Legal Services Board and Office for Legal Complaints triennial reviews

The Bar Standards Board is grateful for the opportunity to contribute to the Triennial Review of the Legal Services Board and Office for Legal Complaints. This written submission is made following attendance at workshops held by the Ministry of Justice, which the BSB was also pleased to be able to participate in.

The Bar Standards Board understands that the Ministry of Justice is considering two questions when looking at the role of the Legal Services Board and Office for Legal Complaints. We understand those questions to be:

1. Is there a continuing need for the Legal Services Board and Office for Legal Complaints? In addressing that, both functions and form are relevant.
2. If yes to the above, do the control and governance arrangements in place ensure that the Legal Services Board and Office for Legal Complaints are operating in line with Government policy including good corporate governance, openness, transparency and accountability.

The Bar Standards Board will address each of these questions in relation to each body in turn, drawing upon the last three years' of operation in doing so. For completeness, we have also addressed the questions in relation to the Legal Services Consumer Panel. This submission is comprised of three sections as a result.

Section 1: Legal Services Board

Summary

1. The BSB considers that:
   a. The Ministry of Justice should confirm the limits of the LSB's role under the LSA for the benefit of all parties. In the BSB's view the LSB should be exercising oversight of a judicial review nature, intervening only when the front line regulators are acting unreasonably, rather than duplicating the function of the front line regulators.
   b. The Ministry of Justice should be setting a clear date by which the LSB should have completed the tasks expected of it. This would enable the LSB to focus on the essential activities that it must complete within a defined time period. The BSB considers that approximately 3 years would be an appropriate period. .
   c. The existing governance arrangements should be clarified to ensure that the direct and indirect costs to the profession (which may well be passed on to consumers) are always kept to a minimum. This means that the LSB's governance should be looked at to ensure that it is appropriately constrained to the statutory remit and it is not undertaking more than it should.

Comment

Is there a continuing need for the Legal Services Board (LSB)?

2. In the BSB's view, it is necessary to look at the role of the LSB within the Legal Services Act 2007 as well as progress to date in order to decide whether there is a continuing need for the LSB.

3. The BSB considers that the legislation is quite clear on the role that the LSB should play in relation to the approved regulators. They must "assist" the approved regulators in maintaining and developing standards of regulation and education or training (section 4); they must specify internal governance rules to ensure separation of representative and regulatory functions (section 30); and in exercising any of their powers in sections 31-48 they must behave as an oversight regulator, ensuring any action is proportionate, consistent and targeted only at cases in which action is needed and intervening only where the approved regulator has behaved unreasonably (section 49). The approved regulators are required to make their own judgments as to what they consider will best meet the regulatory objectives and be consistent with the regulatory principles (section 28). In practice and as required by the Act, all approved regulators have delegated this responsibility to their regulatory body who exercise this judgement. None of this mandates the LSB to second guess reasonable judgments that front line regulators make after directing their minds to the relevant considerations, even if the LSB would have chosen a different course had it been a front line regulator itself. Nor does this envisage the LSB prescribing to the front line regulators what they are to do and how they are to do it, such that they become in effect mere agents of the LSB.

4. Only in specific and limited circumstances, defined by the Act, must the LSB itself assume a front line regulatory role. As the BSB has pointed out to the LSB, it follows from that division of responsibility, and from the terms of s49(4), that the LSB's role in policing the activities of approved regulators is broadly analogous to that of judicial review. Just like a Judge in a judicial review, the LSB should not substitute its own view for the approved regulator's simply because it disagrees with the conclusion reached, as long as that conclusion is reasonable, has had regard to the relevant matters and does not take into account irrelevant matters.

5. The LSB has given only a rather qualified endorsement to that approach. For instance, in its Enforcement Policy it states:

> *In most circumstances it is unlikely that the LSB would consider an act or omission to be unreasonable merely because we would have acted differently or that the act or omission has had or is likely to have an adverse impact on one or more of the Regulatory Objectives. We will, where appropriate, consider the rationale for the act and omission by the Approved Regulator (or the Tribunal) and encourage a review of the situation if we consider, for example, that all options have not been fully explored or the views of consultees were not properly weighed. That, however, is not the same thing as substituting one view for another.*
>
> *However, the LSB does not consider that it has to satisfy the public law test of Wednesbury unreasonableness in order to conclude that an act or omission was unreasonable.*

For example, the LSB might consider that an act or omission was unreasonable if it was carried out by an Approved Regulator, notwithstanding that the Approved Regulator knew (or could be expected to know) that the act or omission was likely to have an adverse impact on one or more of the Regulatory Objectives.

6. Probing and questioning to determine whether approved regulators have thought their decisions through is appropriate but needs to be kept within reasonable bounds. It is not clear to us what distinction the LSB is seeking to draw in the second paragraph. We would suggest that, on the contrary, public law does offer a helpful analogy for the appropriate approach here. The last paragraph reveals an important area of difference. It is generally acknowledged that the regulatory objectives are in tension with one another and views can reasonably differ on how best to reconcile and promote them. Parliament did not prescribe an order of priority. It follows that it is for the approved regulators to make judgments about how best to strike the balance where there is a potential clash. If they approach that task reasonably, they cannot and should not be second guessed because of an arguably adverse impact on the regulatory objective they have decided should, in the particular circumstances, be accorded a lesser priority. Nor is it for the LSB to prescribe an order of priority, where Parliament has chosen not to do so.

