

<b>To:</b>	Board
<b>Date of Meeting:</b>	13 July 2011
<b>Item:</b>	Paper (11) 55

<b>Title:</b>	Chief Executive's progress report: July 2011
<b>Workstream(s):</b>	All
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<b>Status:</b>	Restricted

<b>Summary:</b>
<p>The paper updates Board Members about:</p> <ul style="list-style-type: none"> <li>• staffing and governance issues</li> <li>• progress on the key project areas, by way of a performance report</li> <li>• other internal and external policy developments</li> <li>• stakeholder and communications activities.</li> </ul>

<b>Risks and mitigations</b> (Covered in assessments of project progress)	
<b>Financial:</b>	N/A
<b>FoIA:</b>	Initial assessment of exempted text is highlighted.
<b>Legal:</b>	N/A
<b>Reputational:</b>	N/A
<b>Resource:</b>	N/A

Consultation	Yes	No	Who / why?
<b>Board Members:</b>		✓	N / A – routine update and personal commentary.
<b>Consumer Panel:</b>		✓	
<b>Others:</b>	N / A		

<b>Recommendation:</b>
The Board is invited to note the Chief Executive's progress report.

## LEGAL SERVICES BOARD

<b>To:</b>	Board		
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### Chief Executive's progress report: July 2011

#### Recommendation

The Board is invited to note the Chief Executive's progress report.

#### Operations and governance issues

##### Organisation development and governance

1. The organisation is in the midst of performance management season with all colleagues having appraisals. As part of the process, all colleagues receive feedback from one or two nominated colleagues, as well as their line manager, reportees, etc. This was well-received last year when the process was used for the first time.
2. Whilst we have still not received a response to correspondence about the website issue, it appears from several informal conversations with Ministry of Justice (**MoJ**) officials that LSB and Legal Services Consumer Panel (**LSCP**) will not be instructed to change hosting arrangements or to close websites. We will now initiate the website re-design work, which has been on hold during the period of uncertainty.
3. There has been a change in officials at MoJ, with Abigail Plenty succeeding Elizabeth Gibby as Deputy Director with responsibility for LSB. An introductory session with the Executive is planned for 14 July. Separately, discussions have been had with MoJ about our day-to-day operational sponsorship requirements (non-policy). It is clear that, regardless of officials' best efforts, the frequency and over-lapping nature of data requests from the centre will not diminish and may indeed become more burdensome as MoJ heads into a further round of redundancies.
4. I will update colleagues at the meeting about plans for the Triennial Review.

##### *Governance*

5. Since the last meeting, the Board has agreed by correspondence:
  - the LSB Research Programme 2011/12
  - to make The Legal Services Act 2007 (Licensing Authorities) (Maximum Penalty) Rules 2011.
6. LSB's Annual Report and Accounts 2010/11 was tabled before Parliament on 13 June. This was in accordance with the compressed timeframe necessitated by



the Government's 'Clear Line of Sight (Alignment) Project'.

## **Project update**

### **Programme highlight report**

7. The monthly Programme Highlight Report was circulated to colleagues on 27 June, following the meetings of the Programme Board and Senior Management Team at which it was reviewed.
8. Overall, progress on projects is good. All planning is now complete, or plans for scoping work are in place, and there have been no major changes to the timelines or objectives of the work outlined in the Business Plan 2011/12.
9. Points to note from the last month include:
  - **First-tier complaints handling** – the YouGov consumer research was forwarded to the Approved Regulators (**AR**), ahead of wider publication, alongside letters setting out 'next steps' and the dates for the next procedural review. This marks the completion of the 2011 qualitative review, ahead of schedule
  - **Quality Assurance Scheme for Advocates (QASA)** – after a constructive session with Bar Standards Board (**BSB**) and Solicitors Regulation Authority (**SRA**), there has been a noticeable shift towards devising a workable approach to implementing the diversity transparency and evidence proposals (see **Paper (11) 52**)
  - **Education and training** – a progress meeting (involving SRA, BSB and ILEX Professional Standards) was held to discuss the education review and the scope of the research and we have been re-assured that our key priorities are being addressed. I attended also the first meeting of the research stakeholder group, chaired by Dame Janet Gaymer and Sir Mark Potter
  - **Smaller Regulators** – the Smedley Report was published on the basis agreed by the Board at its last meeting. Anna Bradley (Chair, Council for Licensed Conveyancers (**CLC**)) has thanked the Board for the opportunity to express their concerns and has acknowledged the extent to which these were met in handling publication.

