



The Law Society

**The Law Society's response to the Legal Services Board's consultation on their 2009/2010 Business Plan**

12 March 2009

SUPPORTING  
solicitors

1. The Law Society is grateful for the opportunity to comment on the Legal Services Board's (LSB) draft Business Plan for 2009/10. We welcome the fact that the Business Plan gives the Approved Regulators (ARs) and the regulated community a clear idea of the work and priorities of the Board over the next year.
2. In its first annual plan the LSB will be setting out to the legal professions and the public how it will approach its new role. The Law Society is pleased to have the opportunity of commenting on the draft plan from the perspective of the largest of those professions. It will be vitally important that the plan does not give the appearance of unduly emphasising any of the LSB's objectives over another. For example, it would be unfortunate if it were to give the impression that it was solely concerned with consumer protection. Important as that is, it is essential in the public interest - and for the confidence of the professions, however, for equal weight to be given to the regulatory principles which are less easy to set out in a plan, such as supporting the constitutional principle of the rule of law.
3. In this first plan, we believe that the important principles about the basis on which the Legal Services Board was established should be borne in mind. They include:-
  - Parliament decided that regulation should continue to be based on the existing regulatory bodies – most of which are professional bodies – rather than establishing a new regulatory body on the lines of the FSA. This approach is of major significance for the maintenance of the independence of the legal profession in England and Wales, and hence its success internationally and its value to citizens at home.
  - Parliament decided that the lead role in regulation should rest with the approved regulators, not with the Legal Services Board. The Legal Services Board's role is primarily a safety net to ensure that approved regulators carry out their responsibilities in a satisfactory manner. The mischief which the Legal Services Act (the Act) was aimed at was not a failure of regulation – indeed Sir David Clementi was impressed by the professional standards of the Law Society and the Bar, and wished to preserve that ethical base.<sup>1</sup>
  - In Parliamentary debates, it was repeatedly emphasised that it would not be the role of the Legal Services Board to second guess approved regulators, but to intervene only where they were clearly failing. This eventually found expression in the requirement in the Act that Legal Services Board policy statements should take account of the principle that the Legal Services Board should exercise its powers only where the action or inaction of an approved regulator was unreasonable<sup>2</sup>.
  - The responsibilities of the Legal Services Board (including those for the promotion of competition, and the promotion of access to justice) apply simply to the way in which it carries out its statutory responsibilities for regulation

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<sup>1</sup> Review of the Regulatory Framework for Legal Services in England and Wales, December 2004, p36, para.32.

<sup>2</sup> Legal Services Act, s.49(4).

under the Legal Services Act. The Board's general duty to assist in maintaining and developing standards in regulation does not automatically translate into a power to require approved regulators to act in accordance with the Board's developing thinking.

- In accordance with the regulatory principles of proportionality, the Legal Services Board should take the opportunity to clarify its approach to “excellent” regulation. It is legitimate to aspire to excellence, as does the Law Society and no doubt other approved regulators. But equally it is important to remember that the concept of excellence in regulation must include paying full attention to proportionality and cost effectiveness. In addition of course, the test for whether the Legal Services Board can intervene with an approved regulator must be related to unreasonable behaviour, not lack of excellence, *per se*.
4. Subject to these general observations, we are generally supportive of the approach the LSB intends to take, although we have a number of detailed points.

### **The LSB Vision**

5. The Law Society is concerned that the emphasis in Paragraph 1 of the Plan, does not quite reflect the regulatory objectives set out in the Legal Services Act.<sup>3</sup> The Act first lists ‘protecting and promoting the public interest’ and ‘supporting the constitutional principle of the rule of law’, but neither is mentioned in the opening paragraph. Although we take some comfort from the comments in Paragraph 3, we believe that the LSB should clearly emphasise at the outset its fundamental commitment to the public interest and the rule of law.
6. The LSB will need to give consideration to exactly what its role is in relation to access to justice. In the Law Society’s view this is primarily to ensure that the regulatory impact of its policies does not have a negative effect on access to justice. This should be established by the completion of a thorough Regulatory Impact Assessment (see paragraph 19 below). The LSB will also need to pay particular attention to the impact of ABSs on access to justice (see paragraph 18 below).