7. Yet the LSB has made numerous statements where it places the regulatory objective of "protecting and promoting the interests of consumers" above all of the other regulatory objectives. It also appears to have a poor understanding of the concept of the rule of law and confuses this variously with its own compliance with the Act and primacy of consumer interests. Its endorsement of referral fees despite concerns expressed by almost all regulators, as well as others such as Sir Rupert Jackson and Lord Young of Graffham, is an example of where it did not properly consider the impact on access to justice or the rule of law, instead analysing the issue almost entirely in economic terms. It has also sought to question the BSB's right to set educational entry requirements for the profession, on the grounds that in doing so the BSB is not "regulating outcomes" in respect of the profession.

8. The LSB does not limit itself to an oversight role in the manner envisaged in the Act. It is often highly prescriptive in its requirements, particularly in order to give primacy to consumer protection over other considerations. This then means that there is little room for approved regulators to exercise their own, proper, discretion. For example, when considering whether to approve proposed rule changes, the LSB engages in minute scrutiny rather than focusing on the reasonableness or otherwise of the policy direction. It often uses a relatively minor change to existing rules as an excuse for asking for more widespread review of those rules, regardless of whether there is evidence to justify making this a regulatory priority. More generally, the LSB often initiates wide-ranging and resource intensive activities to which the approved regulators are then required to respond within the timescale prescribed by the LSB. Moreover, these initiatives are launched with limited reference to the approved regulators or after ignoring consultation responses. The effect of this is to hijack the approved regulators' own business plans and substitute the priorities determined for them by the LSB. Whilst requiring approved regulators to base their actions on evidence and target action only where needed, the LSB then applies different standards to itself, intervening without having first identified a clearly evidenced need. The BSB considers that in these respects the LSB is going beyond its statutory remit. Examples of each of these aspects are given below:

LSB prescription and Regulator discretion

Example 1 - QASA

9. The Quality Assurance Scheme for Advocates (known as Quality Assurance for Advocates at the outset) is a significant project being undertaken jointly by the Solicitors Regulation Authority, ILEX Professional Standards and the BSB. It is the first major work programme undertaken together in this way. The work is being overseen by the Joint Advocacy Group (JAG) which is made up of representatives of all the regulators. Leadership is provided by Lord Justice Thomas.

10. In the early stages of this project, the LSB outlined seven principles that it considered any acceptable scheme would have to meet in order to gain its approval. JAG subsequently consulted twice on the scheme. The first consultation was issued in August 2010 and ran until November 2010. Just after the consultation period had closed but before all responses had been analysed a letter was received by JAG from Chris Kenny, the Chief Executive of the LSB. In that letter he stated that the matter had been considered by the LSB at its meeting in the first week of December and while acknowledging that the proposals may change following analysis of the consultation responses, went on to say:

> *[t]he Board nevertheless considered on the information available to it that the absence of a satisfactory QAA scheme for criminal advocacy meets the test for it to consider enforcement action against the relevant approved regulators under the Legal Service Act 2007 – i.e. it is an omission that is likely to have an adverse impact on one or more of the regulatory objectives. We currently have only limited confidence that there are strong enough plans in place to deliver a proportionate scheme that supports the regulatory objectives by July 2011, as agreed with JAG*.

11. It was also outlined that further efforts should be made to resolve the outstanding issues informally before deciding whether formal action was necessary.

12. Following discussions, the LSB withdrew its threat of enforcement action at that time.

13. Subsequently, the LSB has provided more parameters with which it expects the scheme to comply. We would acknowledge that some of these papers have been helpful to an extent, others have not been. On one notable occasion a paper was sent by the LSB that subsequently had to be withdrawn by the LSB's Chairman following significant issues being raised by all other parties.

Example 2 - First tier complaints

14. The LSB issued a requirement to all regulators that clients be advised of a lawyer's complaints procedures at the first point of contact. This requirement is likely to work effectively for solicitors and probably also for barristers in more commercial environments. However, the BSB received strong feedback from barristers that this was highly problematic in some circumstances, particularly the criminal sphere where the first contact with a client is often in a highly stressful environment such as police or Court cells. Often there is no opportunity to meet

with the client in advance for criminal practitioners. The client may be illiterate or need the services of an interpreter, who may not be available.

15. Discussions were initiated with the LSB in order to convey the practical difficulties that arise. The LSB would not alter its stance that this must happen, although acknowledged that more flexible arrangements than those it originally proposed may be acceptable. The BSB has imposed the requirement although there are still significant concerns about its workability, including from the Legal Ombudsman.

16. The LSB's insistence appears to stem from its view that the regulatory objective of "protecting and promoting the interests of consumers" must be given primacy (as reflected in their business plans). Arguments about whether it is really in a client's best interests to have to consider complaints procedures in highly stressful situations when other critical decisions are being taken do not appear to have made any significant impact.