### **Alternative Business Structures (ABS)**

10. The standing report about the key issues and risks facing the implementation of ABS is presented to this meeting (see **Paper (11) 51**).

### **Research**

11. In the past month:
  - we hosted a seminar to discuss the aptitude testing research and our study in relation to the global role of legal education
  - we hosted a session with OXERA, CRA and the Research Strategy Group to discuss the segmentation work

- we published our Research Programme 2011/12.

12. Our focus over the coming two months will include:

- publishing the will-writing, market segmentation, City firms and Special Bodies research
- completing a first draft of the Regulatory Information Review
- developing a proposal for collecting data on 'high street' provision of legal advice commencing procurement process
- developing a specific plan from our Evaluation Framework.

### **Regulatory decisions**

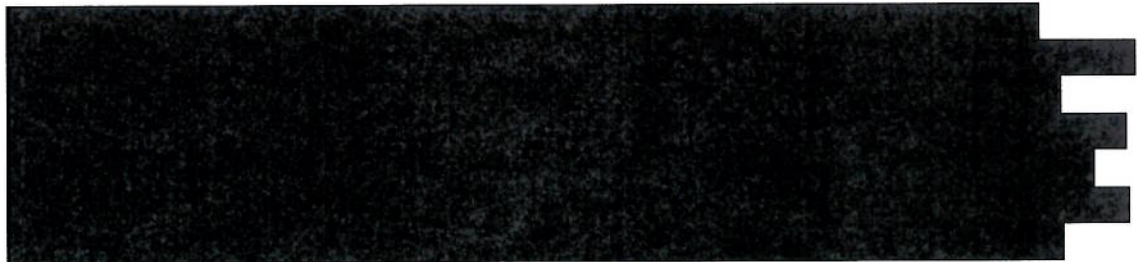
13. Three decision notices have been issued since my last report:

- Intellectual Property Regulation Board (**IPReg**) Examination and Admissions Rules
- IPReg Disciplinary Procedures Rules
- SRA Handbook.

14. Following Board approval of The Law Society / SRA Licensing Authority (**LA**) application, a formal recommendation for designation was submitted on 20 June to MoJ.

15. The assessment of CLC's application to extend its reserved legal activities is ongoing. CLC is considering how to respond to the advice from the mandatory consultees.

16.



17. We await formal confirmation of the decision we understand ILEX Professional Standards has made to withdraw its applications to extend its reserved legal activities to include probate and litigation rights.

### **Referral fees**

#### *Media coverage*

18. There has been a revival of interest in referral fees, prompted by a report from The Rt Hon Jack Straw MP expressing concerns about insurance companies selling the details of people who have had accidents to personal injury lawyers.

19. In general, the press coverage suggested that the selling of claimants' details by insurance firms to personal injury lawyers was a 'hidden' matter. It was suggested that this increased car insurance premiums because it created an



incentive to make unjustified claims. The Information Commissioner (ICO) said it would investigate whether motor insurers who sold clients' details to personal injury lawyers were breaching data protection law. We have agreed to provide ICO with a briefing about referral fees.

20. A commentary about the main themes from recent media coverage is attached (**Annex A**).

*Government comment in the media*

21. Jonathan Djanogly MP (Parliamentary Under-Secretary of State for Justice) said that referral fees, amongst other things, were a symptom of a 'rotten suing culture' and were 'funded by an excess of money swilling around the system and banning anything [was] not necessarily going to solve the problem'. He said that the important thing was to reduce 'the costs that pay for these referral fees'. The purpose of the policy proposals for reforming civil justice litigation would do this by ending the recoverability of success fees, for example. He also consistently referred to LSB's decisions on referral fees as 'recommendations'.

*Parliamentary comment in the media*

22. Louise Ellman MP (Chair, Transport Select Committee) was reported as saying that there was strong evidence to support a ban of referral fees and suggested that there should be a debate about the issue in Parliament. On 30 June, the Transport Select Committee announced it would be re-opening its investigation into motor insurance premiums and would be calling Mr Straw. It must be probable that LSB will also be invited to give oral evidence.

