Pre-Legislative Briefing Service (PLBS)

Legal Practitioners Bill, 2010: A Briefing Document

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Executive Summary

The Legal Practitioners (Regulations and Maintenance of Standards in Professions, Protecting the Interest of Clients and Promoting the Rule of Law) Bill, 2010 (hereinafter "the Bill") is a legislation which primarily aims to overhaul the regulatory structure of the legal profession in India and to protect the interests of consumers. As stated in the preamble, the object of the Bill is to "*make provision for, and in connection with, the regulation of persons who carry out the activities of legal practitioners… and for a scheme to consider and determine complaints against the legal practitioners"*. Accordingly, the Bill provides for the establishment of a number of institutions with varying powers and functions: a Legal Services Board, to serve as an oversight body above even the existing Bar Council; a Consumer Panel to represent the interests of consumers; and an ombudsman to deal with complaints against legal professionals at the state level. Finally, the Bill also requires all legal professionals to provide free legal services to clients below a certain specified level of financial strength. Our aim here is to critically assess the bill, identify issues, and offer recommendations calculated to address those issues.

The establishment a set of new institutions raises two broad questions: *first*, does their establishment and the scope and ambit of their powers, as specified in the Bill, *actually* fulfil the objectives and purposes of the Bill? And *secondly*, what is the relationship between the new institutions such as the Legal Services Board (hereinafter "the LSB"), and existing regulatory bodies such as the Bar Council? In this report, we undertake a detailed analysis of the provisions of the Bill, keeping in mind these two aspects. After a brief comparison between the Bill and the English Act upon which it is modelled, we analyse, in particular, some of the important definitions such as, *inter alia*, "professional principles" and "legal professional". We consider the need for, and the powers and functions of, the LSB, the Consumer Panels and the Ombudsman, and the relationship of the LSB with the Bar Council. We also consider the constitutionality of the requirement for providing free legal services. We conclude that a number of provisions of the Bill, as they stand, are open to attack on constitutional grounds, or fail to *practically* address the problems that the Bill seeks to resolve. On the basis of this analysis, we suggest appropriate amendments to ensure that any problem of unconstitutionality is taken care of, and that the Bill is better equipped to meet the challenges of regulation and enforcement that lie ahead.

I

The LSA 2007 (UK): A Brief Snapshot

The Indian Legal Practitioners Bill is *admittedly* inspired by the Legal Services Act (LSA), 2007 of the United Kingdom (hereinafter "the LSA 2007 (UK)"). The aims and objectives set out by Sec. 3 of the Bill are *identical* to those of the LSA 2007 (UK). The statutory bodies that the Bill proposes to introduce - namely, the Legal Services Board, the Consumer Panel and the Legal Ombudsman - are also to be found in the LSA 2007 (UK). Even the Indian Law & Justice Ministry's circular inviting public consultation states that the Bill '*is proposed for establishment of Legal Services Board on the lines of the Legal Services Board in U.K. suiting the Indian situation*.' The mechanism which is to be found in the LSA 2007 (UK) was calculated to address some pressing regulatory and consumer protection related issues. A study of those issues and mechanisms will shed greater light in assessing the Indian Bill. Given that the Indian Bill sets itself the same aims and objectives as the LSA 2007 (UK) and also proposes an apparently similar regulatory structure, it should be of great use to have a brief snapshot of the LSA 2007 (UK), the issues it was calculated to address, and the extent to which the lawmakers in the UK saw the mechanism employs as furthering those objectives.

I. The Pre 2007 UK Scenario: A Regulatory Mess

1. Regulatory bodies - Before the LSA 2007 (UK) was introduced the state of regulation of legal services in the UK was complex. A government white paper even termed it a 'regulatory maze'. There were *seven* different forms of legal services with each of the services having different front line regulators (FLRs) and different higher level regulators, at times with overlapping functions.[1] We can get a flavour of this labyrinthine maze of regulation with a few brief examples. The Bar Council was primarily the front line regulator for barristers and also for some solicitors exercising rights of

[1] These were solicitors, barristers, legal executives, trademark attorneys, licensed conveyers, patent attorneys and notaries.

audience in courts. The higher level regulators responsible for the oversight of the Bar Council were the Lord Chancellor, Secretary of State for Constitutional Affairs, and the Office of Fair Trading. The Law Society was the front line regulator primarily for solicitors, some barristers, and for legal executives and licensed conveyers. The higher level regulators responsible for the oversight of the Law Society were The Master of Rolls, Secretary of State for Constitutional Affairs, and the Office of Fair Trading. Curiously, for the notaries, the higher level regulator was none other than the Archbishop of Canterbury. The Court of Faculties was their front line regulator.

2. Consumer Grievance Redressal- The consumer protection available to clients availing different legal services was also similarly complex. For consumer complaints pertaining to deficiency in legal services, there were different bodies to be approached. Interestingly, in most cases, it was the front line regulators who also *coupled up* as the consumer grievance redressal forum. For instance, a consumer complaint against a barrister was heard by the Bar Council. It must be stressed that in addition, the power to take disciplinary proceedings also vested with front line regulators like the Bar Council and the Law Society. The front line regulators wore many hats. They were not only functioning in a representative capacity, being comprised of members elected from the profession, but they also acted as the regulators of the profession as well as judges in their own cause.

3. The rationale of the LSA 2007 (UK): The British government was dissatisfied with the then existing legal regulatory regime. The rationale for a new regulatory regime was spelt out in a White Paper entitled '**The Future of Legal Services: Putting Consumers First**'.[2] The white paper incorporated several of the suggestions of a report prepared by Sir David Clementi in 2005. The focus of the White Paper- which was evident from the title- was on *consumer protection*, and most of the problems it identified with the then existing regime had to do with the fact that it was not sensitive enough to consumer protection. The White Paper identified the following problems, and suggested methods to address them:

[2] http://www.dca.gov.uk/legalsys/folwp.pdf. Hereinafter referred to as the white paper.

1. Regulatory complexity- As already seen, there existed different bodies regulating different legal services and leading to an unduly complex regulatory maze. It was thought that there must *one* single oversight body – the Legal Services Board- that could oversee the functioning of the front line regulators, with *clear* and *effective* powers of supervision over the latter.

2. Regulatory capture- The very bodies that framed regulations for the respective legal services were also the representative bodies comprising of elected members from the profession. This, it was thought, led to a perception of unfairness and lack of consumer protection. The Clementi report was very sceptical 'at a level of principle, with whether systems run by lawyers themselves could achieve consumer confidence.' It was suggested that the most effective way of avoiding regulatory capture was by *splitting* up the regulatory and representative aspects of the professions and placing the regulatory aspect under the direct oversight of one single oversight body- the legal services board. Significantly, it was also recommended that the legal services board must comprise of a *majority of non-lawyers* in order to avoid regulatory capture. "The interests of consumers, not providers, drive decisions about regulation… Consumers are confident that regulation is independent of providers and Government.[3]

3. Inadequate consumer protection- The White Paper and the Clementi Report argued that the existing system 'had insufficient regard for the interests of the consumers' because of the following reasons:

a) Lack of say in framing regulations- The consumers had no say whatsoever in the framing of legal regulation pertaining to provision of legal services. The White Paper thought that this must change with the establishment of a consumer panel working in tandem with the legal services board. The consumer panel was meant to be a mouthpiece for consumer interests.

[3] White paper 19

b) Complex regime of consumer protection- Each of the seven forms of legal practice afforded *different* standards of consumer protection and there were different dispute redressal forums for consumer complaints. This meant that consumers of legal services were afforded different levels of protection and had to approach different bodies. The white paper in pointing out the asymmetry of information that this regime led to, remarked: "A consumer seeking a conveyancing service in a high street firm may, within one transaction, deal with a number of individuals – for example, a solicitor, a licensed conveyancer and a legal executive. If a complaint is necessary, there could be several different complaint mechanisms involved."[4]

c) Violation of natural justice- Moreover, to complicate matters further, the consumer complaints were heard by the FLRs who were also elected representatives of legal professionals. This, it was thought, led to a perception of unfairness, with professionals being a judge in their own cause. Emphasising the problem the Impact Report on the LSA prepared in 2006 observed: **'**consumers do not have enough confidence in the current system. They are not convinced that bodies that act as both the team manager and the referee, have the capability to do so effectively.'[5]

It was thought that both these problems- namely, complexity and natural justice concerns - could be solved by putting in place an independent 'Office of Legal Complaints', comprising of a Legal Ombudsman, who would be a one stop shop for all consumer complaints pertaining to legal services. It was thought this would not only reduce the complexity of having to approach different forums in case of different professionals, but also put to rest fears of violation of natural justice that prevailed in the existing regime. However the report made it abundantly clear that the Office of Legal Complaints or the Ombudsman should not be concerned with disciplinary matters of the members.

[4] Regulatory Impact Report(2006) 9 . http://www.justice.gov.uk/publications/docs/ria-legal-services.pdf
[5] Regulatory Impact Report(2006) 10 .

4. The White Paper envisaged the LSB as the central regulatory pillar and oversight body, which would cut the regulatory maze and protect consumer interests:

> 'Front Line Regulators (FLRs) will carry out day-to-day regulation. They will need to be authorised by the LSB to do this. The LSB will first need to be satisfied that they are fit for purpose. FLRs will include the existing professional bodies – the Bar Council, the Law Society, the Council for Licensed Conveyancers, the Institute for Legal Executives and others – if they meet the LSB's high standards. These powers and requirements mean that consumers can be satisfied that quality, high standards and consumer needs are embedded in the new system from the start. If things go wrong, consumers will be sure that the LSB can take tough action.'[6]

II. The Regime Introduced by the LSA

5. Taking on board the recommendations of the Clementi report and the White Paper, the British Parliament enacted the Legal Services Act in 2007. Apart from consumer protection, the act legislated on several other aspects including liberalizing the legal market in the UK and setting up of alternative business structures and the like. However, the latter set of provisions is not useful for our purposes, because the Indian Bill neither seeks to achieve liberalization of the market, nor setting up of an alternative business structure. Hence, we will not be discussing them here. We will confine our study to those aspects of the LSA 2007 (UK) which have a direct bearing on, and provide a template for, the Indian bill. The key features which are relevant for our present purposes are:

1. LSB: the Single Oversight Body - The LSA 2007 (UK) set up the Legal Services Board as the single oversight body for overseeing the front line regulators like the Law Society and Bar Council, and for doing away with the complex regulatory maze.