Level of detail

Example 1 - Equality and Diversity Data Collection

17. The LSB has put in place statutory guidance regarding the collection and publication of equality and diversity data by the profession. It is available at http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/pdf/decision_document_diversity_and_social_mobility_final.pdf

18. The detailed criteria against which each regulator will be assessed by the LSB in terms of the action plans required under the Statutory guidance are available at http://www.legalservicesboard.org.uk/Projects/workforce_development/pdf/20111201_implementationassessmenttool_diversity.pdf

19. It is noteworthy that these requirements go beyond the Government's requirements for public bodies.[1] That guidance was commendably sensitive to the issues surrounding collection and publication of data in organisations with workforces smaller than 150. In contrast to the approach recommended by the government for public bodies, the LSB's approach is to require collection of data on sexual orientation (which government guidance acknowledges is a delicate judgment, rather than a matter for a one size fits all approach), to require collection of data on socio-economic status (despite the fact this is not a protected characteristic and involves definitional difficulties) and to require publication of some of this data at the level of the entity, even though barristers chambers will typically be very much smaller than 150. Concerns that data collection would be more likely to be accurate, and individual confidentiality better safeguarded, by collection and publication at aggregate level were swept aside.

20. The BSB met the deadline imposed by the LSB and submitted its action plan as requested. It has subsequently received a response (attached as Annex 1).

21. There are three concerns in this area. First, the LSB imposed the data collection and publication requirements despite significant concerns expressed to them about the identification of individuals. This was not accepted by the LSB. The

[1] http://www.equalityhumanrights.com/uploaded_files/EqualityAct/PSED/essential_guide_guidance.pdf and http://www.equalityhumanrights.com/uploaded_files/EqualityAct/PSED/ehrc_psed_equality_information_web.pdf

perceived benefit of publication overrode all concerns, despite there being no evidence that publication would in fact deliver the perceived benefits. Secondly, the LSB has required and then assessed each regulator's proposals in a great deal of detail, as the criteria document shows. This is not consistent with exercising an overarching jurisdiction but is more in the nature of second guessing all aspects. Thirdly, as the attached correspondence shows, the LSB is now taking the compliance criteria further by saying:

> *"I do want, at this stage, to be absolutely clear about how the LSB will assess the BSB's compliance. We will consider the extent to which the regulatory objectives are delivered and therefore the extent to which the diversity of the Bar radically improves. We are taking a step change in responsibility for delivery of diversity: we do not expect firms or chambers to be able to hide behind profession wide statistics but to account for the diversity of their own chambers. Only by chambers taking responsibility for the decisions that they take that affect recruitment, retention and progression do we believe that change will happen in practice".*

22. The LSB's statutory guidance is intended to progress the regulatory objectives. The BSB is complying with it. The statutory guidance states that it is aimed at increasing transparency and information as well as the assessing the effectiveness of current policies. The LSB's data requirements will not, and could not, in and of themselves "radically improve" diversity, yet the BSB is being asked to demonstrate this. It is to be noted that the regulatory objectives require the LSB and BSB to "encourage an independent, strong, diverse, and effective legal profession" rather than "radically improve diversity". The latter smacks of a quota based approach which is in fact the antithesis of equality of opportunity, instead amounting to illegal positive discrimination.

Example 2 - Changes to regulatory arrangements

23. All changes to regulatory arrangements must be approved by the Legal Services Board. There is an exemption procedure for smaller or more technical amendments. All applications and LSB correspondence is published on the LSB website. Considerable detail is required in an application, in addition to a series of meetings prior to submission of an application so that the LSB is able to process it within the specified timeframes. This means that even small changes must often go through a full approval process. This is a time consuming and resource intensive process for all parties and we question whether undertaking such a detailed analysis is what was envisaged when the Act was being developed. It is also noteworthy that on occasions, when the rule changes relate to an area in which the LSB is particularly keen on seeing rapid progress, it has indicated that it is prepared to ensure that the changes are assessed within a very short timeframe. The BSB believes that a speedier and more proportionate review should be the norm, rather than the exception. Nor should it be acceptable to hold up proposed rule changes because the LSB would like to see more widespread changes to the regulatory arrangements, not directly related to the proposals. Approved regulators have to prioritise their regulatory activity and it may be entirely reasonable to introduce particular changes to address specific issues without making that the occasion for a general rewriting of rules, all of which were deemed to be approved at the point when the LSA came into force.

Initiation of activities

24. The LSB has shown itself, through its business plans, to be very keen on initiating programmes of work that, in effect, force on the approved regulators the LSB's own views as to which regulatory objectives are to be a priority and how these are to be pursued.

Example 1 - Legal Education and Training Review

25. For example, the LSB has insisted that the regulators embark upon a Legal Education and Training Review (LETR). The LSB launched this in a speech by the Chair in November 2010. The views expressed indicated a lack of familiarity with the way legal education is carried out in this country. The LSB gave out the message that English and Welsh legal education is "not fit for purpose", an allegation that is denied by the profession and clearly demonstrated by the thousands who come to this country to study law, and the centuries old reputation of our lawyers and law schools. It is not by random chance that legal services are one of this country's major exports.

26. It does seem that the 3 thorough reviews of all stages of education for the Bar, carried out in the last 4-5 years by working groups headed by Derek Wood QC, were overlooked. Implementation of two of those reviews is well progressed. The LETR was therefore unnecessary as far as the Bar was concerned, although we recognise the need for measures to address issues that are common to the different branches of the profession such the oversupply of students and inflexibility of transfer between the branches of the profession.