*Debate in Parliament*

23. Referral fees received coverage in the second reading debate about the Legal Aid, Sentencing and Punishment of Offenders Bill, which will also introduce the civil litigation reforms. Several MPs (including Alan Beith, Chairman of the Justice Select Committee) expressed concerns about referral fees, noting that a ban had been a recommendation of the Jackson review of civil litigation costs. The Lord Chancellor said that the Bill did not cover referral fees because LSB 'had taken it on itself to review' their future.
24. Mr Straw used the opportunity to cover the issues in his report, saying that 'referral fees actively encourage individuals to try their luck in making claims for fictitious or wholly exaggerated injuries'. He said that they were a central part of the problem in civil litigation. This was in response to the Minister's comment on the Today interview that referral fees were only a small part of the issue.
25. Mr Djanogly said that he was aware of the strong concern that referral fees in personal injury claims adds to the cost of civil litigation. He said that the issue was being considered and a way forward would be announced shortly.

## *LSB decisions*

26. We published our decision document on referral fees at the end of May. We reiterated our finding that the case for a general ban had not been made, whilst allowing greater flexibility for ARs to improve transparency and disclosure. We provided ARs with outcomes that they will be required to deliver:
- ARs to have in place arrangements that:
    - reduce the likelihood of detriment to consumers as a result of allowing referral fees, referral arrangements and fee sharing
    - can justify any ban or restriction on referral fees, referral arrangements and fee sharing with reference to evidence, regulatory objectives and Better Regulation Principles
  - consumers know when referral fees and/or referral arrangements are or may be in place in order to inform their choices.
27. We have given ARs guidance about how the outcomes can be delivered and we have set out the criteria for delivering them if they choose not to follow the guidance. We have asked the ARs to review their regulatory arrangements against the outcomes, noting that we will undertake a review in 2013/14.
28. In our comments to the media, we have refrained from responding directly to Mr Straw's comments, but we have highlighted that:
- our policy position does not preclude individual ARs advancing bans in specific areas of the market
  - we have not 'endorsed' referral fees – we have simply said that the tests for a ban are not met
  - we have doubts about the viability of referral fee based arrangements as a business model in a post-ABS world – but that is a commercial decision, not a matter for regulatory intervention.

## **Other policy developments**

29. Other policy developments – about which I will elaborate at the meeting – include:
- **The Bar Council** – on 5 July, I met Mark Hatcher (Director of Representation and Policy, The Bar Council). We discussed, amongst other things, the current interim arrangements for The Bar Council Chief Executive (the Directors' Group) and Nick Green QC's review of the Council's governance arrangements. (As colleagues will be aware, the Chairman has contributed to this review.) The Chairman and I also attended The Bar Council's and The Law Society's summer parties on 6 July. Incidentally, the Chairman and I are scheduled to see the former Chief Executive of The Bar Council, David Hobart, on 18 July, in his new role as Chief Executive of the City of London Law Society. We will be joined by its recently appointed Chairman, Alasdair Douglas
  - **Council for Licensed Conveyancers** – I met Victor Olowe (Chief Executive, CLC) on 28 June to discuss, amongst other things, reactions to the Smedley report on the smaller ARs, the conveyancing review and the



education and training review. I have also contributed to CLC's communications and stakeholder engagement review

- **First-tier complaints handling research** – We have rebutted strongly a letter from Des Hudson (Chief Executive, The Law Society), which cast doubt on the validity of the YouGov research. It was disappointing that The Law Society did not recognise that the perception amongst a significant number of consumers that they were being charged for a complaint to be considered was, in itself, a matter of concern.

### Judicial reviews

30.

[REDACTED]

[s36(2) & 44]

31. Colleagues will recall also that LSB is an 'Interested Party' in an action relating to the impact of the QLTS on those students who are currently studying for the Bar on a part-time basis and who might wish to seek to re-qualify as solicitors. [REDACTED]

[REDACTED]

[s36(2)]

32. We had also received a letter before action threatening judicial review if we approve an SRA rule change application that has not been submitted. We have responded explaining that the matter is still to be decided by SRA and that any application received (and our decision) will be published on our website.

### Legal Ombudsman (LeO) / Office for Legal Complaints (OLC)

33. Elizabeth France (Chair, OLC) and Adam Sampson (Chief Ombudsman, LeO) will attend this meeting to present OLC's Annual Report and Accounts 2010/11 (see **Paper (11) 50**). I reviewed an earlier version of the Report when I attended OLC's Audit and Risk Committee on 13 June.
34. I had my regular monthly meeting with Adam Sampson on 14 June. We discussed, amongst other things, progress against the actions agreed at the LSB / OLC joint meeting in December 2010.