[6] White Paper, 29

The White paper suggested that the Legal Services Board will 'provide independent oversight. It will be made up of a majority of non-lawyers.' [7]

2. *Constitution of the LSB*- The legal services board was to comprise of a majority of non-lawyers. Its maximum strength was one non-lawyer as the Chairman, one CEO, and not more than 7-9 additional members.

3. *Powers of the LBS and its relationship with FLRs*-The LSA 2007 (UK) seeks to set out a detailed delineation of authority between the LSB and the FLRs. Before we proceed to study just how the LSA achieves that, it will be in order to briefly touch upon the White Paper's recommendations on how the relationship between the LSB and the FLR ought to be. The White Paper provides that the Legal Services Board will: 'authorise Front Line Regulators to carry out day to day regulation if they meet its standards; have powers to act if Front Line Regulators fail; enable consumers to have the confidence that regulation is working in their interests, because Front Line Regulators will be required to separate their regulatory and representative functions.'[8] The LSA seeks to flesh out the recommendations made in the White Paper. Chapter IV of the LSA pertains to the delineation of authority between the LSB and FLRs. Its salient features are:

a) LSB's power to make rules relating to the exercise of regulatory functions by the FLRs:

Section 30 of the LSA provides that the LSB shall make "internal governance rules" setting out requirements to be met by FLRs for the purpose of ensuring—

(a) that the exercise of the FLRs regulatory functions is not prejudiced by its representative functions, and

(b) that decisions relating to the exercise of FLRs regulatory functions are so far as reasonably practicable taken independently from decisions relating to the exercise of its representative functions.

[7] White Paper 60
[8] White Paper 20

b) LSB's power to set Performance targets for FLRs and monitoring them:

Section 31 of the LSA authorizes the LSB to set performance targets for the FLR if it is satisfied that an act or omission of the FLR is likely to have an adverse impact on one or more of the regulatory objectives. The LSB is obligated to give notice and consider the representation of the FLR before taking such action. Further the LSB is empowered to monitor the extent to which the performance targets are being met.

c) LSB's Power to issue Directions to FLR's

Section 32 provides that if the LSB is empowered to issue directions to the FLR if is satisfied:

(i) that an act or omission of an FLR has had, or is likely to have, an adverse impact on one or more of the regulatory objectives, or

(ii) that an FLR has failed to comply with any requirement imposed on it by the LSA or any other law, or

(iii)that an FLR has failed to ensure :

(a) that the exercise of its regulatory functions is not prejudiced by any of its representative functions,

or

(b) that decisions relating to the exercise of its regulatory functions are taken independently from decisions relating to the exercise of its representative functions.

In the aforesaid circumstances the LSB is empowered to issue directions which will remedy the failure, counter the adverse impact, mitigate its effect, or prevent its occurrence or recurrence.

Section 32 provides that if the FLRs fail to comply with the directions of the LSB, it could seek enforcement of those directions by making an application to the High Court under the section. Section 32 (3) declares that these powers are 'without prejudice to any other powers conferred on the Board by this Part.'

d) Power of Public censure

Section 32 provides that the LSB shall have the power to publicly censure the FLRs and publish such censure and the reasons for doing so, if it is satisfied that an act or omission of an FLR has had, or is likely to have, an adverse impact on one or more of the regulatory objectives.

e) Power to impose penalties

Section 37 provides that the LSB shall have the power to impose penalties on the FLR if it fails to comply with the directions issued by it.

f) Power of intervention and taking over of functions

The most significant power of the LSB is the extraordinary power of intervention in the working of the FLR and 'taking over' of some or all functions of FLRs, in some circumstances. It will be recollected that the White Paper recommended that the LSB must have clear powers to act where the FLRs fail. As the White Paper states, the powers of the LSB have to be such that 'if things go wrong, consumers will be sure that the LSB can take tough action.'[9] The power of intervention is calculated to give shape to that recommendation. However, Sec 41(3) makes it abundantly clear that this extraordinary power must be only exercised where the LSB is satisfied that the matter cannot be adequately addressed by recourse to any of its other powers, which we encountered earlier. Further, Schedule 8 of the LSA also makes detailed provisions about the procedure which must be complied with before an intervention direction is given and the manner in which such a direction is to be given. Thus, it seems the Parliament's intention is that this extraordinary power only ought to be used as a matter of last resort. Section 41 provides that the LSB may give an FLR an intervention direction in relation to any of the FLRs regulatory functions if it is satisfied that:

(a) an act or omission of an FLR has had, or is likely to have, an adverse impact on one or more of the regulatory objectives, and

[9] White Paper 29

(b) it is appropriate to give the intervention direction in all the circumstances of the case (including, in particular, the impact of giving the direction on the other regulatory objectives).

Section 41 (2), which empowers taking over of the functions of the FLRs in extraordinary situations, provides that an intervention direction could require that that the regulatory function(s) of the FLR is to be exercised by the LSB or a person nominated by it. These extraordinary powers can be exercised either with respect to a particular function of an FLR or all of its functions. Section 43 provides that if the FLR fails to comply with the intervention or taking over directive of the LSB, it could approach the High Court for enforcement.

2. *Consumer Panel*- The LSA 2007 (UK) makes provision for the appointment of a Consumer Panel, which is to act as a mouth piece for consumer interests. The Consumer Panel is also entrusted with the responsibility of carrying our consumer and market related research.

3. *Office of Legal Complaints & Ombudsman*- It will be recollected that under the previously existing regulations, the FLRs were also the ones who decided consumer complaints filed against legal professionals belonging to their branch, and were also the ones who acted on disciplinary proceedings. Dissatisfied with the state of affairs. the White Paper proposed the setting up of an Office of Legal Complaints (OLC), which would comprise of Ombudsmen, and constitute a one stop shop for all consumer complaints against all legal professionals. It however also made it clear that the OLC *would not handle disciplinary* matters against legal professionals. The disciplinary jurisdiction was to remain with the FLRs. The White Paper argued: 'there must be no appearance of professionals judging their own. In the handling of complaints, as with all other parts of the reform programme, the Government's view is that the interests of consumers should be paramount and that the measures open to consumers should be as clear and straightforward as possible. For these reasons, the government proposes that the (Office of Legal Complaints) OLC should remain the single and independent

complaints handling authority for consumer complaints, and that it should **not** delegate the handling of consumer complaints to FLRs.' [10]

Accordingly, Part VI of the LSA establishes an Office of Legal Complaints (OLC) which is one stop shop for all consumer complaints against any kind of legal professionals. However the LSA also makes it abundantly clear that the OLC shall not handle any disciplinary matters against any legal professional.

[10] White paper 62

II

A Comparison between the Indian Bill and the LSA 2007(UK)

As was mentioned earlier, the Indian Bill is admittedly inspired by the LSA 2007(UK), and the key bodies the bill proposes to introduce- LSB, Consumer Panel and Ombudsman are also the ones found in the UK legislation. In what follows we provide a brief tabular comparison between the Indian Bill and the LSA 2007 (UK). This comparison will be useful in appreciating the regulatory aims and objects of the Indian Bill, and the methods it employs to achieve them.

	Subject	**LSA 2007 (UK)**	**The Indian Bill**
1	Powers of LSB	Power to make rules relating to the internal regulation of the FLRs	S 12 stipulates a general power to issue guidelines but no specific power is given to make internal regulations.
		Power to ensure that the regulatory and representative functions of the FLRs are kept separate	No such power
		Power to set Performance targets for FLRs and monitoring them	No such power
		Power to issue directions to FLRs regarding their functioning	Yes.
		Power to publicly censure FLRs	Yes
		Power to impose penalties on FLRs	No such power
		Power to intervene and takeover of functions of FLRs	Power to intervene but no power to take over functions of FLRs(Bar council)

2	Constitution of the LSB	9 upto maximum 11 members 1 Chairman + I CEO+ 7-9 ordinary members. Chairman must be a non-lawyer Majority of laymen (non-lawyers) No members from the FLRs like the Bar Council etc	No maximum number specified(to be decided by the Government) 1 Chairman + 1 Member secretary+ unspecified number of other members. No such provision No provision for majority of non-lawyers. At least 5 members from State Bar Councils
3.	Powers of the Ombudsman	Power to hear all consumer complaints against legal officials No power to either entertain disciplinary matters against legal professionals or take disciplinary action against legal professionals (such power remains with the FLRs)	No such power to hear consumer complaints Power to entertain disciplinary matters But no power to take disciplinary action. It is upto the State Bar Councils to take disciplinary actions.
4.	Consumer Panel	Provision for consumer panel to assist the LSB in framing regulation and policy.	Provision for consumer panel materially similar to the one found in the LSA 2007 (UK)
5.	The problems in the previous regime that the legislation is calculated to address	Regulatory complexity- Too many FLRs with overlapping and inconsistent powers existed. Regulatory capture- FLRs represented legal professionals	No such regulatory complexity present, as under the existing regime the Bar Council of India is the sole FLR empowered to enact regulation for advocates. Similar problem of regulatory

		and made regulations for them Lack of consumer participation in formulation of regulations Lack of natural justice in hearing of consumer complaints as the FLRs also coupled as consumer redressal fora Different bodies for different types of consumer complaints against legal professionals	capture as Bar Council of India is a representative and regulatory body No such problem exists because the Bar Council of India or the State Bar Councils do not hear consumer complaints. Consumer complaints against advocates are heard by independent consumer fora No such problem exists as there exist independent consumer fora

III

Critical Analysis of the Indian Bill

A. Definitions

1. It is trite that a careful definition of key terms of a legislation goes a long way in averting protracted litigation. This is especially so for a legislation that proposes to introduce substantial changes to an existing framework of law or regulation, and there is little doubt that the Bill falls into that category. This section of the Report undertakes an analysis of the definition of some of its important terms *in seriatim*, with a view to ascertaining its coherence and potential implications.

2. The definitions are contained in s. 2 of the Bill and may, for analytical purposes, thought to consist of two *types* of terms – one type defining the entities to which the Bill applies, and the other defining the circumstances in which it applies and the nature of the substantive obligations it generates. More specifically, the definition of "client", "consumer of legal practitioner", "legal professional" and "professional principles" is important.