27. The education review was not initially suggested as a joint initiative but rather one that the LSB considered should be undertaken and others must contribute to or be involved in. After some discussion (and concern about the resourcing implications) it was ascertained that the LSB considered that section 4 of the Legal Services Act enabled them to lead on matters relating to maintenance and development of standards for education and training. The section refers to "assisting" the approved regulators in their activities. This envisages the LSB supporting the approved regulators, rather than dictating an agenda. Yet,the Legal Services Board's business plan for 2011-12 referred to section 4 without any reference to the role of the approved regulators. Faced with the prospect of a review conducted by the LSB that might have significant and unforeseen consequences for the education of those coming to the Bar, the BSB considered it preferable the approved regulators should take the lead. The Legal Education and Training Review is now being run by the regulators.

28. The proposal has developed into an overarching review requiring considerable input from all approved regulators. None of this activity was included in the LSB's business plan initially and consequently approved regulators had not allocated specific resources. It is estimated that over £600,000 will be needed to carry it out. The effect is that the approved regulators have had to prioritise this over other initiatives they might otherwise have undertaken.

Example 2 - The Regulatory Standards Framework

29. The principle behind the Regulatory Standards Framework is to be welcomed. However, the approach adopted is overly prescriptive and the timetable unrealistically tight, such that other priorities will need to be deferred in favour of completing the review in time.

30. The BSB has reservations about applying outcome focused regulation to the exclusion of other models, as the framework appears to envisage. Choosing the right regulatory tool for the job in hand is a matter where the approved regulators must be allowed to exercise reasonable discretion. Whilst regulators must certainly ask themselves what they are seeking to achieve and how best to achieve it, there will be times when a prescriptive "bright line" rule will be the best approach and other times when requirements formulated by reference to outcomes will be more effective. Regulatory challenges in the sphere of legal services do not lend themselves to "one-size fits all" solutions.

31. The BSB also has reservations about how the LSB will seek to ensure that frontline regulators comply with the framework. They have for example, without any prior warning, drawn on section 55 of the Legal Services Act to ensure compliance. This does not accord with the BSB's view of how s55 ought to be used, as illustrated in the BSB's response attached as Annex 2. In terms of the framework itself, early indicators are that the LSB plans to be quite prescriptive and to require a great deal of detail before it will agree with an approved regulator's approach. The LSB is quite specific about requiring third party input to the self-assessment exercise. In other words, the methodology is prescribed, rather than leaving approved regulators to exercise reasonable judgments about whether or not they can achieve the necessary degree of independence and objectivity through an internal review, without incurring the costs of external reviewers. This shows, in the BSB's view, that the LSB is not itself applying an outcome focused approach. It is also of concern that despite quite open and frank responses to the Internal Governance Rules, the LSB still does not appear to trust the regulators to be honest in this area. The BSB has seen no evidence to suggest that there is any risk of the regulators behaving badly in this way. Quite the contrary would appear to be the case in fact, for example in relation to the Internal Governance Rules.

32. The LSB has also set a very tight timetable for compliance with the framework. All regulators are required to complete a self-assessment and devise an action plan in the space of four months, including lay member involvement and third party sign off. The LSB is expecting significant change from regulators in order to implement the regulatory standards framework but is not giving sufficient time in order do this work properly. There are numerous examples where the LSB has failed to appreciate the amount of work required to make operational the systems it has devised. It has not proven itself willing to listen to concerns from regulators in this respect, preferring to push for early completion and seeming to perceive any concerns raised as time wasting or prevarication on the part of the regulators. In the case of the regulatory standards framework, it is expecting the self assessment and action plan to be devised with no reference to any organisation's usual planning cycle.

What should be the result of this triennial review?

33. The BSB, of course, accepts that there have also been some positive examples where the LSB's involvement has been of assistance in focussing the relevant issues and in testing the solutions proposed by approved regulators, such that the eventual decisions have been improved. The BSB also accepts that, at this stage in the implementation of the LSA, there remains a role for the LSB. However, the degree of duplication of effort evidenced by the problem areas discussed above is unacceptable.

34. It certainly does not represent value for money. In the current economic climate, it is all the more important to avoid unnecessarily escalating the cost to the providers and consumers of legal services of regulating those services. The BSB estimates that approximately 83% of its budget is required to perform core activities, leaving only 17% available for additional activities. The BSB arrives at its own business plan after careful consideration as to what its priorities should be. If the BSB then has to undertake significant additional work to meet competing LSB requirements, it must either abandon those priorities or visit a much larger bill on a profession, many of whom are under financial pressure already. Equally, if the LSB expands its own field of activity unnecessarily, that translates into a higher levy. These regulatory costs are likely ultimately to be passed on to consumers. The front line regulators are best placed to identify the most urgent pressure points in the areas of legal services for which they are responsible. That is no doubt why Parliament left that job to them, rather than simply replacing them with a single legal services regulator.

35. Given these concerns, the BSB considers that it would be enormously helpful to all parties if the Ministry of Justice would clarify how it was envisaged that the Act would be applied and oversight exercised in practice.

36. This clarification would also be useful in then judging whether the LSB's activities fit properly with its intended remit. At present the LSB does not outline anywhere the balance between its core statutory activities and its own initiatives. Neither its business plan nor its annual report show how much of its resources are devoted to its core statutory activities and how much is dedicated to the activities it has initiated itself. In the BSB's submission, the core statutory functions of approving regulatory arrangement changes and dealing with applications for approved regulator or licensing authority status should be the bulk of the LSB's work. The business plan seems to indicate that the majority of its resources are applied to projects which advance its own much wider view of its statutory remit.