35. In terms of policy, colleagues will have seen the 'press cutting' that summarised LeO's response to our consultation on developing regulatory standards and which highlighted concerns about complaints outside of its jurisdiction. We will consider further how our approach to OLC oversight will fit with our regulatory standards work and, more widely, the most useful way to access information from LeO to inform our regulatory approach and policy making.
36. We await the outputs of the work by LeO, CLC and SRA to develop an approach to determine what complaints against a multi-disciplinary practice it would be appropriate for LeO to consider and how and what complainants should be signposted to LeO. We have had some correspondence with Ombudsman Services and the Financial Ombudsman about signposting arrangements and the scope of LeO's jurisdiction as set out in the Act.
37. We received a letter from Adam Sampson following the publication of the YouGov research on first-tier complaints handling, where concerns were raised about the capturing of evidence relating to second-tier complaints, which we noted. However, we do not feel that the point undermines the principal findings of the research, i.e. that the ARs need to use this research to develop their own form of consumer experience / qualitative testing as part of their regulatory decision making. We have also received from LeO a response to the consultation on our Schedule 12 Rules.
38. Colleagues will be interested to note that LeO now publishes anonymised Ombudsman decisions on its website.

#### **Legal Services Consumer Panel (LSCP)**

39. Baroness Hayter will also attend this meeting to present LSCP's advice about will-writing (see **Paper (11) 48**).
40. Regrettably, Baroness Hayter's resignation as LSCP Chair was announced on 29 June and will take effect from 31 July. Her work launching and embedding the Panel has contributed significantly to LSB's policy thinking and will leave an important legacy, but we wish her well with her other commitments in the House of Lords.
41. The Remuneration and Nomination Committee agreed a process for appointing an Interim Chair to 31 March 2013. In essence, a sub-group of Board Members will interview the candidates who had submitted by 30 June an expression of interest in the role, before submitting a formal recommendation to the Board.
42. On 20 June, LSCP and OLC held a joint meeting. We understand that there was a degree of discussion about the scope of regulation and the publication of complaints. Colleagues might want to take the opportunity of this meeting to discuss these issues with the OLC and LSCP Chairs.
43. On 21 June, the Government's proposals for the new consumer architecture were published. As expected, the proposals confirm a policy desire for all consumer advocacy to be centralised in Citizens Advice, but recognise that the degree to which sectoral consumer advocacy forms part of that is down to



individual Departments. We will be reviewing the proposals, alongside the earlier consultation on consumer empowerment and responding, published by the Department for Business, Innovation and Skills.

## **Communications**

44. The publication of our Annual Report was marked by a positive feature in The Times, led by the Chairman and covering issues including referral fees, opening up the market and progress made by LSB against its work programme. The Chairman also featured in a substantial portion of the BBC Radio 4 Law in Action programme, discussing the emergence of ABS and its impact on the legal services market. The latter interview was carried out by Joshua Rozenberg and gave us the opportunity to comment on the value likely to be added for access to justice and choice through lifting ownership restrictions. In addition, I was interviewed on BBC's Five Live programme about the release of original research on complaints and the 'next steps' for ARs.
45. Across project work, the launch of our referral fees decisions attracted widespread coverage, with The Guardian, The Times and the Daily Mail each providing commentary on the release, alongside the range of trade press publications. A series of briefings was set up to inform commentators prior to the launch.
46. Recent speaking invitations have included a keynote address at the Birmingham Law Society, at which the Chairman spoke on referral fees, workforce development and opening up the market. In addition, Crispin Passmore (Strategy Director) spoke at SRA's LPC conference, addressing an audience of course providers on principles for education and training reform.

06.07.11

**COMMENTS ABOUT REFERRAL FEES FROM LATEST MEDIA COVERAGE****“A perverse incentive to make unjustified claims”****Comment**

- Lawyers are required to deliver the professional principles – independence and integrity and acting in the best interests of clients. If they receive a claim that is without merit but take it forward then they are in breach of their professional regulation. The suggestion is that the weight of the bargaining power of introducers means that lawyers who pay referral fees can no longer be deemed able to act exclusively in the best interests of their clients.
- In its analysis, CRA found no evidence that lawyers were not acting in consumers’ best interests – judging that such evidence would have manifested through higher levels of complaints, higher prices or reductions in quality indicators such as success rates and damages levels.
- We also note that the SRA examination of referral fees in 2008 showed that the numbers of breaches of Rule 1 core duties - which require solicitors to act in the best interests of clients - was relatively low - **92%** of firms appeared to act and advise in the best interests of clients in relation to introducers. Of those that did not, SRA undertook investigations which led to a range of action, leading up to referral to the SDT.
- If claims are unjustified then one might expect their success rate to be low. This is not the case. Between 2005 and 2009, the success rate for claimants in RTAs has remained consistently around 90%. An insurance firm might argue that cases are settled because the cost of defending a claim is higher than the cost of settling, but they are still free to take test cases to set the boundaries of what is acceptable.

