

Minutes of a meeting of Legal Services Board (LSB) on 28 April 2011

- Date:** 28 April 2011
Time: 9.30 am – 12.55 pm
- Venue:** Victoria House, Southampton Row, London WC1B 4AD
- Present:** David Edmonds Chairman
 (Members) Chris Kenny Chief Executive
 Terry Connor
 Steve Green
 Bill Moyes
 Edward Nally
 Barbara Saunders
 Nicole Smith (Items 1-9)
 David Wolfe
- Guests:** Dianne Hayter Chair, Legal Services Consumer Panel ('the Panel')
 (Items 9-10)
- In attendance:** Chris Baas Project Manager (Item 6)
 Steve Brooker Consumer Panel Manager (Items 1-16)
 Fran Gillon Director of Regulatory Practice (Items 1-16)
 Nick Glockling Legal Advisor (Item 6)
 Chris Handford Project Manager (Item 8)
 Edwin Josephs Director of Finance and Services (Items 1-16)
 Emily Lyn Regulatory Associate (Item 7)
 Bruce Macmillan General Counsel (Items 1-16)
 James Meyrick Project Manager (Item 11)
 Julie Myers Corporate Director
 Crispin Passmore Strategy Director (Items 1-16)
 Dawn Reid Project Manager (Item 7)
 Alex Roy Research Manager (Item 8)
 Michael Stacey Project Manager (Item 6)
 Bryan Hislop Board Secretary (Minutes)

Item 1 – Welcome and apologies

1. The Chairman welcomed those present and in attendance to the meeting.
2. There were apologies for absence from Andrew Whittaker. Baroness Hayter (Panel Chair) would attend for Item 10.

Item 2 – Declarations of interests etc.

3. Barbara Saunders declared that she was a member of the Soil Association Certification Board, which was chaired by Anna Bradley (Chair, Council for Licensed Conveyancers (CLC)), but that they had not discussed the application presented for

consideration at Item 7. There were no other declarations of interests.

4. Board Members were reminded to notify the Board Secretary about hospitality extended / received in the course of their LSB work.

Item 3 – Minutes: 28 March 2011

5. **The Board resolved to agree the minutes of the LSB meeting held on 28 March 2011 and to submit them for signing as an authorised record to the Chairman.**

Item 4 – Report of action points

6. **The Board resolved to note the Report of action points.**

Item 5 – Paper (11) 27: Chief Executive’s progress report: April 2011

7. Chris Kenny (Chief Executive) presented his progress report.
8. The Board noted that:
 - both Houses of Parliament had debated and made the relevant Order to designate Institute of Legal Executives as an Approved Regulator (AR) for the conduct of litigation and that the Chairman would respond to points raised in the debate
 - the 2011/12 process for the dual self-certification assessments of compliance with the Internal Governance Rules had been set out in letters to the regulatory and representative arms of the ARs
 - the discussion document, ‘Developing regulatory standards’, was published on 26 April, with the consultation scheduled to close on 11 July
 - the Executive was considering the implications of the Government’s recently announced ‘red-tape’ challenge to reduce regulation (including in relation to legal services)
 - the Department for Business, Innovation and Skills (BIS) had confirmed informally that its impending consultation on the consumer landscape would not propose reforms in relation to the Panel
 - the appointments of LSB’s external HR and legal advisors had been reviewed and extended to 31 March 2012.
9. The Board discussed briefly Legal Ombudsman’s announcement that it would delay its decision about whether to identify law firms subject to complaints. In particular, it was noted that the Panel and Office of Fair Trading considered publication of such data to be consistent with general consumer policy, for example, as set out in ‘Better choices, better deals: Consumers powering growth’ (BIS, April 2011).
10. The Board noted also updates about:

- Joint Advocacy Group's slower than anticipated progress in relation to the development of a Quality Assurance for Advocates (Crime) Scheme
- personnel changes at Ministry of Justice (MoJ), including the appointment of Catherine Lee as its Civil, Family and Legal Aid Director
- revised proposals from MoJ to migrate the content of LSB's and the Panel's websites to an underlying 'independent.gov.uk' domain name, whilst maintaining their current public facing domain names and identities
- the preparation of LSB's Annual Report and Accounts 2010/11, which was now scheduled to be laid before Parliament on 9 June.