37. There is little or no evidence of the LSB taking a stringent, evidence based approach to deciding whether these additional activities are justified and represent value for money or whether on the contrary they risk unnecessary duplication of the function of the approved regulators and/or unwarranted diversion of the resources of the approved regulators. Another recent example was the suggestion that the LSB would look to become a licensing authority, even though other approved regulators have already acquired or have indicated they plan to apply for that status and no evidence whatsoever has been adduced of a gap which only the LSB can properly fill.

38. There are of course elements of the work that the LSB has undertaken since its establishment which have been helpful to the approved regulators in advancing the regulatory objectives. Part of the LSB's statutory role was to ensure that regulation of the profession was undertaken independently of any representative activities. The creation of the Internal Governance Rules (as required by section 30) and the subsequent exercises to ensure compliance with them have indeed been successful in ensuring proper independent regulation. Without the LSB's influence in this area it is unlikely that the progress towards independence across all approved regulators would have been as noticeable. As some of the arrangements supporting independence are still relatively new, the LSB's ongoing vigilance may be necessary to ensure that independence remains a reality.

39. Despite the reservations expressed above, the BSB is supportive of the principle behind the LSB's regulatory standards framework. We see it as an opportunity to improve our own practices and ensure that we are genuinely being an efficient and effective regulator. Once implemented, each regulator's regulatory standards framework should ensure that all activity undertaken properly interprets and reflects the regulatory objectives in all cases. The LSB should not be needed to ensure ongoing compliance once the systems are embedded.

40. Once independent regulation has become the normal mode of operation, alternative business structures are a reality and all regulators are reflecting the regulatory standards framework in a manner appropriate to them, then the LSB should no longer be needed. The reforms of the Legal Services Act 2007 will be fully operative. The checks and balances contained in the regulatory standards framework will ensure that the regulatory objectives are properly upheld. There will be no ongoing need for the additional cost of and time required to respond to an oversight regulator. It has been estimated that the cost to the profession to date is upwards of £27m. The BSB considers that end is in sight and the Ministry of Justice should act now to set a date by when the Legal Services Board will no longer be needed. Combined with a clear articulation of the LSB's role, this will ensure that all LSB activities are targeted and focused in the time period allowed by the Ministry of Justice. Our own estimation is that a further 3 years or so should be sufficient for the LSB to complete the necessary tasks.

Do the LSB's control and governance arrangements ensure good governance, openness, transparency and accountability?

41. Given that the answer to whether the LSB should remain in being is a short term, qualified yes, the next question is whether the LSB's arrangements ensure good governance, openness, transparency and accountability.

42. The BSB has no real concerns regarding openness or transparency. The LSB issues consultation papers or gives an opportunity to comment on its work. It publishes all documents on its website, including its minutes and some aspects of its Board papers, which is to be welcomed.

43. The BSB does however have concerns about the LSB's governance arrangements in some respects. The BSB has raised the question of possible conflict of interest on the part of one of its Board members on several occasions. David Wolfe QC is on both the LSB and is also a Commissioner at the Legal Services Commission. This in itself raises questions of perceived conflict of interest but it was compounded when it became apparent that he was leading on the Quality Assurance Scheme for Advocates work at the LSB (which has pushed hard for QASA from a regulatory perspective – supposed independently of sectoral interests) as well as being involved at the Legal Services Commission (ie as a significant purchase of legal services). The LSB has refused to acknowledge that the issue needs further examination, despite QASA nearly being derailed completely when the Legal Services Commission sought, at an early stage in development, to tie all payments to QASA levels. This is not what the scheme was intended to do and nearly resulted in all parts of the regulated community refusing to participate any further.

44. More importantly on a day to day basis, the BSB has concerns about the LSB's expertise in a number of areas.

45. The LSB is undoubtedly well versed in the regulation of large scale commercial entities and in market regulation, with several of its Board and staff members coming from backgrounds which feature experience in areas such as telecommunications and financial services. There is, however, relatively little experience of the regulation of individual professionals, whether in the legal services sector or other areas of professional services. This is an important lacuna.

46. There are several other examples where the LSB has not ensured that it has expertise in quite specialised areas. The equality and diversity reporting requirements project had no evident specialist equality and diversity support, despite the sensitivity of the issues. The LSB has also started work on quality standards despite having no specialists or any depth of expertise in this area. The QASA scheme development was undertaken with no criminal advocates involved. The LSB was also insistent that the frontline regulators embark on the Legal Education and Training Review, with no expertise in education evident within the LSB itself and no proven need for the review. Worryingly, the LSB has shown itself to be reluctant to listen to issues raised by regulators, either informally or in consultation responses and does not often change its stance following submissions. The approved regulators have accumulated expertise which the LSB itself lacks, but it seems too inclined to overlook this and ignore the views expressed.

47. It is acknowledged that the LSB is not an overly large organisation and so will never be able to have depth of experience in all areas in the same way that a large government department would. Nevertheless it is of concern when expertise has not been obtained when needed. The BSB considers that the LSB's governance processes should require it to ascertain its own expertise in an area, being quite honest with itself when additional knowledge may be necessary. In many ways, the BSB simply expects the LSB to apply its own regulatory standards framework to itself, especially in relation to capacity and capability. There is no evidence that the LSB's governance arrangements are ensuring that this is happening in all areas.