I. Clauses 2(b-d) – "Clients", "Consumer of Legal Professional", "Professional Principles" and "Legal Professional"

3. It is clear that the three terms above – client, consumer and legal professional – are the core of the Bill insofar as the recipient of service is concerned. It is useful to begin by setting out the definitions:

> ...
>
> **(b)** "Clients" means the clients of the Legal Professionals who engaged such Legal Professionals by executing a vakalatnama / letter of authority, by whatever name it may be known.
>
> **(c)** "Consumer of Legal Profession" includes the clients of legal professionals and anyone who might have recourse to legal services because of a legal issue and those who are using or are may be contemplating using services provided by the legal professionals in relation to the legal services arising out of a legal issue.

> **(d)** "Legal Professionals" means the Advocates as defined in the Advocates Act, 1961 and includes the qualified lawyers engaged in legal practice confined to their chamber, engaged in drafting and conveyancing, practitioner of income tax and sale tax and those appearing before the relevant authorities, giving advise to the clients for a fee, gain or reward in the areas of customs, immigrations, trademark and patent services and all other professional services where legal issues are involved;
>
> ...

4. There are two noteworthy features about the definition of "client". *First*, by providing that a client is a client of a legal professional who engaged such professional, the Bill only applies *after* the legal professional-client relationship has come into existence. While this is not an unusual way of describing the lawyer-client relationship, it is, in our view, inappropriate, for it leaves the door open for the argument that certain parts of the Bill do not apply at the stage preceding the formation of that relationship. Such a distinction is not envisaged in the UK Legal Services Act, 2007 (UKLSA) either – indeed, that statute neither defines the term nor makes substantial references to it.

5. *Secondly*, this impression is reinforced by the use of the expression "*executing a vakalatnama/letter of authority, by whatever name it may be known*." A natural interpretation of this phrase suggests that while it covers every case where a client creates the lawyer-client relationship by executing a vakalatnama or a letter of authority regardless of nomenclature, it does *not* dispense with the need for such a document in the first place. In other words, it is not clear whether a person who seeks legal advice either without a written contract or otherwise than upon a vakalatnama or letter of authority is covered by this provision. It is submitted, keeping in mind that the Bill applies to a wide range of legal services and not merely advocacy, that this provision should be reformulated to recognise any relationship that the law considers a lawyer-client relationship, without regard to the manner by which it is brought into existence.[11]

6. The second term in s. 2 is "*consumer of legal profession*", and this definition consists of three components. The first component states that "*clients of legal professionals*" are included within the definition; the second covers "*anyone who might have recourse to legal*

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[11] It will be suggested at a later point that the Bill *should not* apply to actors not covered by the Advocates Act, 1961, but that of itself does not warrant the retention of this definition of "client".

services because of a legal issue" and the third applies to "*those who are using or may be contemplating using services provided by the legal professionals in relation to the legal services arising out of a legal issue*." In our view, there are four concerns with the provision as it currently reads. For one, if it is accepted, as s. 2 seems to, that every "client" is a "consumer", it is unhelpful to distinguish between the two categories. It does not serve any obvious regulatory purpose. *Secondly*, there is no reason in principle either to use the two categories differently, in the specific context of this legislation. *Thirdly*, the language of cl. 2 suggests that the distinction contemplated is that a client is one who *has* engaged the services ("engaged"), while "consumers" are not only clients but also those who "*are using or may be contemplating using*" legal services. It is submitted that the Bill correctly extends its application to potential consumers, but also that it then follows that an independent definition of "client" is unnecessary. *Finally*, the reference to "*anyone who might have recourse to legal services <u>because of a legal issue</u>*" and "*legal services arising out of a legal issue*" are not clear in their purpose. Since there is no obvious guidance in the text, context and history of the Bill, this provision is likely to raise interpretative difficulties in courts. In particular, it makes likely the argument that a user of a legal service is a "consumer" for the purposes of the Act *only* if the use is in relation to an issue of law, or upcoming litigation. It could conceivably therefore exclude services like conveyancing, registration of documents etc., which are clearly within the spirit of the Bill. As an illustration, it is useful to refer to s. 207 of the UK LSA (2007), which defines "consumer" more compendiously:

> "consumers" means (subject to subsection (3)) persons–
> (a) who use, have used or are or may be contemplating using, services within subsection (2),
> (b) who have rights or interests which are derived from, or are otherwise attributable to, the use of such services by other persons, or
> (c) who have rights or interests which may be adversely affected by the use of such services by persons acting on their behalf or in a fiduciary capacity in relation to them;

7. The definition of "legal professional" is without doubt the most important provision of this Bill, for its impact will extend far and wide—from the nature of the legal profession in India, to the relationship between the Bar Council and other regulatory purposes. In our submission, there are two matters that deserve closer scrutiny in considering this provision.

These, respectively, are "the effect of the provision on the extant interpretation of the Advocates Act, 1961", and "the proposed reformulation".

i. The effect of the provision on the extant interpretation of the Advocates Act, 1961

8. The most obvious feature of the proposed definition of "legal professional" is that it covers "*includes qualified lawyers engaged in legal practice in their chamber…all other professional services where legal issues are involved*." At first sight, this appears to confirm the prevailing view in India today that the Advocates Act, 1961 applies not only to the practice of law before a court or Tribunal, but also to non-litigious practice. A closer analysis reveals, however, that the Bill ends up achieving the exact opposite result. S. 35 of the Bill provides that "*the Board shall function as the regulator for regulatory objectives under this Act for legal professionals other than those covered by the Advocates Act 1961 as enumerated in Schedule I*" [emphasis added]. Arts. 1 and 2 of Schedule I, in turn, read as follows:

> **1.** Qualified lawyers who are not practicing advocates, doing legal services in their Chambers.
> **2.** Qualified lawyers engaged in drafting and conveyancing.

9. A conjoint reading of the definition, s. 35 and Arts. 1&2 of Schedule I demonstrate, therefore, that "*qualified lawyers who are not practicing advocates…*" are not "*legal professionals under the Advocates Act, 1961*". This result is contrary to the decision of a Division Bench of the Bombay High Court in *Lawyers Collective v Bar Council of India* (Lawyers Collective),[12] which arose in the context of the right of foreign law firms to practice in India without enrolling under the Advocates Act. In our submission, regardless of the view one takes on the propriety of allowing foreign law firms to practice in India, that decision is correct purely as a matter of statutory interpretation. Even if the intention is to overturn that judgment and the wide scope of s. 29 of the Advocates Act, it is submitted that it is inappropriate to attempt to address it except through an amendment to the *Advocates Act* itself. A change introduced in a statute that is less directly concerned with the questions *Lawyers Collective* considered, and, *without* a corresponding amendment to the Advocates Act, is not likely to advance legislative goals. In addition, introducing a wide definition of

[12] *Lawyers Collective v Bar Council of India* (2010) 112 Bom LR 32.

legal professional contradicts other provisions of the Advocates Act, which is clear on an analysis of the decision of the Bombay High Court.

10. In that case, decided in 2009, the question before the Court was, "*whether practising in non litigious matters amounts to 'practising the profession of law' under Section 29 of the Advocates Act, 1961*?" In answering this conclusion in the affirmative, the Court considered three arguments: whether the Reserve Bank of India, under s. 29 of the Foreign Exchange Regulation Act, 1973 (now not in force) could grant a permit to foreign law firms; *secondly*, whether the non-litigious practice of law is covered by s. 29 of the Advocates Act, 1961, and *finally*, whether Schedule 7, List I of the Constitution has any bearing on the matter.[13] The first contention is only of historical interest, since the FERA has now been replaced by the Foreign Exchange Management Act, 2000.

11. Addressing the second contention, the Court noticed the peremptory language of s. 29 of the Advocates Act - "*there shall… be only one class of persons entitled to practise the profession of law, namely, advocates*". S. 33 in addition provides that no person shall be entitled to practise before any court except by enrolling under the Advocates Act. The High Court held that s. 33 is merely a prohibitory provision that applies to the narrower set of practising in *courts*, that s. 29 applies to the practise of law in *general*, whether in courts or otherwise. It was fortified in its conclusion by, among other things, the Statement of Objects and Reasons. As to the Constitution, an attractive argument was advanced by senior counsel in that case that since the Advocates Act is itself enacted under Entry 77, List I of the Constitution (relating to the right to practice before specific courts), it follows that the legislation does not apply to non-litigious "practice". Indeed, reliance was also placed a case the Supreme Court decided in 1968 where it had observed that the Advocates Act, 1961 is a "*piece of legislation which deals with persons entitled to practice before the Supreme Court*

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[13] Nevertheless, it is relevant to note that s. 29 of the FERA only provides that a person outside India may not except as stated in the provision carry on any activity in India that is of a trading, commercial or industrial nature. Having observed, correctly, that the practice of law does not fall within this description, the Bombay High Court then reached the surprising conclusion that the RBI is not *capable* of granting permission under this provision – overlooking, with respect, that such permission is not required in the first place if the activity is not one of those described above.

and the High Courts [emphasis supplied].[14] The Bombay High Court pointed out, and it is submitted correctly, that Entry 77 does not on a literal reading extend to the District Courts or other subordinate courts – and it is of course not possible to take the view that the Advocates Act does not regulate the practise of law in those courts. In sum, the question whether the *Advocates Act* extends to non-litigious practice is entirely separate from whether India must alter its position in the matter.

12. We believe that changes to the definition of "legal professional" travel far beyond what the Bombay High Court contemplated in *Lawyers Collective*, and that it is not appropriate to introduce those changes in other legislation while leaving the Advocates Act intact—even one that is as fundamental to the legal profession as this Bill will be, if enacted. Considering that the decision arose in the context of the Advocates Act, an amendment of *that* Act, if one is deemed necessary, is more likely to promote a coherent interpretation of the law.

ii. The scope of the proposed formulation independent of the Advocates Act

13. S. 2(d) provides that "legal professional" includes, in addition to the non-litigating lawyers considered above, "*practitioner* [sic] *of income tax and sale tax and those appearing before the relevant authorities, giving advise* [sic] *to the clients for a fee, gain or reward in the areas of customs, immigrations, trademark and patent services and all other professional services where legal issues are involved*". On the face of it, therefore, the provision seems to extend to non-lawyers who in the course of pursuing their profession encounter legal issues. One may object to this interpretation upon the ground that the words "*all other professional services where legal issues are involved*' only qualify "practitioner", and are therefore not a substantive part of the definition of "legal professional". If this view is correct, the implication is that s. 2(d) will apply only to "practitioners" who encounter legal issues and not merely any professional. It is submitted, however, that that interpretation is not persuasive because the portion of the definition commencing with "giving advise [*sic*]" is autonomous and qualifies the word "those" in the previous sentence. The question therefore is whether it is appropriate for the Bill to apply to any professional service where "*legal issues are involved*".