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

Item 6 – Paper (11) 28: ABS implementation: next steps – key issues and risks

11. The Chief Executive and Fran Gillon (Director of Regulatory Practice) reported on progress in relation to the implementation of alternative business structures (ABS).
12. The Board noted that:
 - CLC's application to be designated as an LA would be discussed at Item 7
 - papers in relation to Solicitors Regulation Authority's (SRA) application to be designated as an LA would be presented to the Board on 13 June
 - subject to the approval of their applications to be designated as LAs, CLC and SRA would most likely be in a position to license ABS respectively from October and, following the consultation on SRA's revised decision to use Solicitors Disciplinary Tribunal as the appellate body for ABS, slightly later in 2011. The Board agreed that the delay was regrettable, albeit not 'mission critical', and reiterated its policy in relation to the basis for ABS appeals (i.e. substantive re-hearings, not reviews)
 - there continued to be high levels of interest from prospective new entrants, law firms and external funders in ABS-related opportunities, and that it was important that all concerned with finalising the regulatory framework prioritised rigorously to ensure a proper response to this momentum.
13. The Board noted also the standing progress report about the implementation of ABS, which included a summary of next steps, potential risks, mitigations and changes in risk status.

The Board resolved to note the progress report about the implementation of ABS.

Item 7 – Paper (11) 29: Application by CLC to become an LA and approval of the new Handbook and associated frameworks as a change to regulatory arrangements

14. Crispin Passmore (Strategy Director) and Dawn Reid (Project Manager) introduced a paper that invited the Board to approve: (a) a recommendation to the Lord Chancellor to designate CLC as an LA for probate, reserved instrument activities and the

administration of oaths ('the LA application'); and (b) a new Handbook and related frameworks as a change to CLC's regulatory arrangements ('the Handbook application').

15. The Board noted that:

- the LA application related to CLC's existing reserved legal activities and, therefore, discussion of its merits would not pre-empt the full consideration of CLC's separate application to extend its reserved legal activities (which would be presented to the Board on 13 July)
- in preparing the LA application, CLC had reviewed its regulatory frameworks to ensure an outcomes-focused and risk-based approach to regulation and had submitted for approval by LSB a new Handbook, which would apply both to non-ABS and ABS
- in accordance with Legal Services Act 2007 ('the Act'), LSB had sought (and received) advice about the LA application from each of the Mandatory Consultees, which was set out and addressed in detail in the paper (paragraphs 10.1-10.33)
- the Lord Chief Justice, in his capacity as a Mandatory Consultee, had registered firm opposition to the LA application, and it was agreed to respond formally to his advice, including the outcomes of a due diligence review to test CLC's previous competence as a regulator of ABS-type entities
- the Executive recommended a part approval of the Handbook, which included provisions that would come into force only if CLC's separate applications to be designated as an LA and to extend its reserved legal activities were successful
- the paper as presented to the Board had been developed in consultation with Steve Green and David Wolfe.

16. The Board acknowledged, in particular, the thoroughness of the Executive's review and summary of CLC's applications.

Action

(11) 08 – To respond formally to the Lord Chief Justice's advice about the LA application, including the outcomes of a due diligence review to test CLC's previous competence as a regulator of ABS-type entities.

In relation to CLC's LA application, and subject to the due diligence review to test CLC's previous competence as a regulator of ABS-type entities, the Board resolved:

- a) to make a recommendation to the Lord Chancellor (under paragraph 14(2) of Schedule 10 of the Act) that CLC be designated as an LA for its existing reserved legal activities (probate, reserved instrument activities and the administration of oaths)**
- b) to agree that, in making a recommendation to the Lord Chancellor, the proposed licensing rules are at the same time treated as having been approved by the Board (under paragraph 16(1) of Schedule 10, Part 1 of the**

Act). (This includes the entire CLC Handbook, with the exception of any proposed amendments made in relation to the application to extend CLC's reserved legal activities, and the Licensed Body (ABS) Licensing Framework)

- c) to delegate authority to approve the LA Decision Notice and the wording of the recommendation to the Lord Chancellor to the Chairman and the Chief Executive.**

In relation to CLC's Handbook application, the Board resolved:

- a) to approve in part the new Handbook and related frameworks as a change to CLC's regulatory arrangements under Schedule 4, Part 3 of the Act. (Annex 1 to the draft Decision Notice sets out the arrangements that are approved in full and those approved in part)**
- b) to note the draft Decision Notice in relation to the Schedule 4, Part 3 approval and to delegate authority to approve the final Decision Notice to the Chairman and the Chief Executive.**

Item 8 – Paper (11) 30: Rationalising the scope of regulation

17. The Strategy Director introduced a paper that updated the Board about the workstream to rationalise the scope of regulation of the legal services market.
18. The Board noted that:
- the paper was presented in response to a series of commitments to review the scope of regulation, including in the Business Plan 2011/12, which set out the Board's intentions to examine regulation and reservation and proposed 'a rational and intellectually sustainable framework for assessing whether and where regulation is required'
 - an aim of the review would be to ensure that regulation was more targeted at addressing consumer detriment, whilst remaining proportionate to identified market problems
 - the Act explicitly limited to LSB the power to make recommendations about reserving legal activities (both to entities and to natural persons) to the Lord Chancellor, which indicated that Parliament intended LSB actively to consider the scope of regulation
 - the review of the scope (and nature) of regulation was a priority for LSB, not least because of the emerging policy debate about extending regulation to will-writing, which would provide a case study of the approach set out in the paper to making regulatory decisions
 - Board Members were invited to attend a joint LSB-Legal Services Institute seminar about the future of reserved legal activities on 19 May
 - the Board on 13 July would be invited to approve for publication: (a) a discussion paper about the approach to making regulatory decisions; and (b) the response to the Panel's advice in relation to the regulation of will-writing activities, which might include commencing the process to make a recommendation under section 24 of the Act to extend the list of reserved legal activities to the Lord Chancellor.

19. In the course of the discussion that followed, it was noted that:

- the extension of regulation would be considered on a case-by-case basis, but with reference as appropriate to an over-arching narrative (for example, LSB's Evaluation Framework)
- the prioritisation of areas for review would be informed by an initial assessment of the actual or potential harm of not extending regulation
- the analysis of the tools available (and of any proposal to increase reservation) would include both consumer and criminal law, in particular the potential efficacy and consumer understanding of such remedies and the extent to which they were used in practice by enforcement bodies
- the remedial tools available included the payment of compensation to individuals and damage to the reputation of organisations
- frontline practitioners (including non-regulated stakeholders) would be encouraged to contribute to the proposed consultation.

The Board resolved to note:

- a) the update about the workstream to rationalise the scope of regulation of the legal services market**
- b) the 'next steps' in relation to the workstream, in particular the papers to be presented to the Board on 13 July.**

Item 9 – Paper (11) 31: Referral fees

20. The Strategy Director introduced a paper that invited the Board to consider a post-consultation draft decision document and Guidance about referral fees.

21. The Board noted that:

- the draft decision document and Guidance reflected the discussion at the last meeting of the Board, when it agreed: (a) that there remained no case for a general ban on referral fees; and (b) a shift from prescriptive rules about inputs and regulatory action to prescriptive outcomes supported by guidance to best deliver those outcomes
- the outcomes would ensure that: (a) ARs had in place arrangements that: (i) reduced the likelihood of detriment to consumers as a result of allowing referral fees, referral arrangements and fee sharing; and (ii) could justify any ban or restriction on referral fees with reference to evidence, the regulatory objectives and other better regulation principles; and (b) consumers knew when referral fees and / or referral arrangements were or might be in place in order to shape their choices.

22. The Board agreed in principle the draft decision document, subject to emphasising that:

- a ban or restriction on referral fees could be justified with reference to evidence of actual harm and / or a significant risk of potential harm
 - although ARs were not required to comply with Guidance issued under section 162 of the Act, LSB was entitled to have regard to the extent to which an AR had complied with any Guidance when exercising its functions (including in relation to the approval of changes to regulatory arrangements)
 - the decision document and Guidance were developed in line with the evidence commissioned and presented to LSB.
23. The final decision document and Guidance would be circulated prior to general publication to the Board.