### **Cross-industry issues**

7. It will also be important for the LSB to consider cross-industry issues. The LSB will be ideally placed to address these difficult issues and to provide leadership across the approved regulators.
8. In particular, the Law Society would be grateful for the LSB’s early consideration of referral fees. Referral fees have been a contentious issue for some time. Some view referral fees as a normal part of ordinary business practice, whilst others view them as an improper inducement with potentially negative effects on their ability to act in the best of interests of their client. In particular, many believe that the payment of large referral fees to an introducer risks compromising the quality of work provided to the client; the integrity and impartiality of the legal

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<sup>3</sup> Legal Services Act, s.1.

service provider; and the acceptance of the professionalism of the legal service provider by members of foreign bars.

9. The Law Society is mindful of the fact that, were the former prohibition on referral fees reinstated unilaterally, solicitors would lose business to competitors in the legal market who are permitted to pay referral fees. We therefore ask the LSB to look at this difficult issue as a matter of urgency, in order that a consistent cross-industry approach can be established.

### **Ensuring effective consumer protection**

10. The Law Society's view is that it will be important for the LSB to identify and seek to remedy areas where there is a significant consumer risk from the absence of specific regulation. The Legal Services Act provides a mechanism whereby changes can be made via secondary, rather than primary, legislation, and whilst it is unrealistic to expect the LSB to look at all areas straight away, we would urge the LSB to give immediate attention to will-writing.
11. During the passage of the Legal Services Bill through Parliament, there was wide spread support for the regulation of will-writers. The Joint Committee urged the Government to bring will-writing within the regulatory framework and did not feel that the problem could be dealt with by voluntary regulation, codes of conduct or consumer education. The Minister did not agree to amend the Bill, but viewed it as an issue for consideration by the LSB once established. The Law Society urges the LSB to make consideration of the regulation of will-writing an early priority.
12. The Law Society thinks it is important that the LSB keeps a watching brief on non-regulated advisers generally in order to ensure that consumers are protected from dangerously poor advice from unregulated providers.

### **The LSB's role in the future of regulation**

13. The Law Society welcomes the Board's commitment to principles based regulation and trusts that this will hold true for the Board's own rules in relation to the approved regulators.

### **Policy focus 2009/10**

14. The Business Plan states (Paragraph 39) that the LSB's activities will always reflect the better regulation principles, which we welcome. However we are keen to discover how the LSB plans to embed and measure its activities against these principles.

### **Widening access to the legal market**

15. The Law Society agrees that ABSs should be a high priority for the LSB. We anticipate that it will take time to put an appropriate regulatory framework and consumer protections in place and we agree the LSB will need to take a careful

16. The Law Society is supportive of the introduction of ABSs as we see no reason to restrict entities through which legal services may be provided to the public as long as certain safeguards are in place, namely:
- There are fitness to own criteria in place to ensure that only appropriate people can own and manage ABSs;
  - ABSs are subject to the same regulatory requirements as law firms;
  - Provision is made to ensure that access to justice is taken into account when developing the licensing rules.
17. These principles are incorporated in the Legal Services Act and it will be important for the LSB to keep them in mind when developing the licensing rules, not least to avoid the public confusion which would result if they are not properly addressed at an early stage.
18. The Law Society is concerned that the interests of access to justice for those citizens who are eligible for state support might be considered a lower priority than those who are not. Access to legal aid provision is increasingly difficult, due to the number of solicitors giving up legal aid work. It is essential that the impact of ABSs on legal aid provision is carefully considered to ensure that an already depleted service, for the most vulnerable members of society, is not further eroded.

### **Developing excellence in legal services regulation**

19. The Law Society shares the LSB's view that it is desirable for legal services regulators to be seen as world class, if this is not already the case. In this context, it is important that a world-leading system is also one whose benefits are commensurate with the costs of running such a system. We therefore stress the need to ensure the viability of measures by carrying out a thorough Regulatory Impact Assessment for each policy initiative in accordance with the Better Regulation Executive's guidance.
20. Furthermore we do not believe it would be legitimate, in the quest for world leadership, for the LSB to set an excessively high standard in deciding whether to intervene in ARs. The Act clearly states that "In preparing a statement of policy, the Board must have regard to the principle that its principal role is the oversight of approved regulators"<sup>4</sup> and that in preparing the statement the Board must have regard to the principle that "the Board should not exercise [...its functions] by reason of an act or omission of an approved regulator unless the act or omission was unreasonable."<sup>5</sup> and this must be the guiding principle for the LSB.

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<sup>4</sup> S.49(3) Legal Services Act 2007.

