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Dear Chris

### **Legal Services Board Draft Business Plan – Response to Consultation**

Thank you for the opportunity to comment on the draft business plan issued by the Legal Services Board for consultation.

We are committed to a constructive working relationship with the LSB. That necessarily includes being prepared to be frank about those areas of the business plan that cause us concern. We offer these comments in that spirit and would invite further dialogue with the LSB with a view to resolving areas of potential disagreement. We believe this is all the more important at a time when resources are at a premium. A clear understanding on both sides as to the boundaries of our respective roles will enable us to work together more effectively over the coming year, building on the positive discussions that have taken place between our respective Boards, whereas failing to confront and resolve these areas of difference at the outset could see us each wasting time and energy that would be better directed at getting on with the job in hand.

The Bar Standards Board's response is given in two sections: first, some general themes and secondly, specific points within the plan.

#### **General themes**

##### **Applying own methods**

1. The Bar Standards Board considers that the Legal Services Board should rigorously apply to its own operation the same principles and framework that it expects those it regulates to comply with. For instance, it should undertake a self-assessment against the regulatory standards framework and perhaps also subject this to external review. That would enable it to reassess the framework itself, to remove all aspects of tick box compliance. The LSB should ensure that the requirements it imposes on the front-line regulators are properly outcomes-focused and avoid unnecessary prescriptiveness. In the same manner that the LSB expects the frontline regulators not to substitute their own judgment for that of the firm, it ought not to substitute its own judgment for that of the frontline regulators. It is not clear from the document that the LSB has, or intends to, assess whether or not it has any expertise or relevant staff to set itself up as a licensing authority. There is no evidence that the LSB has made an assessment of its own capacity or capability in that regard even though it would be an entirely new area of work for it. The necessity for this action on the part of the LSB is not demonstrated. Any failure by an existing licensing authority would not be a quick process; the LSB would have plenty of time to prepare itself if the need arose. There is no current

evidence that there is any need at all for this activity at this time and no cost-benefit analysis to demonstrate why the activity should be funded.

### **Quality and independence of research**

2. The research undertaken by the Legal Services Board may have been more enthusiastically received by the regulators if it were of a uniformly high quality and always independent. The Bar Standards Board has concerns about these aspects, especially when the emphasis has been on the solicitors' profession in research to date. The LSB has undertaken much less research that incorporates barristers than it has undertaken in relation to solicitors. Consequently, there is much less information available in relation to the Bar (and particularly the referral nature of the Bar). We are concerned about being expected to utilise findings from LSB research and apply them to the Bar when the research has not considered the barrister profession and its clients. This raises a risk of making incorrect assumptions that are not supported by any research. While sometimes comparisons can validly be made (eg that consumers find it hard to judge the quality of the legal advice they receive is likely to be a universal finding), at other times it may be dangerous or wrong to assume that a finding in relation to solicitors also applies to barristers. The BSB encourages the LSB to consider including barrister aspects wherever possible in its research and to appreciate that it may not be reasonable to rely upon research in relation to another part of the legal profession when considering the Bar.
3. The Bar Standards Board does not think it reasonable to expect us to help the LSB fund research unless we have an equal voice in choosing it; it is necessary and it is of high quality, appropriately peer reviewed. We understand from recent conversations that the LSB is now intending to focus its research activity on the costs of regulation and consumer experiences of "DIY law". The BSB is supportive of the work on costs of regulation provided it is properly focused and undertaken by people with appropriate knowledge and experience. We comment below on the timing of the proposed work on "DIY law". It is understood that issues such as diversity, public access and referral fees will not now be progressed this year by the LSB, which the BSB views as a welcome example of the LSB recognising the need for self-restraint in the number of initiatives progressed in any given year. It is not clear whether "general legal advice" research will be undertaken. The BSB finds it difficult to see how this can be done without breach of professional privilege or a degree of double-guessing occurring. The BSB would expect to see the methodology proposed well before any such work is undertaken. The BSB considers that, as a general approach, the LSB should: consult before commissioning research; set up a peer group of academics to ensure that the best are invited to tender for it; and ensure that peer assessment of all results is completed.

### **Selection of principles**

4. The BSB is concerned at the lack of evidence given to support the LSB's selection of principles and the inconsistencies in the arguments around them. For instance, there is no evidence given to show that competition is the most effective way of achieving the LSB's desired goals, although it is stated as a fact in paragraph 4 on page 10. We see some danger if the principle of market competition is not held in constructive balance with others as distortions will be inevitable. The plan gives no evidence for the benchmarking of diversity data: see page 13, para 13, so we are not clear how the LSB defines how many will be enough, starting from where? There is no evidence to show that ethics and outcomes focus go together; indeed, one can think of situations where reaching an outcome may well be at the expense of ethics. There is no evidence about the link between outcome-focused regulation and cost (page 24, para 57). There is no evidence about inflexibility in the workforce and connection, if any, to education (page 25, para 62). In those cases, which one would expect to be exceptions, where evidence to support the conclusions cannot sensibly be obtained, the reasons for this and the grounds for believing the conclusions are nonetheless valid need to be properly explained. Just as the LSB expects the regulators to justify their

positions, the LSB ought to give a proper explanation rather than just an assertion of an ideological approach.

