risk register. It is therefore prudent to build in a margin for unforeseen costs, and I have suggested that we build in a margin of 15 per cent, which is approximately £5 million. That is based on an analysis of the risks associated with the reform process and the costs that may accompany those risks. It is right and proper to cite a figure that takes into account all the risks of change. Although I do not anticipate the risks, they could include problems such as not being able to find appropriate premises. These are risks that we do not believe will be realised, but none the less have to be taken into account.
>
> We have also looked at the possibility of a spike in complaints volumes occurring two to three years after the introduction of the new scheme. We have analysed what has happened in comparable sectors and the evidence suggests a tendency towards a spike two to three years in. However, I emphasise that our forecasts already take into account a year-on-year increase, and of course the experience of different sectors does not necessarily read across. In addition, in practice we would expect to see economies of scale and a decrease in cost per complaint.
>
> It is obviously crucial that noble Lords and the legal professions have confidence in these figures, so I should like to emphasise that the adjustments which have been made are based on a robust analysis. What is more, I can confirm that the revised figure will now form the basis of the implementation budget for the new organisations when responsibility is handed to the new boards; that is, it will be the budget that they are given.[224]

[224] HL Deb 8 May 2007 cc1325-6

The levy

The Government resisted an amendment moved by Lord Kingsland on report which sought to include a list of matters to which the LSB should have regard when apportioning or imposing the levy.[225] Baroness Ashton said that the LSB would have to be satisfied that the apportionment of the levy would be in accordance with fair principles before making the rules and that she firmly believed that that, rather than a list in the Bill of "what would inevitably be a prescriptive list of factors", was the appropriate provision.[226] She considered that the inclusion of a list might reduce the flexibility to take account of other relevant factors to provide for the smaller bodies.

8. Parts 8 and 9: Miscellaneous provisions about lawyers and general

New provisions in Part 8 include miscellaneous provisions about lawyers and others. These include extensive new provisions relating to the Law Society, solicitors, recognised bodies and foreign lawyers set out in a new Schedule 16 which would amend the *Solicitors Act 1974,* the *Administration of Justice Act 1985,* and the *Courts and Legal Services Act 1990.* Schedule 17 relates to licensed conveyancing and would amend the *Administration of Justice Act 1985.* Schedule 19 would amend the *Compensation Act 2006* in relation to claims management services. Each of these schedules would bring the relevant legislation into line with the proposals in the Bill. The provisions in Part 8 are explained in considerable detail in the Government's Explanatory Notes published with the Bill.[227]

On report, Lord Kingsland pressed for a division on an amendment which would have removed what he considered to be the unfair exemption from the need to hold a practicing solicitor which applies to solicitors (but not barristers) in the Government service. He said that they should be required to contribute an appropriate amount to the cost of regulating solicitors.[228] The Attorney-General, Lord Goldsmith, argued that the existing system adequately regulated such solicitors and that it would be difficult to justify seeking a substantial sum of money to be paid by taxpayers to the Law Society for no benefit to the public.[229] The amendment was defeated by 65 votes to 41.

There was also a debate on the provision which would enable cost awards to be made to a successful litigant who has pro bono representation.[230] The Bill would require any such costs awarded to be managed by a prescribed charity. Lord Kingsland moved an amendment intended to require the prescribed charity to have regard to the wishes of those who do the pro bono work.[231]

Lord Goldsmith, who is president of the Bar Pro Bono Unit and chairman of the Attorney-General's National Pro Bono Coordinating Committee, said that the structure of the

---

225 HL Deb 8 May 2007 c1329
226 HL Deb 8 May 2007 c1330
227 Bill 108-EN, http://www.publications.parliament.uk/pa/cm200607/cmbills/108/en/2007108en.pdf
228 HL Deb 8 May 2007 c1388
229 HL Deb 8 May 2007 c1390
230 Legal work without charge
231 HL Deb 8 May 2007 c1392

single charity envisaged was the subject of study by a working party set up under the auspices of the coordinating committee. Its report envisaged that among the factors to which the single prescribed charity would have regard when making decisions about distribution of money received, would be any expression of preference by the legal representatives who have acted pro bono, although such expression of preference would not be determinative. He also pointed out that the Department for Constitutional Affairs (now the Ministry of Justice) had issued a consultation paper[232] on the clause inviting comments on all aspects of the clause's implementation.[233]

III Comment from interested parties

Interested parties made comments on the draft Bill, to the Joint Committee and on the Bill when it was introduced in the House of Lords and some have continued to produce briefings for the various Parliamentary stages. Consequently this section includes only a short selection of comments and in some cases the concerns raised have been dealt with already by amendments to the Bill in the House of Lords.