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[14] *ON Mohindroo v Bar Council* AIR 1968 SC 888, 893.

14. It is submitted that it is not. This provision, in our view, is too wide, and not warranted by any compelling regulatory consideration in India. Indeed, in *Lawyers Collective*, the appellants feared that the Advocates Act could conceivably be held to apply to bureaucrats giving a legal opinion. The Court answered in the following terms:

> **55.** It was contended by the counsel for Union of India that if it is held that the 1961 Act applies to persons practising in non-litigious matters, then no bureaucrat would be able to draft or give any opinion in non-litigious matters without being enrolled as an advocate. There is no merit in the above argument, because, there is a distinction between a bureaucrat drafting or giving opinion, during the course of his employment and a law firm or an advocate drafting or giving opinion to the clients on professional basis [emphasis supplied].

15. While that particular result will not ensue since it is arguable that a bureaucrat is not rendering a "professional service" otherwise than in the course of his usual duty, it makes the point that a wide definition of the term can impact professionals not obviously covered by the spirit of the legislation or by manifest regulatory considerations. Clearly, the Court envisaged that a legislation that primarily governs the practice of a profession will not apply to similar services offered sporadically by allied professionals subject to a different regulatory regime altogether. We believe that that belief is well founded, and that it is excessively intrusive to subject a chartered accountant, bureaucrat, consultant and virtually any professional with some connection to industry to the onerous obligations that the Bill imposes—legal aid, regulation by the LSB and the Bar Council and so on. Indeed, a conflict between regulatory regimes is not unlikely. We recommend that the definition be no wider than s. 29 of the Advocates Act, and that in any event, any amendment is best introduced through that legislation.

16. Specifically, we believe that the Bill must apply only to those professionals already regulated by the Advocates Act, 1961. We so believe for two reasons. *First*, although the corresponding English legislation – the UKLSA – intended to expand the application of the regulatory regime, there are crucial differences between the two systems. For one, the distinction between a barrister and a solicitor is far more acute than it is in India. In addition, the Advocates Act, 1961, envisages a unified class of professionals practising law, and there is no compelling reason to alter that premise of regulation. The reformulation we suggest below reflects these thoughts.

Recommendations

17. In conclusion, the Hon'ble Ministry may consider the following changes:

- Deletion of the term "client" from the definition section and the Bill, since it is already incorporated into "consumer of legal profession" and for the other reasons stated above;
- Deletion of the expression "*in relation to the legal services arising out of a legal issue*" from s. 2(c)
- Replacement of s. 2(d) with " *'Legal Professionals' means Advocates as defined in the Advocates Act, 1961*"
- Deletion of s. 2(f)(iv), for it is relevant only to a system that distinguishes between solicitors, barristers and confers specific rights of audience

B. The Legal Services Board (LSB)

1. At places the Indian bill displays a distinct asymmetry between the problems it is calculated to address and the methods it employs to achieve a solution of those problems. Still worse, it is feared that at places the bill not only fails to solve the problem it was calculated to solve, but ends up exacerbating the problem. After studying some such asymmetries, suggestions for avoiding them will be recommended. Let us begin with the rationale for the LSB, the centrepiece of the bill.

I. Justification and Constitution of LSB

2. The foremost asymmetry of the bill pertains to the rationale behind the LSB. The most important question is this- what is the justification for setting of the LSB in India? Why do we even need such a body in India? As it would be apparent from the discussion in the previous sections and the above table, the LSB in the UK was meant primarily to address issues of regulatory complexity and regulatory capture. Do we face those problems in India necessitating the setting up of a LSB?

(i) Regulatory complexity- As item 5 of the comparative table shows, the problem of regulatory complexity, which was a huge problem in the UK, is absent in India. In India, we do not have different front line regulators regulating different forms of the legal profession. In India, at the moment, under the Advocates Act 1961, we only have the Bar Council of India that acts as the regulator of the legal profession. The State Bar Councils do not enjoy any power to prescribe regulations pertaining to either standards of practice or education for advocates. The problem of regulatory complexity is absent in India. Why not then just let the Bar Council of India exercise powers as it does, and appoint a consumer panel to assist the Bar Council of India?

(ii) Regulatory capture- The more compelling justification for the LSB is to be found in the problem of regulatory capture. This was a problem under the then existing regulatory regime in the UK, and it is a problem under the current regime in India. At the moment in India, it is the Bar Council of India that acts both as a representative of advocates and also as their regulator. As a consequence it is the lawyers themselves who regulate their own profession. This does lead to the problem of regulatory capture. Avoiding regulatory capture thus provides the best justification for setting up the LSB in India. It will be recollected that one of the primary objectives behind setting up the LSB in UK was to eliminate such regulatory capture. As a consequence, the LSB in the UK is comprised of a majority of non-lawyers and no elected member from any of the FLRs sits on the LSB.

However the Indian Bill fails to act on this justification of regulatory capture. The constitution of the LSB in the Indian Bill does not seem to avoid regulatory capture at all; on the contrary it seems to encourage regulatory capture. The make-up of the LSB in India is geared to have a significant number, perhaps even a majority, of lawyers. We cannot say anything with certainty about the make- up of the LSB because curiously, the Bill does not specify the maximum strength of members comprising the LSB. ***The Bill leaves the number of members of the LSB to be prescribed by the Government. This, it is submitted, is a crucial omission.*** The make- up of the LSB is an important aspect of the very justification for having the LSB and as such the Bill ought to specify the maximum number of members constituting the LSB. If at all there is a justification for

having an LSB, its composition must be such that it avoids regulatory capture. And we cannot arrive at such a composition unless we know what the specified strength of the body is. Moreover, there is another aspect of regulatory capture pertaining to the powers of the LSB that will be discussed a little later. Here we will be concerned with the issue of regulatory capture in so far as it impacts the constitution of the LSB. The issue of regulatory capture and powers of the LSB will be discussed separately.

3. ***Most significantly, if the justification for the LSB is to avoid regulatory capture, it must not comprise of any elected members from State bar councils, though, arguably, it may comprise of a 'slender' majority of lawyers.*** The present bill provides for appointment of 5 Chairmen of State Bar Councils from the five geographical zones of India. Even though we don't know for sure whether these 5 members may be constitute a majority- because we don't know the maximum specified strength of the LSB- the 5 State bar council members are likely to be a very significant block on the LSB. In many respects, this defeats the very purpose of having an LSB. With such a large presence of members of State Bar Councils, the LSB would then increasingly begin to look like an *avatar* of the Bar Council of India. Given that the LSB has oversight functions over the Bar Council of India, including the power to issue directions, it is imperative that the LSB must not comprise of such a large block of members drawn from State Bar Councils, because this could lead to a potential conflict of interest in their function as members of LSB. Moreover, if at the end of the day the bill is just going to give us an LSB which has a heavy representation from the State Bar Councils, then why call for a change in the existing set up at all? Why can't we then rest satisfied with the Bar Council of India as the regulator for the legal profession? This raises serious questions about the very *raison d'etre* of the LSB, and it is submitted that bill must firmly decide whether it wants to avoid regulatory capture or not.

II. Recommendations

5. If the bill doesn't want to avoid regulatory capture, then there is no justification for the LSB. If it does want to avoid regulatory capture, then it must significantly alter the constitution of the LSB. The only justification for a change in status quo is the avoidance of regulatory capture. But

that can be achieved only if the bill does three things, and accordingly, the Hon'ble Ministry may consider the following changes:

1. Section 4(2) of the bill must specify the maximum numbers of the LSB. It is recommended that the number be not more than 10. [15]

2. Section 4(2) of the bill must specifically provide that no elected member of either any State Bar Council or the Bar Council of India be a member of the LSB.

3. Section 4(2) of the bill must provide for a significant number of non -lawyers on the LSB. Ideally the bill could provide for a majority of non-lawyers. However, it is submitted that this is not entirely necessary to avoid regulatory capture, though the LSA 2007 (UK) and the White Papers leading to it, happen to think otherwise. In our opinion the Consumer Panel, to some extent, does provide a strong voice to consumer interests and thereby acts as (at least) a partial counter balance to regulatory capture. In the circumstances, it would suffice if the Bill provides that at least 3 to 4 members on the LSB be non-lawyers. The presence of these non-lawyer members is crucial to the regulatory objectives of the bill and for minimising regulatory capture.

2. Powers and Functions of LSB

It will be argued in this section that as Section 12 of the Bill, which empowers the LSB to issue binding schemes and guidelines, read with Section 2(f) raises issues of excessive delegation.

1. S. 2(f) of the Bill, at present, reads as follows:
   "Professional Principles" include –

   (i) that the Legal Professionals should act with independence and integrity;

   (ii) that the Legal Professionals should maintain proper standards of work;

[15] The White paper of the LSA UK argues that a body which comprises of more than 10-12 members would become unwieldy and incapable of executing the tasks set for the LSB. In our submission this argument is a compelling one. As such we believe that the LSB maximum strength including the Chairman and member secretary be set at 10.

(iii) that the Legal Professionals should act in the best interest of their clients;

(iv) that the Legal Professionals who are authorise[d] *to appear before a court or tribunal, by virtue of being such authorisation should comply with their duty to the court / tribunal to act with independence in the interest of justice;*

(v) that the affairs of clients should be kept confidential.

2. It is submitted that terms such as "*proper standards of work*", "*best interest of the client*" and "*independence and integrity*" are somewhat vague, and need to be fleshed out in clearer terms (especially "*proper standards of work*"). While this would not normally be a problem, as such terms are often merely used as guidelines for the implementing authority to keep in mind (**See below**) while operating within its sphere of responsibilities, the difficulty becomes especially acute when one analyses the purpose to which these terms (under the heading of "professional principles") are put in the Bill.

3. **It is submitted that the vague standards referred to in S. 2(f) are subsequently employed as the bases of the LSB's power to issue binding guidelines. This leaves these provisions to an attack on the ground of excessive delegation of power.** This is demonstrated below.

4. S. 3(1)(h) defines "*promoting and maintaining adherence to the professional principles*" as forming part of the "regulatory objectives". It states that:

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

...

(h) promoting and maintaining adherence to the professional principles.

5. S. 12, in turn, confers upon the LSB "*the power to issue schemes and guidelines to promote the regulatory objectives*." In particular, S. 12(2)(d) states:

   (2) The guidelines and regulations shall be made in a way –

   ...