### Specific points

5. The Bar Standards Board notes again that the LSB makes a number of strong comments about it seeking to ensure that regulators focus on delivery and respond to emerging challenges. There is insufficient recognition of the fact that the primary focus for all frontline regulators is their core work of regulating the profession and reserved activities undertaken by authorised persons. A clearer focus on the LSB's own core, statutory, activity of approving changes to regulatory arrangements would be more appropriate. As has been noted previously, this core activity forms a very minor part of the work outlined for the coming year. It is not clear what proportion of the LSB's costs are attributable to its core work and what is attributable to the discretionary activities it is undertaking. Clarity and transparency on this point would be welcomed. In particular, the LSB should examine critically the time it takes to process rule change applications and evaluate whether it is spreading itself too thinly across too many areas of activity, at the expense of efficiency and speed in respect of this core function (and resultant delays in the ability of the front-line regulators to deliver changes).
6. The LSB suggests that regulatory boards should avoid micro-management of policy issues. By the same token, the LSB needs to avoid micro-management of frontline regulators. There is a balance, which the BSB recognises is not always easy to strike, between avoiding micro-management and duplication of function on the one hand, and ensuring that the LSB does engage sufficiently with the detail so that the impact of its decisions are fully understood and practical issues are addressed.
7. Understanding the cost of regulation in term of direct costs, compliance costs and associated costs (such as insurance) should in principle be valuable work. This work should also include an assessment of the costs imposed on front line regulators as a result of the choices the LSB makes in its own priorities, which the LSB then seeks to enforce on front line regulators. This work is, however, not something that the LSB has undertaken in the past and it may be complex and time-consuming to do properly. There is no explanation of how it is assuring itself, or those who ultimately will be paying for this work to be done, that it has the necessary capacity and capability to undertake it. We suggest some clarification of scope and methodology ought to be agreed before work starts. Looking at established methodologies and research in these areas may be helpful as considerable work has been done by others both in the UK and internationally that may provide a useful basis.
8. The BSB considers that the list of the LSB's responsibilities on page 11 is a mix of statutory objectives and discretionary activity. It is not correct to conflate the two and give them equal weight. The LSB's role is described as being to *make sure* that we meet our responsibility of "devising, developing and implementing regulation that guarantees public trust and confidence in the legal profession in England and Wales" and, later, that it "monitors compliance with regulatory requirements". These broad statements appear to the BSB to be wider in their scope than the powers the LSB has in fact been given in the Act. The LSB's statutory powers relate to oversight and assistance and (in an extreme case) prevention of acts or omissions by front-line regulators which have had or are likely to have an adverse impact on a regulatory objective. They do not permit the LSB to compel the regulators to act in a particular way, where the LSB and the regulators merely take different reasonable views as to whether any regulatory intervention is necessary, or as to which of a number of reasonable approaches to take.
9. On the approval and recognition bullet point in paragraph 8, the BSB wishes to emphasise that the LSB's power relates to changes to regulatory arrangements. That does not, in the BSB's view, allow a wholesale reconsideration of existing elements that are not changing. Any challenge to existing elements of regulatory arrangements can be made only if the threshold for enforcement action is met in respect of those elements.

