

Minutes of a meeting of the Legal Services Board (LSB) on 9 July 2014

Date: 9 July 2014
Time: 13.00-1500
Venue: Wallace Space, 2 Dryden St, London

Present: Sir Michael Pitt Chairman
(Members) Chris Kenny Chief Executive
 Terry Babbs
 Anneliese Day QC
 David Eveleigh
 Marina Gibbs
 Bill Moyes
 Ed Nally

In attendance: Steve Brooker Consumer Panel Manager (item 4)
 Frances Harrison Consumer Panel member (item 4)
 Jeanette Fordyce-Harvey PA to the Chairman and CEO (observing)
 Nick Glockling Legal Director
 Edwin Josephs Director of Finance and Services
 Karen Marchant Regulatory Associate (item 5)
 Julie Myers Corporate Director
 Dawn Reid Head of Statutory Decisions
 Bryony Sheldon Regulatory Project Manager (items 4&5)
 Caroline Wallace Strategy Director
 Kate Webb Regulatory Project Manager (observing)
 Adewale Kadiri Corporate Governance Manager (minutes)

Item 1 – Welcome and apologies

1. The Chairman welcomed those present and in attendance to the meeting, including Kate Webb and Jeanette Fordyce-Harvey who were attending their first Board meeting as observers.

Item 2 – Declarations of interests relevant to the business of the Board

2. There were no declarations of interest.
3. Board Members were reminded to notify the Corporate Governance Manager of any hospitality extended and/or received in the course of their LSB work.

Item 3 – Items considered out of Committee since 22 May 2014

4. The Board noted that the Finance Report for May had been circulated electronically on 20 June.

Item 4 – Paper (14) 36 Legal Services Consumer Panel report on fee charging McKenzie Friends

5. Frances Harrison introduced this item, supported by Steve Brooker. She declared that she had acted as an unpaid McKenzie Friend in the past. She noted that, primarily as a result of changes to the scope of legal aid funding, there has been a significant rise in the number of litigants in person, particularly in the family courts. Concerns had been expressed in various quarters about the potential harm that the use of such assistance could cause. The following benefits and risks had been identified by the Panel:

Benefits:

- McKenzie Friends supported access to justice for litigants who are either unable to afford the services of a lawyer, or may not wish to engage one
- The courtroom environment is alien to most litigants in person. Assistance from a McKenzie Friend could make the process smoother and fairer, for the benefit of all
- The availability of McKenzie Friends provides litigants with more choice as some have reasons other than affordability for choosing not to engage lawyers. For instance, McKenzie Friends also offer emotional support, which can be important, especially in family cases.

Risks

- The Panel's research indicated that some McKenzie Friends are "agenda driven", and can exploit their involvement in cases to the detriment of the litigants that they are supporting
- McKenzie Friends are not usually legally qualified, and are often not insured
- They can give poor quality advice that is detrimental to the litigant
- Consumers do not always understand the limits of the assistance that McKenzie Friends are able to provide
- There have been instances of breaches of privacy, where, for example, litigants' details have been disclosed via blogs or social media
- There are indications that some struck off lawyers are setting up as fee charging McKenzie Friends.

6. Having weighed the arguments and available evidence the Panel concluded that fee charging McKenzie Friends should not be regulated as there was no evidence of consumer harm. In addition, regulation could drive them out of the market thus reducing even further routes of support available to consumers. The report's recommendations included:

- McKenzie Friends should be accepted as a feature of the modern legal market, and those charging fees should commit to some form of self regulation. A group of McKenzie Friends are to meet shortly to consider this
- Limited changes should be made to the guidance issued to judges, such that judges have a wide discretion to grant a right of audience when this would be in the interests of justice. However, automatic rights of audience should not be granted to McKenzie Friends.
- More details of judgements, highlighting where the rights of McKenzie Friends who have behaved improperly have been restricted by the use of Civil Restraint Orders, should be routinely published on gov.uk
- Steps should be taken to ensure that consumers are aware of the assistance that could be provided by McKenzie Friends. There is presently no trusted information available about the options that exist for unrepresented litigants.

The Panel set out two recommendations specifically for the LSB:

- The LSB should review case law on the definition of the conduct of litigation and publish a document which seeks to clarify its meaning. Depending on the findings of this research, the LSB should consider recommending to the Law Commission that the law in this area be reviewed
- The findings set out in the Panel's report should be included as part of the LSB's ongoing work on simplifying regulation.