48. This lack of appreciation of its own areas of vulnerability, and governance structures that do not remedy those vulnerabilities, means that the LSB is not exercising proper governance in the BSB's view. This in turn means that the LSB is not effective and that it is susceptible to carrying out its role in a way that increases cost to the profession and to consumers. Increased focus on governance and its own capacity and capability would also assist in ensuring that the LSB does not exceed its statutory remit. As outlined in section 1(a) above, the BSB is concerned that there is insufficient focus on the limits of the LSB's role.

Section 2: Office for Legal Complaints

Summary

49. The BSB considers that
    a. The BSB considers that the OLC should remain in existence and continue to be independent of the LSB,
    b. The BSB considers that the addition of the Legal Ombudsman scheme has been beneficial to consumers, and
    c. Arrangements should be made to ensure that this continues.

Comment

Is there a continuing need for the Office for Legal Complaints (OLC)?

50. The Office for Legal Complaints seems to the BSB to be working effectively and efficiently. Initially the Chairs of the BSB and OLC met at least 3 times per year. As the Office and Ombudsman service itself is now fully established with the BSB having full confidence in the Office and its operation. Contact with the Office of Legal Complaints is now relatively limit but there are protocols in place with the Legal Ombudsman (LeO) and operational issues are being dealt with as they arise in a manner that is BSB finds constructive. LeO is often willing to go to considerable efforts to accommodate the BSB's needs, including putting in place manual systems where necessary despite their intention of being an automated office. The Professional Conduct Department has conducted a review of how well LeO is identifying possible misconduct matters which has shown that, within the context of the Ombudsman service, misconduct is being identified appropriately.

51. The only major area of concern is in relation to feedback on complaints handling by barristers and chambers. As the BSB now has less "frontline" contact with barristers and chambers about complaints, we are reliant upon the OLC providing information to us about chambers' complaints handling performance. Unfortunately this is not yet being provided and therefore there has been a substantial reduction in regulatory information available to the BSB in this area. This issue is being raised in feedback on the OLC's Business Plan. It will also be raised in the workshops. On the whole the BSB is able to provide positive feedback about the operation of LeO. It has removed one area of jurisdiction from the BSB, so there is no conflict, and operational issues are being dealt with positively between our organisations.

52. Given the importance of any ombudsman scheme being perceived as independent by those that use it, the BSB considers that the OLC should remain as an independent entity. Any suggestion of amalgamating with the LSB should be resisted. The roles are fundamentally different in the BSB's view and do not lend themselves to combination.

Do the OLC's control and governance arrangements ensure good governance, openness, transparency and accountability

53. This seems to be working satisfactorily from the BSB's perspective. The OLC appears to the BSB to have put in place systems and procedures that ensure that the Legal Ombudsman scheme is operating effectively and efficiently. The BSB

notes that the OLC must report to and obtain funding from the LSB. This seems to us to raise questions about the possibility of duplication of activity in both the OLC and LSB. In the BSB's view, the LSB's operation must be scrutinised to ensure that this risk does not eventuate.

Section 3: Legal Services Consumer Panel

Summary

54. The BSB considers that:
    a. it would be very useful if the Legal Services Consumer Panel was able to provide constructive guidance and support to frontline regulators in reaching out to consumers and better understanding their needs;
    b. the Consumer Panel should consider the regulatory objective of increasing public understanding of citizens' legal rights and duties, which will be difficult for any approved regulator to progress alone;
    c. however, unless and until these tasks are undertaken, the BSB considers that the Consumer Panel is not adding a great deal of value. The next triennial review should be looking at abolishing the panel unless, by that time, greater value is amply demonstrated.

Comment

Is there a continuing need for the Legal Services Consumer Panel?

55. The Legal Services Consumer Panel is established to advise the Legal Services Board, so as a matter of statute that must be its primary focus. However, the Panel has as one of its stated aims in its terms of reference: "To help the approved regulators develop their own approach to consumer engagement to inform their work". To date this has consisted of the Panel facilitating one workshop. This is an area in which the regulators would welcome additional assistance and support. It is not easy to reach the consumers of lawyers' services, especially those who use barristers. Only a very small section of the public ever comes into contact with a barrister. The BSB would have welcomed the Consumer Panel being more supportive and facilitative in this respect. All regulators have limited resources and face similar difficulties. The Consumer Panel could be a considerable force for change and a considerable source of support if it worked across the entire sector to provide constructive and concrete options in relation to consumer engagement.

56. There are also some elements of the regulatory objectives, such as "increasing public understanding of the citizen's legal rights and duties" which are very difficult for a single approved regulator to effectively promote on its own. Some coordination of activity or initiation of activity would be very welcome in this respect. This aspect has not been furthered at all by the Legal Services Consumer Panel.

57. Further, if the Consumer Panel continues to focus on less prominent areas of work, such as comparison websites, the BSB does not see that the Consumer Panel adds significant value.

58. The BSB considers that there is perhaps not an immediate need to abolish the Consumer Panel but the next triennial review should be examining carefully the amount of value added to the overall regulation of legal services. If considerably more is not evident then it should not continue.