   (d) any other principle appearing to it [the Board] *to represent the best legal professional practice.*

6. It is submitted, as outlined above, that the vagueness in S. 2(f) which therefore extends to S. 3, and is then subsequently used as the basis and *raison d'etre* of the LSB's power to issue guidelines under S. 12, lays this entire scheme open to an attack on the ground of excessive delegation.

7. On a number of occasions, the apex Court has ruled that while delegated legislation is permissible, it is essential that the policy of the Act be stated clearly and unambiguously, so as to provide a concrete framework within which the executive can operate. This has been the consistent position of law ever since the case of **In Re Delhi Laws Act**[16], where the Court first laid down the prohibition on the "*abdication and effacement*" by the legislature of its powers and functions.

8. Furthermore, the question of excessive delegation, regard must be had to the Act as a whole. Excessive delegation would therefore occur in a situation where the power conferred upon the executive was "*uncanalised and unguided*" – without any mitigating aspects in the Act. Such mitigating factors include, for instance, an overall control exercised by the legislature, especially at the points where the discretion vested is at its maximum degree (**Corporation of Calcutta v. Liberty Cinema**[17]**)**,

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[16] *In Re Delhi Laws Act*, (1951) 2 SCR 747.
[17] *Corporation of Calcutta* v. *Liberty Cinema*, A.I.R. 1965 S.C. 1107.

9. Aspects that are beyond the scope of delegation include primarily legislative policy and the formulation of binding rules of conduct. Thus, the freedom of the executive to act, and the scope of its discretion, must be limited by a clearly expressed *legislative policy*. (**Khambalia Municipality v. State of Gujarat[18])**.

10. It has, of course, been admitted that "*complexities of modern administration*" required a certain degree of flexibility to be yielded to the legislature. Nevertheless, it must be investigated whether "*the policy of the legislation has been indicated sufficiently or even* [the] *change of policy has been left to the sweet will and pleasure of the delegate*". In **Avinder Singh v. State of Punjab[19]**, for example, the impugned phrase in question delegated power to the executive guided only by "*the purposes of the Act*". After referring to a catena of prior decisions precisely on this point, the Court observed that the scheme of the Act was sufficiently clear, and therefore, there was no excessive delegation.

11. Another attempt at clarifying with precision the boundaries of delegated legislation was made by the Supreme Court in **Gwalior Rayon Silk Mfg. v. Asst. Commr. Of Sales Tax[20]**. The Court cited the Corpus Juris Secundum to observe that *"if the legislature fails to prescribe with reasonable clarity the limits of power delegated to an administrative agency, or if those limits are too broad, its attempt to delegate is a nullity."* Mere possession of the power to eventually repeal the enactment was held not to constitute a sufficient degree of control.

12. The consistent position that has crystallized out of a combined reading of all these cases (and many more) is that while delegation *per se* is permissible, it is imperative that there be a legislative policy to act as a framework and guideline within the bounds of which executive action can operate. The legislative policy cannot be overly broad, and must be

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[18] *Khambalia Municipality* v. *State of Gujarat*, A.I.R. 1967 S.C. 1048.
[19] *Avinder Singh* v. *State of Punjab*, A.I.R. 1979 S.C. 321.
[20] *Gwalior Rayon Silk Mfg*. v. *Asst. Commr. Of Sales Tax*, A.I.R. 1974 S.C. 1660.

expressed with sufficient clarity. In the instant case, as has been pointed out in Paragraph 2, the words used to express the legislative policy ("*proper standards of work"*, "*independence and integrity*") are open-ended, broad and ambiguous. This, with insufficient guidelines to act as a check on the executive's power, lays these provisions of the Act open to an attack based on the vice of excessive delegation.

13. It is further submitted that the problem of vagueness permeates other parts of S. 3 as well, which too are referred to by S. 12 in defining the powers of the LSB. Lastly, and in any event, S. 12(d) is highly problematic, as the phrase "*any other principle appearing to…* [the Board] *to represent the best legal professional practice*" does not refer back *even* to the standards laid out in Ss. 2 and 3. With no reference to the prior guidelines, and with the Preamble of the Bill providing little aid this provision seems to be conferring upon the LSB just that degree of "*arbitrary and uncanalized legislative power*" that the Supreme Court has expressly held to be impermissible.

14. From the above discussion it emerges that the power under Section 12 is likely to be treated as an instance of excessive delegation and hence struck down. However there is in our opinion a way in which this problem could be avoided. If Sec 12 be so recast that it no longer be a source of power to frame schemes and guidelines legally binding on the Bar Councils; but rather a device for the LSB to lay down non mandatory schemes and guidelines *for itself* in order to give specificity to the abstract aims and objectives of the act, the problem identified here could be avoided. Such 'soft' guidelines could also additionally be used to reveal the policy and stands that the LSB takes on several issues and even to specify 'model', albeit non-binding, rules and regulations for the BCI. The advantage of such a provision cannot be overstated. The 'soft' guidelines that the LSB makes in exercise of its powers under Sec 12 could also act as an indicator to the BCI as to what the LSB takes as fulfilling the abstract aims and objects of the Act. Besides, the BCI could strive as far as it may to comply with these guidelines, in the process minimising the need for interventions from the LSB. We envisage that the LSB could use this power to set aspirational goals for the BCI, though the goals are not meant to be legally binding.

III. Recommendations

15. **On the basis of this discussion, the Hon'ble Committee may consider:**

a) Amending the definitional section so as to provide greater clarity to terms such as "*proper standards of work*"

b) Amending S. 12(1) to state:

> "*the Board may issue non mandatory guidelines or schemes to guide its functions or that of the Bar Council of India or any State Bar Council*. Provided that the while such guidelines and schemes in so far as they apply to the Bar Council of India or the State Bar Councils are not binding, the Bar Council of India may strive to incorporate them as far as practicable in the exercise of their powers.
>
> Provided further that non compliance by the Bar Council of India or any State Bar Council of the guidelines made under this section shall not be justiciable. "

c) Deleting S. 12(2)(d), as the purpose is already adequately served by the rest of S. 12 (in particular, S. 12(2)(b).

C. The Relationship between the LSB and the BCI

I. Powers to intervene

1. The lack of clarity in the rationale of having LSB also affects the delineation of authority that the Bill sets out between the LSB and the Bar Council of India. Independently of that issue, it will be argued that the Bill is also ambivalent on the issue of whether the LSB is to be a regulatory oversight body over the BCI, or a piecemeal supervisor of the BCI. The result, it is submitted, is an arrangement that lacks a clear delineation of authority between the two bodies, and which may lead to a crippling log jam.

2. Before we begin discussing the problem with the Indian Bill, let us quickly revisit the delineation of authority between the LSB and the FLRs under the LSA 2007 (UK). The LSA 2007 (UK) provides that the LSB will be a constant oversight body over the FLRs. It empowers it to lay down rules that the FLRs ought to obey in framing their regulations, and for ensuring that the FLRs keep their regulatory and representative aspects separate. Subject to obeying those rules, the FLRs are entitled to continue framing regulations. However, if the LSB is satisfied that the regulations of the FLR is not in accordance with the objectives, it may issue directions or interventions or make a public censure or impose fines on the LSB. This makes the LSB appear to be a piecemeal regulator with some oversight functions. However, most significantly the LSB has the extraordinary power to take over one or more functions of the FLR, if it is satisfied that the other sanctions won't be effective. The importance of this power cannot be understated. If the FLR is systematically and routinely disobeying the directions of the LSB, then it would be futile to expect the LSB to approach the courts in respect of each such contravention by the FLR. This would lead to an administrative logjam between the two bodies. However the LSA 2007 (UK) provides that in extraordinary situations the LSB has the power to take over one or more of the FLR's functions. This is not only an effective sanction incentivising the FLR to heed to the directions of the LSB but also ensures that there are no lasting log jams between the bodies.

3. Sections 30 and 33 of the bill give the LSB the power to issue directions and intervene in the functioning of the BCI. However the BCI still retains its power to make regulations for the legal profession, and the Bill stipulates that the LSB must assist the BCI in formulating regulations. However the Bill does not give the LSB the power to take over working of the bodies. It is feared that such a scheme could lead to a crippling logjam between the two bodies.

II. Recommendations

4. LSB as oversight body - It is felt that the bill must take a clearer position on whether it envisages the LSB as an oversight body or a piecemeal supervisor. It is submitted that in order to fulfil the aims and objectives that the Bill sets out to achieve, it is important that the LSB act as an oversight body. If the LSB is not given the powers to act as an effective oversight body, it will lead to a crippling logjam between the LSB and the BCI.

5. Power to take over – If the LSB has to be an effective oversight body, it must have the extraordinary power to take over one or more of the functions of the BCI, if it is satisfied that the other prescribed mechanisms won't be effective in a particular case. In light of this we propose that the Hon'ble Ministry may consider that following provision be added to Section 33:

New Section 33(1) (A)

An intervention direction, in relation to a regulatory function of an approved regulator, will include a direction-

(a) that the regulatory function in question is to be exercised by the Board or a person nominated by it, and

(b) that the approved regulator must comply with any instructions of the Board or its nominee in relation to the exercise of the function.

Provided further that the Board shall not determine that it is appropriate to give an intervention of the nature provided for in this sub section unless it is satisfied that the matter cannot be

adequately addressed by the Board exercising any of its other powers prescribed by the present act.

II Powers of Direction and Control

In addition to the above recommendation, we believe that a few more alterations need to be made to provisions pertaining to the powers of the LSB, as discussed below. Ss. 24, 29 and 30 read, in relevant part, as follows (emphasis supplied):

> **24. Status.**—(1) The Board is not to be regarded –
> **(a)** as a subordinate to any Government Department or as the agent of the Government; or
> **(b)** as enjoying ay status, immunity or privilege as provided by any other law.
> **(2)** The Board shall be entitled to hold and purchase movable and immovable properties for its efficient functioning and shall have a body incorporate having a perpetual succession with a common seal.
>
> **29. Legal Services Board and the Bar Councils.** – (1) The Legal Services Board shall have full authority to deal with the regulatory objectives in this Act and the Bar Council of India and State Bar Councils shall continue to exercise the functions assigned to them by Advocates Act, 1961.
> (2) The directions of the Legal Services Board relating to the regulatory objectives of this act shall be the guiding principles in so far as functioning, performance and professional principles to be followed by all legal professionals.
> (3) In discharging its regulatory functions assigned by the Advocate Act, 1961, the Bar Council of India and the State Bar Councils shall comply with the requirements of the regulatory objectives in this act.
> (4) The Bar Council of India and State Bar council, shall, so far as is reasonably practicable, act in a way –
> (a) which is compatible with the regulatory objectives, and
> (b) which the Bar Councils consider most appropriate for the purpose of meeting those objectives.
>
> **30. Directions.** – (1) This section applies if the Board is satisfied –
> (a) that an act or omission of the Bar Councils has and, or is likely to have an adverse impact on one or more of the regulatory objectives, **and**
> (b) that the Bar Council has failed to comply with any requirement imposed on it by or under this Act or any other enactment; **and**
> (c) that the Bar Council –
> (i) has failed to ensure that the exercise of its regulatory functions is not prejudiced by any of its other functions, or

(ii) has failed to ensure that decisions relating to the exercise of its regulatory functions are, so far as reasonably practicable, taken independently from decisions relating to the exercise of its representative functions.