7. The Board welcomed the report and made the following points in response:

- There was some doubt as to whether and if so how far the LSB ought to go in endorsing fee charging McKenzie Friends. The research done thus far did not justify drawing absolute conclusions at this stage
- It was acknowledged that defining what is meant by the conduct of litigation is a matter for the courts. As such, the Board was content with the approach taken by the Executive to the LSB specific recommendations i.e. to accept the second, but to seek to encourage the judicial working party to pursue the first.
- Doubts were expressed as to who would be responsible for setting out the guidelines and frameworks required in order to set up a credible self regulatory structure and whether some form of external oversight, such as the Consumer Codes Approval Board would still be needed
- It was noted that some junior qualified lawyers work at cheaper rates than those quoted for McKenzie Friends within the report, and it was suggested that information about how such lawyers could be accessed would be helpful to consumers. The fact that there are other alternatives to McKenzie Friends, such as lawyers who do pro bono work, was also noted
- It was argued that the family law system needs radical reform, and the Board were concerned that McKenzie Friends could be seen as an easy alternative to wider change.
- The judiciary have found the report to be valuable, as it has highlighted inconsistencies in the way that different judges deal with McKenzie Friends. A working party has been set up to consider the issue

- In responding to the Panel, the Board should reiterate that it did not endorse it in its entirety to avoid the risk that it be seen as the LSB's suggestion for filling access gaps
- The BSB and Law Society recently gave evidence before the Justice Select Committee and took a very negative stance towards McKenzie Friends
- The draft letter attached to the paper was directed at the Consumer Panel, but a wider response is needed in terms of a commentary on the report which might be helpful to the judicial working group.

8. The Board resolved:

- (a) To reject the first and accept the second of the Consumer Panel's recommendations to the LSB, and to receive a single, open response to the Consumer Panel's report from the Executive, reflecting the points raised in this debate, and asking the judicial working group to consider whether it might be able to address the Panel's first recommendation on the definition of the conduct of litigation,**
- (b) Ask the Consumer Panel to return to a future meeting within the next 18 to 24 months to update the Board on steps that the judiciary is taking to reflect the needs of litigants in person and wider developments.**

Item 5 – Paper (14) 37 Bar Standards Board entity application

9. Dawn Reid introduced this paper, supported by Karen Marchant and Bryony Sheldon. The BSB application had been formally received on 25 June. It will take three months for a decision to be made on the application. This is the second of three key changes that the BSB is making (the first was their revised handbook, and they are also expected to make an application to become a licensing authority). The LSB has been working with the BSB for two years on this, and they have made very significant progress over that period. Analysis on the final application would need to concentrate on the key issues of vires, insurance and public access.

10. In the course of the discussion, the following points were made:

- [REDACTED]
- [REDACTED]
- [REDACTED]

[REDACTED]

[FOIA exempt: s44]

- The Board acknowledged that there were risks involved in approving the application in these circumstances, and emphasised that this arrangement should not lead to any lessening of pressure on the MoJ to deal with the section 69 order in a timely fashion, noting that there would inevitably be some uncertainty in the event of a legal challenge to the BSB's powers.

11. The Board resolved to nominate Anneliese Day, David Eveleigh and Bill Moyes to provide further guidance to the Executive as the assessment of the application progresses.

Item 6 – Paper (14) 38 Section 69 recommendation to the Lord Chancellor on modification of SRA regulation of sole practice

12. Dawn Reid introduced this item. This is the conclusion of work that the SRA started some time ago that would make all SRA regulated entities subject to the same regulatory regime. It would result in savings both to firms and the SRA itself. A consultation was carried out and this had received one favourable response. As this is a de-regulatory measure, it is required to be included on a Statement of New Regulation, and this will be done in December.

13. The Board resolved to:

- (a) Note the content of the response document, and approve its publication,**
- (b) Approve the making of the recommendation set out in Annex A to the response document, and**
- (c) Note the draft statutory order accompanying the recommendation.**

Item 7 – Paper (14) 39 Technical changes to some of the Legal Service Board's rules

14. Dawn Reid presented this paper, which addresses inconsistencies between the LSB's appeal rules and those of its appellate body of choice, the General Regulatory Chamber of the First Tier Tribunal. The LSB rules have been amended to match those of the Tribunal, and some of the approved regulators would be required to make some minor amendments to their own regulatory arrangements. This is already in train.

15. The Board resolved to:

- (a) Note the content of the decision document and approve its publication, and**
- (b) Approve the changes to the LSB's Rules as set out in Annexes A, B and C to the decision document.**

Item 8 – Minutes of the meeting of 22 May 2014

- 16. The minutes of the meeting were agreed as an accurate record.