Do the Legal Services Consumer Panel's control and governance arrangements ensure good governance, openness, transparency and accountability

59. The Consumer Panel has no stated expertise or experience of the user of barristers' services within it. That is a concern for the BSB when the Panel is then advising the LSB on the implication of various policies. It simply does not have the experience to provide a perspective that takes advocacy into account. Given the weight that the LSB attaches to the Consumer Panel's advice this is a significant omission. As a matter of governance, this should be rectified.

Annex 1

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23 March 2012

Dear Vanessa,

I am writing in regard to the BSB's action plan submitted in response to the LSB's section 162 guidance on gathering an evidence base about diversity across the legal workforce and promoting transparency at entity level. We received the BSB's action plan on 30 January 2012 and as you know our teams have been in discussion throughout this process. My Board will consider progress with implementation of the guidance at its meeting on 28 April and this letter sets out our initial views.

It is not for the LSB to approve the plans, as such, but there is specific provision within section 162(5) of the Legal Services Act 2007 for us to have regard to the extent to which an approved regulator has complied with any guidance issued by the LSB under section 162. So our approach is clear, when it comes to section 162 guidance, approved regulators have to "comply or explain". I refer you to paragraph 13 of our guidance:

"To justify an approach [that departs from the guidance] the Board would expect an approved regulator to establish evidentially the extent to which it has concluded that the departed approach is the most appropriate way of acting compatibly with the Regulatory Objectives and is in accordance with the Better Regulation Principles and regulatory best practice."

Therefore, if regulators decide to depart from the guidance we will need to look very closely at the way in which they choose to deliver the Regulatory Objective of a diverse and effective profession and respond accordingly.

I would like to start by revisiting the objectives set out at paragraph 11 of the guidance:

- Gathering an evidence base about the composition of the workforce to inform targeted policy responses and to be used as a benchmark to evaluate the effectiveness and impact of existing diversity initiatives

- Promoting transparency about workforce diversity at entity level as an incentive on owners/managers to take action (both in terms of 'peer pressure' and better information for corporate and individual consumers and potential employees, which they can use to inform their choice of law firm)

The BSB's proposed approach will clearly deliver the first of these objectives. Individuals will be required to provide diversity data as part of the Authorisation to Practice process and aggregated data will be published by the BSB on an annual basis each January.

The BSB proposes to deliver the second objective through a new code requirement placed on chambers requiring the appointment of a diversity data officer with responsibility for ensuring that data is collected and published every three years.

We welcome the BSB's decision to place an explicit responsibility for entity level collection and publication on chambers. However, the objectives contained within the guidance are not only about the action plans and what regulators propose to do. They are about implementation of the proposals and the impact that has on the Regulatory Objectives.

I would therefore encourage the BSB to ensure that the guidance currently under development does not undermine the new rule or realisation of the wider objective to place responsibility on employers. As with any regulatory requirement, it is a matter for chambers to determine how it applies to them given their particular circumstances. This includes issues such data protection requirements. In fact, it would be very difficult for a regulator to set out a blanket approach for all without risking unnecessary restrictions.

In considering the BSB's application for approval of changes to regulatory arrangements, we will need to consider the guidance and its impact on implementation of the rule. This is therefore an issue we are likely to discuss further with you as this work progresses. Similarly, we will be interested to see the BSB's approach to exemptions for smaller chambers.

I do want, at this stage, to be absolutely clear about how the LSB will assess the BSB's compliance. We will consider the extent to which the regulatory objectives are delivered and therefore the extent to which the diversity of the Bar radically improves. We are seeking a step change in responsibility for delivering diversity: we do not expect firms or chambers to be able to hide behind profession wide statistics but to account for the diversity of their own chambers. Only by chambers taking responsibility for the decisions that they take that affect recruitment, retention and progression do we believe that change will happen in practice.

Our final assessment will be published as soon as practicable after the Board discussion at the end of April but as I referred to earlier, you should not hold up implementation awaiting formal LSB approval. The overall timetable remains the same as set out in the

original guidance - implementation from March 2012 and expectations achieved by end of 2012. We would also like to publish a copy of the action plan alongside it. I would be grateful if your team could inform Emily Lyn, Regulatory Project Manager, if there are any issues with publication of the action plan by 5pm on Wednesday 4 April.

Yours sincerely,

Chris Kenny
Chief Executive
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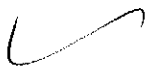

BAR STANDARDS BOARD

REGULATING BARRISTERS

Chris Kenny
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30 March 2012

Dear Chris

Regulatory Standards Self- Assessment – section 55 information requirement

1. I write following the LSB's letter and formal notice under s55 of 19 December 2011, addressed to Mark Hatcher, Director of Representation and Policy at the Bar Council. It is not entirely clear to me why the Notice was addressed to Mark and only copied to the BSB, given that its terms clearly engage the regulatory body (Mark was not at the time Acting CEO of the Approved Regulator.) Notwithstanding, the BSB is of course assuming responsibility for the process.

2. We note that the LSB has drawn on s55 to require compliance with the decision document on Regulatory Standards. Your intention to require compliance via this route was not indicated in the consultation on the Standards, nor is it referenced in the decision document itself, or in your press statement on 15 December 2011. Your published policy statements in relation to your statutory enforcement powers other than in s55 make only oblique references to using s55 powers once informal processes of gathering information may have been exhausted (para 2.21).