<sup>5</sup> S.49(4) Legal Services Act 2007.

21. The draft Business Plan recognises the need for a shared understanding of regulatory excellence, assessment of regulatory performance and benchmarking. Given that it will take several months to establish this framework, we doubt whether it is practical to have completed the review of ARs and set out action plans on the proposed timetable.

### **Securing independent regulation**

22. We agree with the Board that a further breakdown of financial information should be made available to solicitors in relation to the practising fee, and we will work with the LSB to achieve this.

### **Promoting access to a diverse legal profession**

23. We note the Board's commitment to quality assurance. We agree that quality of service and advice is of fundamental importance to the survival of a vibrant and respected profession. We therefore believe that any quality assurance measures which the LSB supports should be flexible, able to respond quickly to changes in the profession and should encourage innovation.

24. We agree with the Board that much is already being done to improve the diversity of the professions. In 2008 10% of those holding a practising certificate were from black and minority ethnic groups and 44.4% were female. Whereas in 1990 only 1.3% of practising certificate holders were from black and minority ethnic groups and 23% were women<sup>6</sup>. The Law Society also runs the Diversity Access Scheme to enable talented and committed people to overcome obstacles, such as financial circumstances or disability, which may mean it is harder for them to pursue a career as a solicitor.

### **Developing research and public legal education strategies**

25. The Law Society welcomes the fact that the LSB is committed to evidence-based decision making. However the LSB will need to target its research resources carefully in order to ensure that the overall LSB budget is not further increased.

26. The Law Society recognises that improving public education is a regulatory objective under the Act. However we again caution against duplication of effort. This is an area where many approved regulators already carry out a significant amount of work, for example, the Law Society publishes guides to common legal problems. However we appreciate this is an area where further work is needed and we look forward to working with the LSB on this.

### **The levy**

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<sup>6</sup> Between 1990 and 2008 there was an increase of 294% in the number of women practising certificate holders and an increase of 1353% in the number of black and minority ethnic practising certificate holders.

27. The Law Society looks forward to responding in due course to the consultation on the principles underlying the apportionment of the levy. At this stage, the Society will make three observations:-

- It is wrong for the Legal Services Board to float the possibility that the levy for implementation costs for LSB/OLC might be recovered in a single year when there was a clear Ministerial assurance during the passage of the Bill through Parliament that collection would be spread over a number of years.<sup>7</sup>
- Apportionment of the levy must be based on clear principles relating to the shares of costs reasonable attributable to those regulated by each approved regulator, rather than being based on some notion of ability to pay.
- It is important that the Legal Services Board pays full attention to the budget cycles of the approved regulators in determining what is required of them from the levy. This is for practical reasons so that the regulators can collect the levy efficiently, and so that those who pay the levy have proper notice and can do so in accordance with their own business cycles.

### **Building the LSB**

28. The Law Society notes the LSB's strategy for risk management. We assume that this relates to the management of LSB specific risks, rather than those more properly allocated to the approved regulators. We would however expect the LSB to ensure that ARs do themselves have appropriate risk management tools in place.

### **Resourcing the LSB strategy**

29. We commend the LSB's decision to support a staffing model which assumes fewer staff but at a higher skill level.

30. We note that the projected LSB spend on implementation is expected to be £0.8M over budget. Although we are grateful for the confirmation that this does not alter the overall LSB/OLC budget, we must emphasise the importance of preventing any further escalation in the implementation costs. Given that it will be individual firms and solicitors who will inevitably pay for these increases, increased regulatory costs potentially threaten the survival of businesses who are already suffering in a harsh economic climate, and consequently on access to justice. It is also imperative that the increase in implementation costs does not foreshadow ongoing LSB costs at a higher level than in the estimates provided to Parliament.

31. The Consumer Panel will have an important role to play. However in deciding its remit, workload and membership it will again be important to be mindful of the costs implications. The approved regulators will have their own arrangements for ensuring that the consumer voice is fully taken into account and it will be important for all concerned that there is no wasteful duplication.

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<sup>7</sup> Baroness Ashton, Lords Committee, 6 March 2007, Hansard Column 155.

### **What the LSB will do and when**

32. On a practical point, we note that a number of consultations are due to take place during Quarter 2, that is over the summer. If consultees are to be able to contribute meaningful responses to each of these consultations, it will be important not to shorten the normal three month consultation period, since so many organisations will have difficulty in responding on a shortened timetable over the summer.