

BAR STANDARDS BOARD

REGULATING BARRISTERS

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9 March 2012

The Bar Standards Board is grateful for the opportunity to comment on the Legal Services Board's draft Strategic Plan for 2012-15 and Business Plan for 2012/13.

Some of the points raised in this written response were outlined in a meeting between members of the Legal Services Board (LSB) and Bar Standards Board (BSB) on 9 February 2012. The BSB is grateful to the LSB for arranging and hosting that meeting. It was a constructive meeting, especially in terms of providing a sound basis upon which better ongoing communication between our two organisations at Board level may be built. We would welcome making these types of meetings a regulator feature and to that end, would like to offer to host the next one.

The BSB has grouped its comments under five headings:

- Unanticipated impact,
- Oversight v frontline regulation,
- Degree of management by LSB,
- Avoiding duplication, and
- Budget.

Unanticipated impact

The activities described in the business plan have mostly been outlined by the LSB to frontline regulators in one forum or another. To that extent, the strategic and business plans do not contain any particular surprises, which is to be welcomed. The BSB also agrees that many areas of activity may assist the regulators in improving their activities or may provide results that will be useful to the regulators. For instance, implementation of the regulatory standards framework is something that the BSB broadly welcomes and will pursue although as was canvassed at some length at our meeting discussions on some aspects (in particular, where it is and is not appropriate to use OFR) and on timeframes will be necessary.

However, the BSB does have concerns about the LSB's plans in terms of being able to understand exactly what the impact of the LSB's stated activities will be on the BSB. The draft does not contain any indication of the amount of resources that the LSB is devoting to the areas of work outlined, nor are the activities described in sufficient detail for the BSB to be able to assess the amount of work it will need to do in response. It would be very helpful for planning purposes if the scope were clearer.

As has been previously discussed with the LSB, the BSB's budget is set prior to the LSB's draft plan being issued. Between 75-85% of the BSB's budget is utilised undertaking the frontline work of regulating barristers. If the LSB introduces activity requirements that are either not anticipated or to different timescales (particularly if they are short timescales), the resource impacts are significant. Either the BSB has to re-allocate and re-prioritise resources, with consequences for delivery against its own business plans, or it is faced with needing to negotiate with the LSB around realistic delivery dates for work the LSB is proposing. This effectively puts the BSB in the position of having to revise its business plan regularly through the year as the LSB's work programme progresses. It would be helpful if the LSB were able to give an indication of what activities it intends undertaking in years 2 and 3 of its strategic plan. If combined with some idea of the amount of resource being allocated in each area, this would be helpful as a guide for regulators in allocating their own resources to support LSB plans.

It would be very useful if the LSB were clearer about the impact it thinks its work programme may have on regulators, whether by indicating how its resources have been allocated to the areas of activity outlined in the plan or by indicating the amount of input it expects from the regulators to its activities.

Oversight v frontline regulation

The plans make mention of the LSB's role being one of oversight. This is clearly correct and consistent with the role of the LSB outlined in the Legal Services Act 2007, not least section 49(3) which states that the LSB's "principal role is the oversight of approved regulators". This is further reinforced by the structure of the Act which recognises that the regulatory arrangements are the preserve of the approved regulators with the LSB having an approval role only.

The BSB is very concerned to ensure that the LSB does indeed restrict its role to one of oversight. In the BSB's view, and as we have highlighted in our responses to other proposals on other occasions, the LSB has a recurring tendency to stray into the detail of operation of the approved regulators and this should be resisted by the LSB.