...

(4) A direction under subsection (2)—

(a) may only require the Bar Council to take steps which it has power to take;

(b) may require a Bar Council to take steps with a view to the modification of any part of its regulatory arrangements.

...

At the outset, it is important to examine s. 24(1)(b) of the Bill. S. 24 provides that the LSB is "not to be regarded" as "*a subordinate to any Government Department or as the agent of the Government*"; or "*as enjoying any status, immunity or privilege as provided by any other law*." It is submitted that clause (1)(b) – "status, immunity or privilege" must be deleted, because it is not clear what goal it seeks to advance. It appears to be analogous to Art. 26(2), Sch. I of the UK LSA, which provides that the LSB is "*not to be regarded*" as "*enjoying any status, immunity or privilege of the Crown*." Such a provision, of course, is of no relevance in India. We recommend that it be deleted.

The core of the relationship between the LSB and the existing regulatory bodies is addressed by s. 29. S. 29(2) provides that the directions of the LSB relating to regulatory objectives "*shall be the guiding principles insofar as functioning, performance and professional principles to be followed by all legal professionals*." The Hon'ble Ministry may consider reformulating this provision, for its precise import is far from clear.

S. 30, however, is a provision that calls for closer scrutiny. It provides for the LSB to issue directions, and sets out the conditions upon whose satisfaction those directions may be issued. Curiously, the particular conditions are separated by a conjunctive ("and") instead of a disjunctive ("or"). It is clear that the disjunctive is the appropriate clause. The circumstances triggering a direction enumerated in s. 30 are an act or omission of the BCI that is likely to have an adverse impact on regulatory objectives, its failure to comply with a requirement of the Bill or any other law and the failure to adequately separate regulatory and representative functions. It is submitted that the *conjunctive* cannot be properly used to refer to these circumstances, first, because it is clearly the intention of the legislation that a direction must redress *any* of these circumstances, and *secondly*, because it is almost

impossible that the three infractions are constituted by the same set of facts. It is interesting to note that the UK LSA, in a nearly identical provision, correctly uses the *disjunctive*. We recommend, for these reasons, that the "and" be replaced with "or" in s. 30.

Similarly, s. 30(4), in outlining the direction, provides in Clause (a) that the LSB may require "*the*" Bar Council to take certain steps, and in Clause (b) that it may require "*a*" Bar Council to take certain other steps. In our submission, this may lead to needless confusion over whether clause (a) is confined in its operation to the Bar Council of India, by virtue of the use of the definite article. It is best to avert this controversy by using the expression "the" in both cases, which it is clear will comprehend both institutions, especially in view of the specific reference to State Bar Councils in the first part of the provision.

Recommendations

The Hon'ble Ministry may consider the following recommendations:

- Delete s. 24(1)(b)
- Substitute the expression "*shall be the guiding principles insofar as functioning, performance and professional principles to be followed by all legal professionals*" in s. 29(2) with "*shall constitute important guidance as to the amplitude of the professional principles and regulatory objectives for the purposes of this Act*"
- Replace the word "and" with the word "or" in s. 30(1)(a) and s. 30(1)(b)

D. The Ombudsman and Consumer Protection

I. Is the Ombudsman Needed in India?

1. It will be argued in what follows that the office of the Ombudsman, which the bill seeks to introduce, is a superfluous institution that performs no real role and hence must be done away with. The Ombudsman in the UK was introduced as a one stop shop for consumer complaints of deficiency in services against lawyers, and not for hearing disciplinary proceedings. The Indian Ombudsman, proposed by the bill, is concerned *not* with consumer complains but *solely* with disciplinary complaints. The rationale for the Ombudsman exercising such a jurisdiction in the Indian context will be called into question. We will also recommend an alternative - and far more efficient- method by which the objective of consumer protection can be achieved.

2. Section 20 of the bill provides for the appointment of a Chief Legal Ombudsman at its office and for appointment of Ombudsmen in the states. Section 22 of the bill provides that the Ombudsman shall have the power to entertain disciplinary complaints against members of the legal profession. However, the Ombudsmen have not been given the power to take disciplinary action against any member found to be guilty of professional misconduct. Section 22 stipulates that the Ombudsmen have to submit a report containing their findings to the respective State Bar Council, which for reasons in writing, may refuse to act on the report of the Ombudsmen.

3. The justification for the creation of an Ombudsman is not a sound one for the following reasons:

i) It is submitted that the office of the Ombudsman is a superfluous body which performs no real work at all. The Ombudsmen under the bill are confined to the task of hearing disciplinary complaints against legal professionals. Moreover, they do not have the power to take any action against errant lawyers. However, it appears that the Ombudsmen will only duplicate the disciplinary powers that are already being exercised by the State Bar Councils.

ii) The office of an Ombudsman will create unnecessary confusion and needless complexity. If a client has a complaint against a lawyer, is he expected to approach the State Bar Council or the Ombudsman in the first instance? What rationale could possibly be given for making a client approach the Ombudsman in the first instance when it doesn't even have the power to take disciplinary action against the errant lawyer? Left to the client wouldn't he rather- and justifiably so- approach a body with power to take action rather than one which has no such powers? It is submitted that it would be less than optimal to expect a client to prosecute a disciplinary complaint with the State Ombudsman without them having any powers of taking disciplinary action, rather than just straight away approaching the State Bar Council.

iii) It would not be desirable for an Ombudsman to exercise disciplinary powers because the State Bar Councils are far better equipped to handle disciplinary matters. The State Bar Councils, with greater access to manpower for handling these complaints, are likely to deal with these issues more expeditiously than a sole state Ombudsman. Furthermore, in practice, the State Bar Councils delegate powers to senior legal practitioners in the district from where the complaint originates. This gives the client access to recourse at his doorstep, rather than having to travel to the State capital to the Ombudsman – on the reasonable assumption that an Ombudsman cannot be appointed in each district except at an astronomical cost, well beyond what the Government is likely to have anticipated currently.

iv) Moreover, as it should be apparent, the disciplinary proceedings before a single Ombudsman are likely to take a greater time for disposal than the time taken for disciplinary proceedings in State Bar Councils which, in practice, delegate their power to senior members of the bar. Add to that the time granted for the State Bar Council to refuse to accept the report of the Ombudsman, and we will find that it would lead to burdening clients' with significantly lengthy proceedings; proceedings at the end of which the client may have an order which he will not know how to enforce.

v) The office of the Ombudsman seems to involve a heavy -and certainly avoidable – strain on government finances. Setting up a team of Ombudsmen, where they do not add any value to the justice delivery to the consumer, does not appear to be justified.

Recommendations

In the light of the above, it is recommended that there is no justifiable need for the Office of a legal Ombudsman in India and therefore the provisions relating thereto ought to be deleted from the bill.

It could be objected that in recommending the abolition of the office of the Ombudsman, we have not considered the possibility of the Bill being so amended that instead of hearing disciplinary matters the Ombudsmen could start adjudicating on consumer complaints. However as will be explained subsequently, such a role of the Ombudsman will not be justified as there exists a far better and more efficient way of ensuring consumer protection.

II Consumer Protection against Deficiency in Service

It is somewhat paradoxical that the Indian bill borrows the idea of the office of an Ombudsman from the LSA 2007 (UK), but does so to reach the exact opposite result. The Ombudsman in UK was felt necessary because the consumer complaints pertaining to deficiency in legal services were heard by front line regulators, and there existed multiple regulators leading to complexity. In India, the objective of consumer protection can be achieved by declaring that legal professionals as defined in the Bill, shall fall under the remit of Section 2(1)(o) of the Consumer Protection Act 1986.

It is submitted that it is somewhat surprising that the present Bill, which is calculated to further consumer protection and declares it as one its aims and objectives, fails to make provision for consumer protection for deficiency in services by legal professionals. Section 3(d) of the bill declares as one of its objectives 'protecting and promoting the interests of the clients of the legal practitioners'. It is felt that the absence of a clear declaration of legal professionals falling within the ambit of the Consumer Protection Act is an omission which ought to be remedied to bring the Bill in line with its rationale and guiding objectives.

The National Consumer Disputes Redressal Commission has taken the first step in the direction in *D.K. Gandhi v. M. Mathias*, where it declared that advocates fall under the

remit of Section 2(1)(o) of the Consumer Protection Act 1986.[21] The present Bill *ought* to enshrine this as a statutory declaration by declaring that legal professionals as defined in 2(d) of the Bill read with the Schedule I to the Bill, shall fall within the remit of Section 2(1)(o) of the Consumer Protection Act, 1986. This will give clients availing of services of legal professionals, the protection of the consumer grievance redressal fora. It must also be added legal professionals rendering free legal services as obligated under Section 27 of the Bill must also be included within the definition of Section 2(1)(o) of the Consumer Protection Act, 1986. Such a provision is necessary because there are observations in the judgment in *D.K. Gandhi v. M. Mathias* to the effect that only legal services, which are paid for, would fall under Section 2(1)(o). A provision to include legal professionals rendering free legal services would eliminate the possibility of ambiguity about the status of free legal services.

Recommendations

Therefore, the Hon'ble Ministry may consider that:

a) Subsection (2) be added to Section 28 which reads:

Any legal service rendered by a legal professional shall amount to 'services' under Section 2(1)(o) of the Consumer Protection Act.

b) Subsection (3) be added to 28 which reads:

Notwithstanding anything to the contrary contained in any other law for the time being in force, free legal services rendered by legal professionals in discharge of their obligation under Section 27 of the bill shall amount to 'services' under Section 2(1)(o) of the Consumer Protection Act 1986

E. Legal Aid

[21] 2007 3 CPJ 337 (NC).