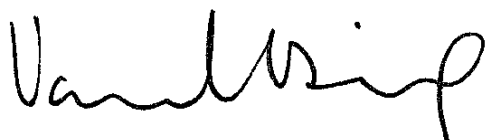
10. The fourth bullet point relating to education and training is a rewording of section 4 of the Act, which we think alters the meaning of the legislation. The original wording should be reflected to ensure that the proper statutory basis is used, rather than introducing a gloss on the words of the statute. We record again our view that the word “assist” does not justify proactive, directive actions on the LSB’s part.
11. The logic of the first bullet point in paragraph 10 does not follow. The mapping of work back to the regulatory objectives does not ensure that all work is undertaken in a way that is transparent, accountable, proportionate, consistent and targeted. Work must be mapped to the regulatory objectives as that shows the relationship between the work and the end result that is being sought. That must happen regardless of whether or not the activity is done in a way that is transparent, accountable, proportionate, consistent and targeted. The objectives could potentially be achieved in a way that is not transparent etc. It seems to us that is rather more a case of activities being undertaken that lead to the regulatory objectives, and done in a way that is transparent, accountable etc.
12. The BSB agrees that it would be desirable to work in a relationship of openness and trust. It is to be hoped this can be improved in the coming year, building upon the constructive Board interactions in 2012. The Board is keen that, wherever possible, interactions occur ahead of submissions to minimise the risk of any miscommunication.
13. The BSB agrees that duplication of work between the LSB and other regulators should be avoided. In this regard, the LSB’s role ought to be one of coordination and support of the regulators’ activities rather than prescribing them.
14. The BSB would encourage the LSB to enhance its relationships with the professions directly, as stated in the sixth bullet point of paragraph 10. Building an ongoing understanding of how the professions operate, how they conduct their business, and how they are changing, is invaluable for the oversight regulator as much as it is necessary for frontline regulators.
15. On the last bullet point in paragraph 10, the BSB considers that the LSB’s activities should, and indeed must, be guided by all of the regulatory objectives, as required by the Act.
16. The BSB agrees with the LSB’s approach this year in not starting a number of new initiatives, as stated in paragraph 14 onwards. Time is needed to undertake the volume of work already started, and ensure that it is done properly.
17. *Regulator performance and oversight strand* – The BSB expects that the LSB would take a reasonable approach in considering the speed of progress made by the regulators to improve against the regulatory standards framework. Forcing adherence to a timetable in a rigid manner would not be a proportionate response on the LSB’s part. Utilising statutory powers may also be disproportionate. This includes the unnecessary use of section 55 to compel particular actions to be taken. The BSB has a Strategic Plan incorporating much change and improvement, and its Board alone is accountable for delivery against it.
18. *Referral fees* - The BSB considers that the LSB is taking an inconsistent approach to referral fees in requiring evidence to justify a ban. Rather, the BSB considers that the LSB should be seeking evidence to justify the LSB’s view that action short of a ban would not cause harm. This is especially so given developments (ie the introduction of statutory bans in other areas) since the LSB first made its pronouncement about referral fees.
19. *The regulation of immigration advice* - Work is well underway and on track between the LSB, BSB and other regulators.
20. *Review of regulatory sanctions and appeals* - The BSB is concerned to see the LSB saying that the Administrative Justice and Tribunal Council’s criteria for administrative justice must

be met. This item has not been consulted upon. Nor is it clear that the LSB has considered whether all elements of those criteria are suitable for all aspects of the frontline regulators' activities. A further complication is that the Government is proposing to abolish the Administrative Justice and Tribunal Council with a draft order under the provisions of section 11 (1) of the Public Bodies Act 2011 laid before Parliament on 18 December 2012. At this stage the most that is appropriate is an indication that the LSB will consider the extent to which the existing AJTC criteria might be implemented.

21. *Standard of proof* - The BSB welcomes the LSB taking the lead in coordinating how the standards of proof are applied across the sector, with the aim of achieving a single, agreed approach by all.
22. It is not entirely clear what the discussion document outlined in paragraph 38 will actually address. If it is looking at the range of regulatory sanctions that may be used by a regulator, the BSB urges the LSB not to contemplate anything that might fetter a regulator's discretion in their known area of operation. Unproven assertions such as that relating to "the sheer inefficiency" of current disciplinary arrangements are unhelpful.
23. *Transitional arrangements* - The BSB is happy to work constructively with the LSB to determine what needs to be done as the transitional arrangements come to an end.
24. *Developing a changing workforce* - It is rather confusing to have the quality aspects and the diversity aspects dealt with interchangeably in this section. We suggest breaking them into separate "Quality" and "Diversity" sections.
25. *Legal Education and Training Review* - It may be appropriate for the LSB to "challenge" the regulators regarding the LETR recommendations, provided that "challenge" does not translate into directing action and going beyond the LSB's statutory powers. The regulators must each consider how best to incorporate any recommendations into their existing and future arrangements.
26. *Research and evaluation* - Recent discussions have made it clear that 2013-14 LSB research activity is likely to focus on costs and working with the Legal Services Consumer Panel on "DIY law". We agree that research into regulatory cost should be a priority. Research on "DIY Law" would complement the BSB's own work on analysing complaints from self-represented litigants and barristers' experiences of direct access, so could be a useful initiative. The BSB is intending to gather better information from barristers regarding public access as part of the biennial survey being undertaken in 2013. Any research into this area this year would therefore be premature. We may usefully have discussions about whether additional research may be helpful the following year.

We hope that these comments are helpful to you. As always, if further explanation is required or it is felt that discussion would be helpful, we would be very pleased to contribute further.

Yours sincerely



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