3. It is therefore very surprising that the LSB has chosen to draw on s55 in relation to the self assessment process: I doubt very much that s55 was ever intended as a hook on which to hang such a discursive and wide-ranging enquiry as opposed to the answer to a specific question or supply of a specific document or identifiable category of documents. Even then, I would expect the LSB only to resort to a formal notice procedure if an informal approach had not elicited the information or a reasonable explanation for not providing it. Its use therefore seems disproportionate and unreasonable.

4. To the extent that the LSB is properly using s55, this letter is to be treated as a section 56 (1) notice that the BSB cannot comply.

5. I set out below our proposed approach and timescale, which the BSB believes to be reasonable and proportionate.

6. Firstly, as I have indicated informally to you on several occasions, the BSB broadly welcomes the concept of the standards framework. Both the Board and the Senior Management Team are enthusiastic about using it as a platform for change and modernisation within the organisation. We do of course continue to have a more nuanced view on the outcomes-focused approach to regulation, which has been publicly and privately rehearsed between our two

organisations. The standards have been developed by you generically to apply to all eight front line regulators; each will seek to adapt the framework to the specific needs of consumers of the legal services its regulated community provides and the overall public interest. The BSB is no exception. Our submission to the Ministry of Justice's Triennial Review of the LSB will also indicate that we consider the level of detail and engagement in the process of adopting the framework by the LSB goes significantly beyond the scope of your role as an oversight regulator.

7. Nonetheless, we have agreed a systematic and thorough approach internally to undertaking the self-assessment, scrutinising it, and to adopting the standards. It does not in our view vary materially from the approach set out in the decision document, but is both more proportionate, relevant to our needs and those of the public we serve, and thus more effective. I set out the details below.

8. We intend to adopt a slightly different timetable to the one set out in your decision document. We consider it to be more realistic and proportionate and therefore more likely to deliver a good result. It will enable publication of assessments and plans by the end of March 2013.

Our approach and timetable

9. Following consideration and decision by the full Board in January, the Senior Management Team (SMT) and the BSB's Planning, Resources and Performance Committee (PRP) will prepare the draft self assessments against the criteria laid down. The PRP Committee will review the work of the SMT. The draft self-assessments will be scrutinised by the BSB's Governance, Risk and Audit Committee (GRA). The draft self-assessments will then be submitted to the LSB for discussion. We aim to do this by the end of May 2012.

10. The action plans drawn up in relation to the standards framework will be incorporated in the BSB's business and strategic planning processes. The framework designed by the LSB is clearly expected to be fundamental to the approach, strategy and operations of the front line regulators. It makes no organisational or strategic sense to develop action plans in relation to the framework separately from or independently of the strategic and business planning processes already well embedded in the BSB and intrinsically linked to the statutory practising certificate fee-raising cycle. It would therefore be disproportionate and unreasonable to require a separate action plan process

11. The issue of asynchronous planning processes as between the LSB and the BSB, and the implications for resources and risk management, have been the subject of other discussions between the BSB and the LSB (eg joint Board meeting on 9 February 2012.) Our draft new three year strategic plan and budget, incorporating action required in relation to the standards framework is expected to be available by mid-December 2012.

12. The decision document sets out a requirement for external third party audit of the self-assessments and action plans, or an explanation of why this will not be secured. This was not pre-figured in the consultation and could not reasonably have been anticipated by the front line regulators and has not therefore been resourced in the BSB's budget for 2012. We have very substantial professional audit expertise in our GRA Committee. We therefore will expect a high degree of challenge and scrutiny from the GRA Committee, which will offer a more targeted, proportionate and better value for money level of audit than an external third party auditor.

13. We will seek to exchange information and views with other legal service regulators in relation to the self assessments and action plans, but cannot at this stage guarantee that this will be delivered as clearly it is not entirely in our control.

14. The final assessment and action plans will be signed off by our full Board, following recommendations from our PRP and GRA Committees. We will expect to submit those to the LSB by the end of March 2013.

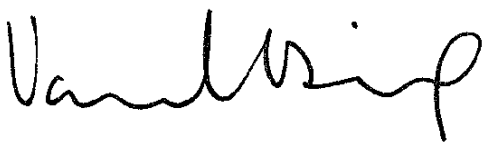
15. No indicative timetable was given in the consultation document and so resource planning to accommodate the LSB's requirements in relation to the framework could not reasonably be undertaken. The BSB already has a significant, planned and resourced programme of new work to execute in 2012 as well, of course, as its usual core regulatory activity. The LSB itself approved a budget for the Bar Council / BSB in January 2012 which did not make provision for such activity as the LSB is requiring in relation to the framework: the near-simultaneity of the budget approval exercise and of your own decision document necessarily precluded this.

16. In order to achieve even the timetable set out above, the BSB would need to apply to the Approved Regulator for additional funds to meet, for example, the costs of a change manager to support the senior team who are leading the project. It remains to be seen whether the Approved Regulator will consider it reasonable and practicable to make available the additional funds the BSB will need to achieve the timetable set out above. I doubt that the LSB anticipated drawing on s55(4) of the LSA to assist us financially in providing the information requested.

I will of course keep you updated on progress, both informally in our regular monthly meetings and formally as we reach key points in our project plan.

Please get in touch if I can provide any further clarification at this stage.

Yours sincerely



Dr Vanessa Davies
Director, Bar Standards Board