A. The Law Society

The Law Society considered that the *Legal Services Bill* introduced in the House of Lords to be 'much improved' from the draft Bill but raised a number of outstanding concerns, some of which have since been dealt with during the Lords' stages:

> Fiona Woolf [Law Society President] says: "The Law Society has consistently supported the principles of the Bill – separation of representation from regulation in the professional bodies; light-touch oversight from an independent Legal Services Board; creating a new body to handle all consumer complaints about lawyers; and enabling new ways of delivering services to the public to be developed.
>
> "The draft Bill failed to incorporate these principles satisfactorily, and risked creating a micro-managing Legal Services Board which would undermine the independence of the legal profession from Government. We are pleased that the Government has accepted a number of the Joint Committee's recommendations and has listened to some of what the Law Society and other stakeholders have said. The result is a much improved Bill.
>
> "But there are still a number of important issues where amendments are needed. The Bill should ensure: that the process for appointing to the Legal Services Board is genuinely independent of Government; that the Legal Services Board works in partnership with approved regulators using its powers only where there is a risk of serious regulatory failure; that the system for regulating new business vehicles (ABSs) takes proper account of the potential impact of any new providers on access to justice and that the Government pays a fair share of the costs of the Legal Services Board. We will raise our detailed concerns on these issues with parliamentarians during the passage of the Bill."[234]

---

[232] CP 7/07 16 April 2007
[233] HL Deb 8 May 2007 c1394
[234] Law Society press release, *Much improved Legal Services Bill,* 24 November 2006,

B. Bar Council

Geoffrey Vos QC, who took over as Bar Council Chairman from 1 January 2007, set out his agenda for the Bar in his inaugural speech to the 2007 Bar Council and commented specifically on the Bill. He said that the Bar would continue to lobby on the issue of the Bar's ability to retain jurisdiction over handling of service complaints. [235] He was subsequently reported to be "delighted" with the successful Opposition amendments enabling the Office for Legal Complaints to delegate service and conducts complaints-handling to approved regulators such as the Bar Standards Board and providing more safeguards for lawyers "against the threat of unjustified legal costs".

> The Bar Council has previously warned against a 'one size fits all' complaints system which could result from the Bill. Geoffrey Vos added: "They [the peers] obviously understood the importance of allowing the new OLC to delegate complaints-handling back to the Bar Standards Board. The BSB has proved it can handle consumer complaints economically and effectively. It would have been most unfortunate to have wasted the expertise that's been built up over many years."
>
> The two amendments follow on swiftly from two other amendments initiated by the Bar Council to strengthen the independence of the Legal Services Board and to raise the threshold for intervention by the board in the activities of approved regulators such as the Bar Council.[236]

C. Legal action Group, Legal Aid Practitioners Group and Sole Practitioners Group

The Legal Action Group, Legal Aid Practitioners Group and Sole Practitioners Group joined together for the first time to express concerns about the ABS proposals saying that they would "seriously reduce access to justice, which is already under threat, not least because legal aid is faltering":

> ABSs allow outside shareholders, who may have no connection with the law, to own and control solicitors' firms. ABSs, staffed largely by unqualified people, will tend to jeopardize the following:
>
> - The independence of legal advice (particularly avoidance of conflict of interest, especially if the law firm is owned as part of a public holding company where cross-selling to other companies in the group may be involved.)
> - The absolute and essential integrity of the profession (at a time when the business and financial world are under increasing threat from corrupt influences)

---

http://www.lawsociety.org.uk/newsandevents/pressreleases/view=newsarticle.law?NEWSID=311031

235 Bar Council press release, *2007 Bar Chairman sets out agenda for the coming year: quality of advocacy a key theme*, 11 December 2006, http://www.barcouncil.org.uk/news/pressarchive/112.html

236 Bar Council press release, *Bar Council succeeds with more amendments to the Legal Services Bill,* 11 May 2007, http://www.barcouncil.org.uk/news/latest/47.html

- Access to legal services, and hence justice, principally because of the inevitable cherry picking if commercial investors purchase or run law firms.

(…)

(a) Legal Aid practices are under increasing pressure and many are abandoning legal aid, so that there are already significant areas of the country without provision. In brief the main reasons are: uneconomic legal aid rates (often as little as one third of the private client rates charged by the same firms); increasing and unsustainable earnings disparity with non-legal aid practice affecting staff recruitment and retention; bureaucratic overburden by the Legal Services Commission: proposed capping of legal aid fees at unrealistic levels.