The Board resolved:

- a) to note the draft decision document and Guidance about referral fees**
- b) to delegate authority to approve the final decision document and Guidance about referral fees, amended as set out above, to the Chairman and the Chief Executive.**

Item 10 – Legal Services Consumer Panel – verbal report

24. Baroness Hayter (Panel Chair) delivered a brief verbal report about the activities of the Panel in 2010/11 and 2011/12.
25. The Board noted that:
- the Panel's Annual Report 2010/11 would be presented to the next meeting of the Board
 - the Panel was satisfied that it had developed an independent, albeit collaborative, relationship with LSB's Board and Executive
 - increased consumer engagement at AR-level was a priority for the Panel, and that this could be achieved by financial and / or other contributions from the ARs to the activities of the Panel.
26. The Board acknowledged the work of the Panel (and its Secretariat) during 2010/11, both in relation to advising LSB and others and developing the policy agenda.

The Board resolved to note the verbal report about the activities of the Panel in 2010/11 and 2011/12.

Item 11 – Paper (11) 32: Smaller Approved Regulators research – LSB reaction

27. The Strategy Director introduced a paper that invited the Board to approve a desired policy outcome in relation to the smaller ARs¹ and the publication of research about the capability and capacity of the smaller ARs².

¹ The 'smaller ARs' are all the ARs, excluding The Bar Council and The Law Society.

² 'The smaller approved regulators' (Smedley, April 2011).

28. The Board noted that:

- the desired policy outcome was: ‘a legal services market in which all Authorised Persons are regulated in an efficient manner which reflects best regulatory practice; that all consumers are protected from unacceptable risks; and that the ARs promote the regulatory objectives’
- the research, which highlighted the variability of the capability and capacity of the smaller ARs, would be circulated prior to general publication to the smaller ARs
- LSB’s role was not to dictate a single framework for responding to the research, but instead to facilitate discussions between ARs, to emphasise the desired policy outcome and to promote the developing regulatory standards workstream
- LSB would formally review the smaller ARs’ response to the research by the end of 2011.

The Board resolved to agree:

- a) the publication of the research, ‘The smaller approved regulators’, after due notice and prior circulation to the smaller ARs**
- b) the desired policy outcomes in relation to the smaller ARs and the proposed ‘next steps’.**

Item 12 – Paper (11) 33: Q4 performance report: January – March 2011

29. Julie Myers (Corporate Director) introduced a paper that set out the Q4 report of performance against the Business Plan 2010/11, which also included the draft submission to MoJ.

30. The Board noted:

- the quarterly highlight report
- an overview of regulatory decisions in the quarter
- the quarterly activity report from the Panel
- the assessment of LSB’s status of its over-arching programme to deliver the Business Plan 2010/11.

The Board resolved:

- a) to note the draft Q4 performance report**
- b) to agree to its use as a basis for discussion with MoJ.**

Item 13 – Paper (11) 34: Audit and Risk Committee – annual report 2010/11

31. Bill Moyes (Committee Chairman) introduced a paper about the activities of the Audit and Risk Committee during 2010/11, which was presented in accordance with the Committee’s Terms of Reference.

- 32. The Committee had concluded that its activities in the year, including the rigorous challenge of the auditors and the Executive, had been sufficient to provide assurance that there were effective arrangements in place in relation to risk management, governance and internal control.

The Board resolved to note the paper about the activities of the Audit and Risk Committee during 2010/11.

Item 14 – Paper (11) 35: Remuneration and Nomination Committee – annual report 2010/11

- 33. Terry Connor (Committee Chairman) introduced a paper about the activities of the Remuneration and Nomination Committee during 2010/11, which was presented in accordance with the Committee’s Terms of Reference.
- 34. The Committee had concluded that its activities in the year, including the rigorous challenge of the Executive, had been sufficient to provide assurance that there were effective arrangements in place in relation to remuneration and nomination.

The Board resolved to note the paper about the activities of the Remuneration and Nomination Committee during 2010/11.

Item 15 – Any other business

- 35. There were no items of other business.

Item 16 – Date of next meeting

- 36. The Board would next meet on 26 May 2011, 9.30am – 1.30pm (timing to be confirmed). The venue would be LSB’s offices at Victoria House, Southampton Row, London WC1B 4AD.

Item 17 – Private session

- 37. The Board, Corporate Director and Board Secretary met briefly in private session.

BH 03.05.11

Signed as an accurate record of the meeting

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Date
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