Degree of management by LSB

Following on from the comments about the LSB maintaining an oversight role, the BSB considers that whenever the LSB is operating it should be avoiding any semblance of micro-management when doing so. The LSB should, in general, allow the regulators to develop and implement their own plans for dealing with the issues they identify as requiring their intervention, in accordance with the priorities they determine for themselves. There are clear statutory criteria that limit when the LSB should seek to interfere with the judgments that are entrusted by Parliament to the front-line regulators. Historically this has often not been the LSB's mode of operation, instead veering towards having very prescriptive actions that must be followed, both as to what issues to prioritise and as to precisely what action the front-line regulators are expected to take in respect of those issues eg first-tier complaints advice

requirements and the equality and diversity data collection and publication requirements. The BSB is concerned to ensure that the LSB's implementation of the regulatory standards framework does not, likewise, become prescriptive. The BSB, along with all other frontline regulators, should be free to determine how it might best implement the regulatory standards framework. It is not for the LSB to insist that its view must be adhered to by the frontline regulators or to supply very detailed requirements that can only be met by following them precisely.

Avoiding duplication

There are two concerns in relation to avoiding duplication. One is the maintenance of the oversight v frontline regulatory roles, as discussed above. The LSB should not be undertaking activities that properly belong with the frontline regulators. This does not relate so much to the activities described in the plan but more how those activities are then carried out. If, for instance, the LSB's "quality toolkit" is an outline or framework from which the frontline regulators can pick and choose as they see fit, then that could be a useful complement to the frontline roles. If, however, the LSB develops a toolkit then tells the regulators that they must implement all of it (or even selected parts of it) and it will check to see it has done so, it is then overstepping its role and dictating frontline regulation. The Act gives the LSB an oversight role and it should stick to that. If, the regulators are already working on quality measures (as indeed they must be to implement the regulatory standards framework properly) this also raises the possibility of significant duplication of effort. This must be avoided. To that end, the BSB would like to see that more detailed plans are provided in work areas and that frontline regulators are always given the opportunity to develop their own systems without LSB intervention in the first instance.

Secondly, the regulatory landscape is already very complicated. The LSB's stated intention of investigating itself becoming a licensing authority raises the spectre that it will enter the frontline regulator ranks and thereby complicate the landscape further. The professions would then be required to pay for the cost of the existing frontline regulators as well as or both frontline and oversight regulation by the LSB. There is no demonstration of how this is perceived to be consistent with the regulatory principles in terms of being proportionate and only targeted at cases where action is needed.

The Act allows the LSB up to 12 months to prepare for the role of licensing authority if and when it determines that step to be necessary. The clear intention was that the LSB should step up and perform this role (and thereby cross over to the ranks of front-line regulators) only if the provisions in the LSA relating to ABS otherwise risked not being realised, either because the approved regulators did not become licensing authorities or because there were gaps in coverage which left some potential ABSs without a suitable licensing authority. This was not intended to provide for the LSB simply to duplicate the role of those existing approved regulators who have become or indicated plans to become licensing authorities. To use the power in that way would be plainly inconsistent with the regulatory principles. There is no evidence or analysis of risk that would indicate such a move is necessary at present and every reason to think that it is not. Given the timeframe allowed, action now does not on any view seem necessary or justified and should only be undertaken at all on the back of an analysis that clearly demonstrates why it is necessary and proportionate for the LSB to take the proposed step.

Budget

The LSB claims a 9% reduction in its budget but it does not outline which activities have been reduced or stopped in order to achieve this. A comparison of the current year's plan and budget areas shows that the vast majority of the reduction appears to come from depreciation being treated differently, yet this is not explained in the plan.

As mentioned above, there is no indication of how the budget is distributed between core statutory work and the many initiatives and projects being undertaken by the LSB. At a time when front line regulators are under ever greater financial pressure, because of the financial pressures on those whom they in turn regulate, the front line regulators are entitled to expect that the LSB will set a budget for its own activities based on what it anticipates it will need to perform its core statutory activities, without duplication of effort, unnecessary intervention into the roles of frontline regulators or otherwise budgeting for work which is either outside the proper scope of the LSB's role or which, although proper to its role, is not justified by the regulatory principles. Much greater clarity and accountability as to the allocation of the budget is required, in order to reassure the regulated community that the LSB is not undertaking more than is strictly necessary to meet its oversight regulator obligations and is not undertaking activity to justify the continued operation and size of the LSB.

Bar Standards Board