Compulsory Legal Services: Issues of vagueness and constitutionality

It is submitted that the positive obligation of providing free legal services that the Bill imposes upon legal professionals is, as it is presently worded, impermissibly broad, and open to constitutional attacks on the twin grounds of the "*void for vagueness doctrine*", as well as unreasonable restrictions upon Article 19(1)(g) of the Constitution.

Section 27 of the Bill states:

> *Every Legal Practitioner shall be duty bound to give free legal services to the financially weaker consumers/clients who fall just above the income levels prescribed under Section 12(h) of the Legal Services Authorities Act, 1987.*

Section 27 places a *positive binding obligation* upon legal practitioners. At the outset, it may be noted that the provision is worded in an extremely broad manner, with many essential features left not uncertain. For example, the provision surely cannot mean that a legal practitioner is obligated to take the cases of every single client belonging to the "*financially weaker*" sections. Consequently, it is imperative that *specific* guidelines be enunciated in the provision to concretize the scope of the obligations that are being placed upon legal practitioners.

In light of the above discussion, the provision in its present form suffers from a defect that may leave it open to a constitutional challenge. Article 19(1)(g) confers a right upon all citizens "*to practice any profession, or carry out any occupation, trade or business*". It is unnecessary to refer to the numerous judgments defining "profession" under Article 19(1)(g) to establish that the legal profession comes within the scope of the fundamental freedom.

With the applicability of Art. 19(1)(g) incontestable, a violation of the Article shall render the offending provision unconstitutional and liable to be struck down. One ground for striking down

legislation as being violative of fundamental rights is known as the "**void for vagueness"** doctrine. Although initially rejected as forming part of a "*due process*" requirement alien to the Indian legal and constitutional system, it is now accepted that an excessive degree of vagueness can be used as a ground for striking down a statute. Admittedly, there is a high degree of presumption in favour of legislative validity, and in the case of an ambiguous or unclear definition, the Court must make all attempts to construe it in a particular manner in consonance with accepted principles of statutory interpretation. If, however, "*no... construction is possible...* [and there is] *a boundless sea of uncertainty... and the law prima facie takes away a guaranteed freedom... the law must be held to offend the Constitution*."[22]

This doctrine has been reiterated in a number of cases (*See, e.g.*, **Kartar Singh v. State of Punjab[23])**. Admittedly, a number of these cases deal with criminal provisions. However, it is submitted that the *rationale* of the doctrine does not admit of any such restriction. Indeed, the doctrine has been applied in **K.A. Abbas v. Union of India** which, being a case under Article 19(1)(a) (dealing with pre-censorship of movies), is directly apposite to the present situation.[24]

It is submitted that S. 27 may fall foul of the void for vagueness test and reasonable restriction test for the aforesaid reasons. Besides the section is too broad and vague and the obligation it imposes needs to be specified more precisely. Both objectives can be met if the broad obligation to offer legal services is hemmed in with some limitations:

i. The duty to offer free legal service should constitute a specified percentage of a legal professional's overall practice.

ii. Unlike "*legal practice*", "*legal services*" is not a defined term of art. Does legal aid entail taking up a case from beginning to end, throughout the entire hierarchy of the court system? Is it limited to offering advice in a single consultation? Does it mean something in between? S. 2(a) of the Legal Services Authorities Act, 1987,

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[22] *State of Madhya Pradesh* v. *Baldeo Prasad*, (1961) 1 S.C.R. 970.
[23] *Kartar Singh* v. *State of Punjab*, (1994) S.C.C. (Cri) 899.
[24] *K.A. Abbas* v. *Union of India*, (1970) 2 S.C.C. 870.

defines it extremely broadly as "*any service in the conduct of any case or legal proceeding before any court or other authority or tribunal and the giving of advice on any legal matter*." While the definition is adequate for the Legal Services Authorities Act, it is clearly problematic when used to impose a *positive obligation* upon legal professionals.

iii. In almost all cases, a legal professional's practice is limited both in terms of the scope of subject matter, as well as the forums in which he practices. Consequently, is the obligation under S. 27 determined by the scope and forums of practice? In the event that it is, it leads to a further problem: certain legal professionals have a practice of such a nature that practically speaking, the *type* of legal services required by the persons contemplated under S. 12(h) of the Legal Services Authorities Act. The direct result of such an interpretation would be exempting certain kinds of legal professionals from the duty that S. 27 seeks to impose upon the legal community *as a whole*.

iv. In a connected issue, the duty imposed also does not take into account the nature of the *matter* itself that is brought before the legal professional. This is especially important in light of the *obligation* to provide *free* legal service. The Legal Services Authority Act attempts to address the difficulty by requiring, in S. 13(1), the additional requirement of proving a "*prima facie case to prosecute or defend*". There is, however, no such safeguard clause in the Bill. Of course, the Legal Services Authority Act has an authority dealing with this issue. In the Bill, however, it might be undesirable to leave the subjective determination of whether or not a *prima facie* case exists in the hands of the legal professional to whom the case is brought. It is submitted that the determination must be made by an external authority.

While admittedly the judiciary has taken upon itself the burden of filling in the gaps left by vague provisions to make an Act workable, it is submitted that gaps such as those pointed out above (except, possibly, the third one) are ones that cannot possibly be filled in the course of the normal judicial function. Solutions must be provided by the *legislature* within the scheme of the Act itself. Without at least guidelines of some nature to fill in the abovementioned gaps, it is clear that the provision suffers from the vice of vagueness.

There is an additional factor that must be taken into account both with respect to the present wording of the provision, as well as during any process of reformulation. The only ground on which the fundamental freedom under Art. 19(1)(g) can be bypassed is contained in Article 19(6): the legislature may impose *reasonable restrictions* upon the freedom keeping in mind certain specific purposes. Thus, there are two requirements: the law must be a *restriction*; and it must be *reasonable*.

The nature of the scrutiny undertaken by the Court is dependent upon the degree to which the offending provision infringed a fundamental freedom. Thus, the Court has famously stated that what Article 19 envisages is a "*regulation*", and not an "*extinction*" of the fundamental freedoms listed therein (**Bennett Coleman & Co. Ltd. v. Union of India[25])**. Hence, it has been observed that *"the greater the restriction, the more the need for strict scrutiny by the Court."* (**Narendra Kumar v. Union of India[26]**) Therefore, while the Court has held that a complete prohibition may amount to a reasonable restriction, it has in such cases held the impugned legislation to a higher standard of review than otherwise. One of the factors that must be taken into account in cases of near-total prohibitions is whether or not a "*lesser alternative would be adequate*" to satisfy the purposes of the Act in question (**State of Gujarat v. Mirzapur Moti Kureshi Kasab Jamat[27])**.

As observed above, Section 27, as it is presently worded, contemplates a limitless positive obligation upon legal professionals and, consequently, is tantamount to a severe curtailment (if not a prohibition). The same features that were cited above – proportionality, limitation of scope and forums, and limitation of the term "legal services" – continue to be absent here. As detailed above, the Courts have always been cautious of restrictions as widely worded so as to become equivalent to *prohibitions* upon rights, and have always required the legislature to discharge a high burden with respect to the need of the prohibition as well as the manner of its implementation. Consequently, Section 27 may not survive a Part III challenge grounded upon Article 19(1)(g). In any event, even assuming the present provision is constitutionality sound as it

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[25] *Bennett Coleman* v. *Union of India*, (1972) 2 S.C.C. 788,
[26] *Narendra Kumar* v. *Union of India*, A.I.R. 1960 S.C. 430.
[27] *State of Gujarat* v. *Mirzapur Moti Kureshi Kasab Jamat*, (2005) 8 S.C.C. 534.

stands, it is too vague to serve any practical purpose. Hence there is a need to set out the requirements contained with far greater specificity than what is found presently.

Recommendations

On the basis of the above discussion, the Hon'ble Committee may consider reformulating Section 27 to address the following concerns, keeping in mind the scope and permissible restrictions upon Article 19(1)(g) of the Constitution:

I. Stating what proportion of a legal professional's legal practice must be compulsorily diverted in order to fulfil the requirements of S. 27
II. Stating the precise scope and ambit of "*legal service*" the professional is required to provide.
III. Stating whether Sec 27 obligates the professional to offer services only within his ordinary area of competence and practice.
IV. Introducing safeguards to offset the possible fall-outs of free compulsory legal service, such as those provided in the Legal Services Authority Act.

In the light of the above considerations, the provision may be rephrased to address all these concerns in the following manner:

S. ***27. Free Legal Services to the Financially Weaker Consumers / Clients.*** *– (1) Every Legal Practitioner shall be duty bound to give free legal services to the financially weaker consumers/clients who fall just above the income levels prescribed under Section 12(h) of the Legal Services Authorities Act, 1987.*

(2) Provided that the obligation to render free legal service is limited to 5% of the Legal Practitioner's total case load each year. To calculate the case load for the purposes of determining the scope of his obligation, the total number of matters in which the Legal Practitioner either formally advised or appeared in court on behalf of a client, for consideration, in the previous year, shall be taken into account.

(3) Provided also that a Legal Practitioner shall not be obliged to represent a client in a Court in which he is not competent to do so, or in a matter which is not ordinarily covered by his regular practice.

(4) Provided also that a Legal Practitioner shall not be obliged to represent a client where objective grounds exist for believing that the latter has no "prima facie case to prosecute or defend", within the meaning of S. 13 of the Legal Services Authorities Act, 1987.

(5) In the event that a Legal Practitioner refuses a client falling within the scope of S. 27(1) free legal aid, he must record he reasons in writing and forward the same to the client. Any legal professional found to be acting in violation of his obligations under the present section will be subject to disciplinary proceedings by the State Bar Council that he is a member of.

(6)Any legal professional found to act in violation of the present section shall in addition to being liable for any other disciplinary action that the State Bar Council may take against him be subject to a fine of Rs. 50,000, which shall either be paid into the legal aid fund of the state in which the Legal Professional is registered or if the State Bar Council thinks fit, awarded to the consumer whose legal right he violated.

F. Problems of Effectiveness

It is submitted that at many places in the Bill, various bodies have been set up with certain specified functions; however, the absence of any enforcement mechanisms might render a number of these provisions ineffective when it comes to their implementation.