(b) Ability to do legal aid work, and to try to service at least some of the legal needs of the very many citizens outside legal aid who often cannot afford full private client rates (i.e. semi pro-bono work) depends on a fair share of private clients paying normal rates.

(c) Commercial/non-legal investors in ABSs will cherry pick only the profitable work which can be standardised. That will upset the balance of work of high street firms (see (b) above) and inevitably accelerate the existing crisis in legal services.

(d) Further loss of high street firms doing this sort of work will further hit geographical and physical access.

Arguments that ABSs may assist retention of non-partner lawyers in huge law firms, and/or assist them to expand parallel, non-legal services/ventures is arguable and of very secondary importance compared to issues of accessibility, independence and integrity of solicitors' services to their clients.

Furthermore, suggestions (by amongst others, the Law Society) that these accessibility problems could be effectively addressed by the small print of the licensing regime for ABSs is illusory. The Bill is already a 320 page monster of regulatory complexity with much secondary legislation to come. Those preparing the detail of the licensing regime will have to try to guess in advance what all the subtle adverse impacts of these changes might be over the medium term. There is every reason to believe that there will be serious unforeseen consequences, but by the time they become apparent, it will be too late to stop them. Buying legal services is not the same as buying a tin of beans. The consequences of getting it wrong are far more serious.

We believe that the Law Society is itself caught in a conflict of interest over ABSs because the interests of general practices and their clients are contrary to the wishes of some larger commercial firms; and the issue is not of direct interest to the Bar. Government claims of increased competition via ABSs are implausible. No-one will compete for the most difficult clients, at often uncommercial rates for

> cases usually involving socially complex issues and/or relatively small amounts.[237]

D. Which?

Which?, the consumers organisation, has stated that it "strongly supports" the proposals set out in the Bill:

> The proposed new regulatory structure will improve the quality of legal services for consumers because quality is affected by the way professions are regulated and how they view consumers. In particular, independent, effective complaints handling that can highlight issues, give feedback to regulators on trends and encourage professionals to improve their complaints handling and service levels can only have a beneficial impact on service quality.[238]

Earlier, Which? had commented on research which it said showed that the proposed legal services reforms had struck a chord with the public. Louise Restell, legal services campaigner at Which? said:

> "Which? is pleased to see that a radical overhaul of the regulation of the legal professions is on the way. We believe this is a long overdue measure.
>
> "What's more, ending the restrictions on the type of businesses lawyers can form will make it easier for new providers to enter the market, stimulating competition and innovation."
>
> The research found:
>
> - More than half agree that they would have more trust in solicitors or other legal advisors (56 per cent) and that there would be a better quality of service provided by solicitors or other legal advisors if the legal profession was regulated by an independent body.
>
> - Almost four fifths (78 per cent) agree that an independent regulator should be able to fine the legal profession if it does not do its job properly.
>
> - Three quarters (75 per cent) think that the idea of obtaining legal services at supermarkets or high street banks is a good idea.
>
> - Six in ten (60 per cent) would consider getting legal services through a supermarket or high street bank in the future.[239]

---

[237] http://www.lag.org.uk/Shared_ASP_Files/UploadedFiles/7B500F0E-E3AC-4855-8B54-7D16AF2C1E34_BriefingverfinalonLegalServicesBillJan2007.doc

[238] Which?, *House of Commons 2nd Reading Briefing on the Legal services Bill,* May 2007

[239] Which? Corporate Press Release, *Legal services reforms strikes a chord,* 30 November 2006, http://www.which.co.uk/press/press_topics/campaign_news/other_issues/legalservices301106_571_103143.jsp

E. The National Consumer Council

The National Consumer Council (NCC) warmly supported the main proposals in the *Legal Services Bill*. Steve Brooker, Senior Policy Advocate at the National Consumer Council, said:

> 'This Bill is designed to put the interests of consumers first and this must remain the case as it progresses onto the statute book. NCC is calling on members of the House of Lords and MPs to make sure the proposals are not watered down as they pass through Parliament.
>
> 'This Bill should deliver much-improved legal services for consumers: in particular, a new scheme to handle all complaints about lawyers – entirely independent of the professions – will replace a system that has failed consumers time and time again.
>
> 'In future, new types of businesses, such as supermarkets and banks, could provide legal services. This will not only offer consumers greater choice and convenience, but could also bring down the cost of, say, writing a will, or buying a house'.
>
> The NCC also welcomes plans for the creation of a new regulator with powers to ensure that professional bodies carry on the day-to-day job of regulation effectively – and has a range of sanctions at its disposal if they don't.[240]