**“The number of PI claims has increased dramatically”****Comment**

- RTAs and road traffic injuries have both been decreasing since 1999. The number of motor claims has increased dramatically since 2004. This coincides with the lifting of the ban on referral fees. However, we have said that other factors may have influenced this, including that success and ATE fees became recoverable and the introduction of the Fixed Recoverable Cost Regime.
- In 2010, around 34% of people had used legal services. The majority of them had used conveyancing services (50%), followed by will-writing (17%), probate (17%), family matters (15%) and then accident/injury claims (11%). Around half of those with PI claims had come into the legal services through a referral by another organisation. Those using conveyancing services were as likely to find their provider through friends or family (31%) as they were to use a referral from another organisation (29%).

**“It’s nonsense to say that referral fees allow greater access to legal services”****Comment**

- Analysis of the English and Welsh Justice Survey shows that fewer consumers resolve personal injury problems than other types of problem. Over 40% of



respondents did nothing or gave up pursuing their problem before it was resolved.

- Our own research in December 2009 showed that 20% of consumers had been in a situation that might be addressed by legal advice but had not taken it.

**“Referral fees are funded by excess money in the system”**

***Comment***

- There is an assumption that the claims management activity adds no value. This is supported by the recent statement from The Law Society that it’s easy for consumers to find a lawyer and get a CFA without the intervention of a claims management company. Evidence suggests that this is not the case.
- The legal services market is estimated to be worth £27bn and we believe that is only about half its potential size.
- Analysis by Advisory Committee on Civil Costs looked at whether the marketing costs of claims management companies were excessive and whether there was evidence of making disproportionate profits or being excessively inefficient. They found evidence of neither.
- The current civil justice litigation proposals will stop success fees and ATE premiums from being recoverable and will take money out of the system reducing the scope for referral fees. It also means that consumers will have a greater stake in cases which will also push costs down since law firms may be expected to compete on the basis of the lowest success, for example. The Minister has also said that referral fees are only a small part of the “no win no fee” regime.

**“The number of claims management companies has doubled”**

***Comment***

- There has been an increase in the number of Personal Injury claims management companies registered with the Claims Management Regulator (CMR), but the amount of turnover has reduced from £287m in June 2009 to £248 in 2010.
- There has been a significant increase in the number of firms registered with the CMR in the financial sector (around 277%) and turnover has increased dramatically (around 235%). This reflects the nature of the claims management market, which is relatively transient, responding to particular problems. Once the problems are solved, businesses will move onto the next issue which may explain the drop in revenue in the PI sector.

**WHAT WERE THE MAIN CRITICISMS OF REFERRAL FEES DURING LSB INVESTIGATION?**

**Reduces quality**

- Because lawyers increasingly need to buy their cases from claims managers and for increasing amounts of money, the only way to make a profit is by cutting corners. They do this either by spending less time on cases or by commoditising the way in which they deal with cases.

### ***What did we find?***

- **57%** of conveyancers who pay referral fees were faster to complete than those who did not (CRA).
- Only **14** people have complained to the Legal Complaints Service about referral fees or fee sharing over the last 10 years (CRA).
- There has been an increase in the average level of claim for RTAs from around £2,500 in 2001, to £3,500 in 2008.

### **Adds to costs**

- Lord Justice Jackson was strongly of the view that referral fees add to the costs of justice and delivered no real benefit.
- Referral fees have increased over time both in conveyancing and personal injury. In PI, they are currently estimated to be between £200 and £1,000, and in conveyancing between £250 and £400.

### ***What did we find?***

- Conveyancing rates charged to clients were found to be higher among firms paying referral fees – around 26%.
- Claims Management Companies offer different services, which is reflected in the referral fee that they offer – from £100-200 for a pure referral, to £800-1,000 having done all pre-litigation work.
- While insurers have argued that referral fees are excessive, the Advisory Committee on Civil Costs has concluded that claims management companies do not make excessive profits.
- ACCC also found that while claimant lawyer costs were higher than defendant lawyer costs, these could largely be explained by differences in business models.