Item 9 – Report of action points

- 17. All actions were noted as on-track, and all items had either been included on the agenda or are on the Board forward plan for future agendas.
- 18. **The Board noted the updates to the report of action points.**

Item 10 – Paper (14) 40 Chief Executive's progress report July 2014

- 19. The Chief Executive presented his progress report. The Board noted:

Operations and governance issues

- 20. Necessary approvals had not yet been received in order to allow the LSB Member recruitment campaign to start. As such, the timetable is now one month behind the original schedule. The Executive had offered to fund newspaper as well as online advertisements to improve the diversity of the field, but the MoJ Public Appointments team did not accept that a case for print advertising was made and insisted that the LSB prepared a detailed business case for MoJ approval – even though the LSB would be bearing the cost.

SRA issues

- 21. The SRA continues to make slow but steady improvements in its performance on ABS authorisations in spite of recent changes in personnel.
- 22. The SRA has recently issued four consultation papers covering compensation, professional indemnity insurance (PII), and multi disciplinary practices (MDPs). Some unease has been expressed by various bodies about the shortness of consultation period (six weeks) and in particular, (in conjunction with a proposal that firms should assess and purchase an appropriate level of PII) the proposal to reduce the minimum level of PII from £2m to £500k. It is argued that this could encourage large mortgage lenders to restrict the size of their practitioner panels to the larger firms, thus reducing competition and diversity of provision. It is also questioned whether the insurance industry would be able to adapt quickly enough to the proposed arrangements, and whether some firms may inadvertently under-insure themselves. Questions were raised as to what would happen where work had been done four or five years ago, but the issues only come to light now, and whether in those

circumstances, if the firm's cover was insufficient, consumers would have access to the compensation fund.

23. The SRA is keen that the LSB approves the rule change required to bring this proposal into effect within 28 days. It was agreed that a Board sub-group of Ed Nally and Marina Gibb would be set up to assist with the more detailed consideration of the proposals.

Statutory Orders

24. The ICAEW section 69 order is to be debated in the House of Commons at 6pm on 14 July.

QASA judicial review

25. There is a strong possibility that the decision on the appeal could be communicated before the next Board meeting. Some contingency planning has been done on options if the High Court's decision were to be overturned.

Access to data

26. Some progress is being made, but some approved regulators have failed to respond to either of the letters sent. Work is being done with them to address outstanding issues and the Chairman is minded to cover this area in his Westminster Policy Forum speech on 4 September.

Office for Legal Complaints

27. Dialogue is continuing with OLC on a range of performance issues.

Communications and stakeholder engagement

28. Copies of the Chairman's letter to Shailesh Vara MP, attaching the LSB's deregulatory action plan, had been circulated to the Board. This has also been shared with the approved regulators in advance of the Regulators' Summit on 21 July. It was noted that no other responses from regulators had as yet been circulated.
29. The Chief Executive had a productive meeting with his opposite number from the Office of Rail Regulation, who is the Chair of the UK Regulators Network (UKRN). The Board agreed that the Executive should progress the LSB joining the UKRN as an observer.
30. The Board noted the SRA's appropriate response to reports in the media of organisations either using bogus law firms or pretending that their in-house lawyers are separate organisations. The issue highlighted gaps in the Act's definitions, and raises ethical questions for those concerned.
31. **The Board resolved to note the Chief Executive's update.**

Item 11 – Paper (14) 41 Q1 Performance Report: 1 April to 30 June 2014

- 32. Julie Myers introduced the report which is presented to the Board in draft before submission to the MoJ. The status of the overarching programme to deliver Business Plan commitments is Green. Although it would appear that there are a number of new risks in the programme, this reflects more the fact that project managers have now been allocated to the different work areas and are in the process of identifying risks. The plan is broadly on track, although subject to some minor re-planning.
- 33. **The Board agreed that the report should be submitted to the MoJ and used as the basis for discussion with them.**

Item 12 – Paper (14) 42 Finance Report to 30 June 2014

- 34. Edwin Josephs introduced this item. The Board noted that a suitable legislative vehicle for dealing with the treatment of levy income was being sought with the MoJ.
- 35. **The Board noted the Finance Report.**

Item 13 – Any other business

- 36. The Chairman reported that he had had a useful session with members of the media two weeks ago. One of the issues that had arisen was the time it took for LSB Board papers and minutes to be published, and the fact that meetings are held entirely in private. A paper is to be presented to the next meeting addressing these issues.

Action: JM/AK to take forward.

Item 14 - Date of next meeting

- 37. The Board would next meet on 29 September 2014 at 12.30pm. The venue would be the Office of Rail Regulation, One Kemble Street, London WC2B 4AN.

AK, 11/07/14

Signed as an accurate record of the meeting

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Date
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