[240] National Consumer Council, *Legal Services Bill sets out new legal landscape, says NCC*, 24 November 2006, http://www.ncc.org.uk/cgi-bin/kmdb10.cgi/-load69994_nccviewcurrent.htm

IV Appendix: Principal amendments to the Bill in the House of Lords

A. Government amendments

Many of the amendments made were Government amendments tabled to meet concerns expressed during the Lords stages of the Bill. The principal amendments included:

- the insertion of a new regulatory objective of protecting and promoting the public interest in Clause 1

- amendments, throughout the Bill, consequential to other amendments accepted in committee to transfer functions from the Secretary of State to the Lord Chancellor, (Lord Kingsland commented that he had calculated that there were 550 Government amendments tabled for report, of which 230 concerned exclusively transferring functions to the Lord Chancellor[241]); and further amendments designed to ensure that these functions would be entrenched and could not be transferred from the Lord Chancellor to another Minister simply through a transfer of functions order

- the Lord Chancellor would be responsible for laying before Parliament the audited annual accounts of the Legal Services Board and the Office for Legal Complaints (Schedule 1 Paragraph 22 and Schedule 15 Paragraph 23)

- the circumstances in which the LSB might exercise its power to fine approved regulators would be limited to those instances where an approved regulator has failed to separate its regulatory and representative functions, failed to comply with a direction, or failed to comply with rules relating to practising certificate fees

- the time within which an approved regulator could appeal a financial penalty has been lengthened from 42 days to three months to reflect the timeframe for judicial review (Clause 39)

- licensing authorities for alternative business structures would have to issue policy statements, with the approval of the LSB, setting out how they would comply with the duty to promote the regulatory objectives (Clause 82)

- the LSB would now have to make licensing rules for ABS firms only when it was established that the Board needed to act. This would include when there was no other licensing authority with suitable arrangements in place for a particular type of body, or in the case of non-commercial bodies, when there was no licensing authority able to offer appropriate terms (previously the LSB had been required to make licensing rules within12 months of a date set by the Lord Chancellor) (Clause 83 and Schedule 12)

---

[241] HL Deb 16 April 2007 c24

- the LSB would have a duty to report on the development of alternative business structures in its annual report (Clause 110)

- OLC scheme rules would have to make provision permitting specified persons to continue a complaint following the death or incapacitation of the original complainant (Clause 132)

- an ombudsman would have power to make a costs award against a complainant in favour of the OLC only if, in the ombudsman's opinion, the complainant acted so unreasonably that it is appropriate in all the circumstances of the case to make such an award (Clause 133(3)(j))

- only an ombudsman would have power to summarily dismiss a complaint made to the OLC (Clause 134)

- where a respondent fails or refuses to comply with an ombudsman's determination, ombudsmen would have power to take enforcement action on a complainant's behalf (details would be in the scheme rules) (Clause 141)

- where an approved regulator suspects widespread wrongdoing, they could require authorised persons to investigate their files, and if they find signs of potential wrongdoing, alert the consumer and initiate the internal complaints process (Clause 159)

- the OLC would have power to administer a voluntary complaints handling scheme for the purpose of improving standards and promoting best practice in the provision of legal services (Clauses 164 to 167)

- the LSB would now have to have regard to the need to ensure, as far as reasonably practicable, that the OLC and approved regulators, in sharing information, assist one another to perform their function; the OLC and approved regulators would be required to consult each other prior to submission of rules or arrangements for LSB approval and if there were unresolved disagreements, these would have to be reported to LSB when the rules or regulatory arrangements were submitted for approval (Clause 145)

- the Bill would now define the term "barrister" and create a new offence of pretending to be a barrister when not qualified (Clauses 182, 208

- employees of certain housing management organisations would be able to exercise rights to conduct litigation and rights of audience in relation to specified housing-related proceedings, in particular where anti-social behaviour is an issue: Baroness Ashton explained the relevant amendments, and the safeguards intended to address concerns, in some detail on the third day of report[242]

---

[242] HL Deb 8 May 2007 c1385

- amendments designed to ensure that the transition to the new regulatory framework would not be hindered by undue delay: these were also explained by Baroness Ashton on the third day of report[243]

- amendments to implement recommendations made by the Delegated Powers and Regulatory Reform Committee in its report on the Bill[244]

- a large number of further amendments, many of them detailed and technical, dealing with a wide range of matters including, for example:

    - amendments designed to bring other legislation into line with the Bill and to correct certain anomalies

    - confirmation that the restrictions on providing immigration services and immigration advice contained in the *Immigration and Asylum Act 1999* would still apply

    - the addition of the Association of Law Costs Draftsmen to the list of approved regulators in Schedule 4 to the Bill

    - technical amendments to bring the *Public Notaries Acts* of 1801 and 1843 into line with the Bill

    - further technical amendments designed to ensure that the authorisation and other requirements in the Bill for different types of bodies and individuals would apply effectively and consistently, including changes in relation to employees, employers and foreign lawyers; changes to ensure that the threshold provisions of the Part 5 licensing regime would take account of current practice structures; and further provisions for bodies formed under foreign law; these amendments were explained by Lord Evans of Guiting on the second day of report[245]

    - numerous technical amendments (following detailed discussions with the Law Society) which would amend the *Solicitors Act 1974*, the *Administration of Justice Act 1985* and the *Courts and Legal Services Act 1990* relating to solicitors, recognised bodies and foreign lawyers. On report, Lord Evans of Temple Guiting said that further amendments relating to the Law Society's powers to rebuke and reprimand, and enhanced regulatory powers in relation to sole practices required further work with the Law Society and would be brought forward at a later stage in the Bill's passage; he also said that it would be possible to make these amendments under an order made under a proposed amendment and that should it not prove possible to bring forward amendments during the

---

[243] HL Deb 8 May 2007 c1401-2
[244] For details see HL Deb 21 February 2007 cc1160-62
[245] HL Deb 18 April 2007 cc239-241

passage of the Bill, "the Government would make these amendments a high priority for any Schedule 22 order"[246]

- amendments designed to update the Law Society's powers to require information

- further technical amendments relating to the regulation of licensed conveyancers

B. Other amendments

A number of other amendments were successfully pressed. These included:

- a requirement for the appointment of the Chair and members of the LSB to be made by the Lord Chancellor "with the concurrence of the Lord Chief Justice"; the Lord Chancellor would also have power to remove members of the LSB with the concurrence of the Lord Chief Justice

- the threshold for intervention by the LSB has been raised: it is now provided in relevant clauses in the Bill that there would have to be an act or omission of an approved regulator which would have, or would be likely to have, "a significant adverse impact on the regulatory objectives taken as a whole" (rather than, as originally provided, an adverse impact on one or more of the regulatory objectives)

- the Bill now specifically provides for the relative roles of the LSB and approved regulators in relation to the LSB's statements of policy which must now "a) respect the principle that primary responsibility for regulation rests with the approved regulators; (b) ensure that the Board exercises its powers only where it considers that the action or inaction of an approved regulator is not an approach which the approved regulator could reasonably have taken; (c) provide that, save where there is an imminent risk of significant damage to the regulatory objectives, the Board will seek to resolve matters informally with the approved regulator before seeking its powers" (Clause 49)

- it is now provided that licensing authorities for alternative business structures would be required to consider the likely impact of a proposed application on access to justice when considering an application (Clause 83)

- no order may be made to bring Part 5 into force (alternative business structures) until after consideration by both Houses of Parliament of a comprehensive report to be commissioned by the Lord Chancellor from an independent source analysing the advantages or disadvantages (or both) which may be realistically expected to flow from the implementation of Part 5, including the benefits or risks (or both) to consumers; the potential enhancement or curtailment (or both) of access to justice;

[246] HL Deb 8 May 2007 cc1335-6

and the threats (actual or internationally perceived) to the independence of lawyers practising in England and Wales (Clause 212)

- the envisaged "polluter pays" levy could have required a contribution to the cost of processing a complaint to the OLC which was not upheld, from the person against whom the complaint was made; the Bill now provides that costs could be recovered in more limited circumstances; the scheme rules may make provision for costs to be awarded against a practitioner if a complaint is determined or otherwise resolved substantially in favour of the complainant, or if, in the ombudsman's opinion, the respondent practitioner failed to deal with the complaint in accordance with the relevant regulatory arrangements (Clause 133 (3)(i)

- The Bill now provides for the delegation of complaints handling to an approved regulator by a direction of the Legal Services Board and, where such a direction is given, for the approved regulator to award redress to the complainant; the Legal Services Board would have power subsequently to vary or withdraw a direction; in deciding whether to give, vary or withdraw a direction, the Legal Services Board would be bound by Clause 3 to act compatibly with the regulatory objectives and the other regulatory principles of the Bill (Clause 143).