1. At many places, the Bill makes provisions for contribution in different forms by various bodies. S. 18, for instance, deals with representations made by the Consumer Panel, S. 19 with the advice and research functions of the same body, and S. 22 with the Report of the Ombudsman. The relevant provisions state:

   18 (1) Representations made by the consumer panel shall be considered by the Board.

   19(1) The consumer panel may, at the request of the Board –

   (a) carry out research for the Board;

   22(2) The Ombudsman shall examine the documents and the witnesses, if any, on both sides and shall prepare his findings after hearing both sides.

2. To ensure that these contributions of these entities do not remain in the nature of mere pious declarations, S. 18(2), for instance, requires that if the LSB disagrees with the views expressed by the Panel, *it must give its reasons in writing* and such reasons may be published by the Panel. S. 18(2) states:

   (2) If the Board disagrees with the views expressed, or proposal made, in the representations, it must give the consumer panel a notice to that effect stating its reasons for such disagreeing.

3. Similarly, under S. 22(6), if the State Bar Council rejects the report of the Ombudsman, the reasons must be recorded in writing, and published. S. 22(6) states:

   (6) The Disciplinary Committee of the Bar Council of the State shall consider the report of the Ombudsman and if such report is not accepted by the Bar Council reasons thereof

shall be recorded in writing and such reasons shall be published in the manner prescribed by Rules with sufficient justification.

4. Unfortunately, there are no parallel provisions in S. 19 and 32. While S. 19(2) makes it mandatory for the LSB to "consider" the advice and results of the Panel's research, the absence of a regulatory provision such as is found in Ss. 18(2) and 22(6) leaves this little more than a dead letter. S. 19(2) only states that:

   (2) The Board shall consider any advices given and results of any research carried out under this section.

5. This issue is even more pertinent in the case of S. 32, which deals with public censure of the Bar Council by the LSB. S. 32(5) gives the Bar Council the opportunity to make representations which *must* be considered by the LSB – but once again, in the absence of a regulatory provision requiring the LSB to give reasons for whatever action it takes upon the representation leaves it shorn of much of its force. S. 32(5) merely states:

   (5) Before publishing the statement the Board must consider any representations which are duly made.

6. Additionally and separately, a central focus of the Bill is to ensure that the interests of the clients of legal professionals, dubbed as "*consumers*", are adequately protected. It is with this in mind that Part – II of the Bill deals with the setting up of the "Consumer Panel".

7. While the objective is no doubt laudatory, it must be noted that the Consumer Panel's function is restricted to being purely recommendatory in nature – and, as pointed out above – in S. 19 there is not even a mechanism to ensure that its advice and findings are *actually* taken into account. This may result in the Consumer Panel being a toothless organ when it comes to the implementation of the Bill. This, in turn, does not fit well with

the objective of the Bill to introduce, for the first time, a mechanism to protect the rights of the consumers of legal services.

8. Consequently, it is important that the role of the consumer panel be more than merely recommendatory. One possible way of ensuring this is to provide for consumer representation *within the LSB* (which is currently not provided for) so as to provide both a stake and a scope for decision-making to the consumers and their representatives. This may be through the consumer panel itself, or independently.

Recommendations

On the basis of the above discussion, the Hon'ble Committee may consider:

a) Inserting regulatory provisions, the nature of which are found in Ss. 18(2) and 22(6), into Ss. 19 and 32, so as to ensure that the relevant actions of the Consumer Panel and the Bar Council are considered by the LSB in a *verifiable* manner. These may be worded in the following manner:
In S. 19(2), after the first sentence: *The Board shall state in writing any action that is specifically taken on the basis of the advice or research provided by the Consumer Panel. If no action is taken, reasons for the same shall be recorded in writing*.

In S. 32(5), after the first sentence: *If the Board decides to publish the statement of censure notwithstanding the representations made by the Bar Council, it must state its reasons in writing*.

b) Providing for representation from the Consumer Panel within the LSB, so as to provide consumers with an actual stake in the functioning of the LSB. In S. 4(2)(c), it may be added at the end: "*One member shall be an elected representative of the consumer panel*".

Summary of Recommendations

1. Definition Section

The Hon'ble Ministry may consider:

- Deletion of the term "client" from the definition section and the Bill, since it is already incorporated into "consumer of legal profession" and for the other reasons stated in this note;
- Deletion of the expression "*in relation to the legal services arising out of a legal issue*" from s. 2(c)
- Replacement of s. 2(d) with " *'Legal Professionals' means Advocates as defined in the Advocates Act, 1961*"
- Deletion of s. 2(f)(iv), for it is relevant only to a system that distinguishes between solicitors, barristers and confers specific rights of audience
- Amending s.(f)(ii) so as to define with greater clarity "*proper standards of work*"

2. Section 4(2)

The Hon'ble Ministry may consider:

1. Section 4(2) of the bill must specify the maximum numbers of the LSB. It is recommended that the number be not more than 10.

2. Section 4(2) of the bill must specifically provide that no elected member of either any State Bar Council or the Bar Council of India be a member of the LSB.

3. Section 4(2) of the bill must provide for a significant number of non -lawyers on the LSB. Ideally the bill could provide for a majority of non-lawyers. However it is submitted that this is not entirely necessary to avoid regulatory capture, though the LSA 2007 (UK) and the whitepapers leading to it, happen to think otherwise. In our opinion the consumer panel, to some extent does provide a strong voice to consumer interests and thereby acts as (at least) a partial counter balance to

regulatory capture. In the circumstances, it would suffice if the bill provides that at least 3 to 4 members on the LSB be non-lawyers. Further the bill may provide that at least one member from the consumer panel must be appointed to the LSB. The presence of these non-lawyer/ consumer panel members is crucial to the regulatory objectives of the bill and for minimising regulatory capture.

3. Section 12

The Hon'ble Ministry may consider:

1) Amending S. 12(1) to state:

a) "*the Board may issue non mandatory guidelines or schemes to guide its functions or that of the Bar Council of India or any State Bar Council*. Provided that the while such guidelines and schemes in so far as they apply to the Bar Council of India or the State Bar Councils are not binding, the Bar Council of India may strive to incorporate them as far as practicable in the exercise of their powers. Provided further that non compliance by the Bar Council of India, or any State Bar Council, of the guidelines made under this section, shall not be justiciable. "

2) Deleting S. 12(2)(d), as the purpose is already adequately served by the rest of S. 12 (in particular, S. 12(2)(b).

4. Part III: The Ombudsman

The Hon'ble Ministry may consider omitting the provisions dealing with the Ombudsman from the Bill, as it is submitted that there is no justification for such an office in India.

5. Section 19

The Hon'ble Ministry may consider adding to S. 19(2), the following:

The Board shall state in writing any action that is specifically taken on the basis of the advice or research provided by the Consumer Panel. If no action is taken, reasons for the same shall be recorded in writing.

6. Section 27

The Hon'ble Ministry may consider re-drafting S. 27 in the following manner:

S. 27. Free Legal Services to the Financially Weaker Consumers / Clients. – (1) Every Legal Practitioner shall be duty bound to give free legal services to the financially weaker consumers/clients who fall just above the income levels prescribed under Section 12(h) of the Legal Services Authorities Act, 1987.

(2) Provided that the obligation to render free legal service is limited to 5% of the Legal Practitioner's total case load each year. To calculate the case load for the purposes of determining the scope of his obligation, the total number of matters in which the Legal Practitioner either formally advised or appeared in court on behalf of a client, for consideration, in the previous year, shall be taken into account.

(3) Provided also that a Legal Practitioner shall not be obliged to represent a client in a Court in which he is not competent to do so, or in a matter which is not ordinarily covered by his regular practice.

(4) Provided also that a Legal Practitioner shall not be obliged to represent a client where objective grounds exist for believing that the latter has no "prima facie case to prosecute or defend", within the meaning of S. 13 of the Legal Services Authorities Act, 1987.

(5) In the event that a Legal Practitioner refuses a client falling within the scope of S. 27(1) free legal aid, he must record he reasons in writing and forward the same to the client. Any legal professional found to be acting in violation of his obligations under the present section will be subject to disciplinary proceedings by the State Bar Council that he is a member of.

(6)Any legal professional found to act in violation of the present section shall in addition to being liable for any other disciplinary action that the State Bar Council may take against him be subject to a fine of Rs. 50,000, which shall either be paid into the legal aid fund of the state in

which the Legal Professional is registered or if the State Bar Council thinks fit, awarded to the consumer whose legal obligation he violated.

8. Section 28

The Hon'ble Ministry may consider the following:

a) Subsection (2) be added to Section 28 which reads:

Any legal service rendered by a legal professional shall amount to 'services' under Section 2(1)(o) of the Consumer Protection Act.

b) Subsection (3) be added to 28 which reads:

Notwithstanding anything to the contrary contained in any other law for the time being in force, free legal services rendered by legal professionals in discharge of their obligation under Section 27 of the bill shall amount to 'services' under Section 2(1)(o) of the Consumer Protection Act 1986.

9. Sections 24 & 30

The Hon'ble Ministry may :

- Delete s. 24(1)(b)
- Substitute the expression "*shall be the guiding principles insofar as functioning, performance and professional principles to be followed by all legal professionals*" in s. 29(2) with "*shall constitute important guidance as to the amplitude of the professional principles and regulatory objectives for the purposes of this Act*"
- Replace the word "and" with the word "or" in s. 30(1)(a) and s. 30(1)(b)

10. Section 32

The Hon'ble Ministry may consider:

Adding to S. 32(5), *If the Board decides to publish the statement of censure notwithstanding the representations made by the Bar Council*, *it must state its reasons in writing*.

11. Section 33

The Hon'ble Ministry may consider inserting a new Section 33(1) (A) into the Bill, which reads:

An intervention direction, in relation to a regulatory function of an approved regulator, will include a direction-

(a) that the regulatory function in question is to be exercised by the Board or a person nominated by it, and

(b) that the approved regulator must comply with any instructions of the Board or its nominee in relation to the exercise of the function.

Provided further that the Board shall not determine that it is appropriate to give an intervention direction of the nature provided for in this sub-section unless it is satisfied that the matter cannot be adequately addressed by the Board exercising any of its other powers prescribed by the present act.

About us and Contact Details

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- To provide rigorous, independent and non-partisan legal and policy analysis of Bills introduced in Parliament
- To suggest appropriate legal reform to enable bills to pass tests of constitutionality if challenged
- To suggest appropriate policy reform if the legislative policy is to be sound in principle and efficacious in practice

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