

Minutes of a meeting of Legal Services Board (LSB) on 10 October 2012

Date: 10 October 2012
Time: 09:30 – 12:15
Venue: Victoria House, Southampton Row, London WC1B 4AD

Present: David Edmonds Chairman
(Members) Chris Kenny Chief Executive
 Steve Green
 Bill Moyes
 Ed Nally
 Nicole Smith
 Barbara Saunders (to item 8 only)
 Andrew Whittaker
 David Wolfe

In attendance: Nicholas Baré Regulatory Associate (item 8)
 Rob Cross Research Project Manager (item 4)
 Sonya Gedson Regulatory Associate (item 7)
 Fran Gillon Director of Regulatory Practice
 Nick Glockling Legal Director
 Chris Handford Regulatory Project Manager (item 5)
 Edwin Josephs Director of Finance and Services
 James Meyrick Regulatory Project Manager (item 8)
 Julie Myers Corporate Director
 Crispin Passmore Strategy Director
 Dawn Reid Head of Statutory Decisions (items 6 and 7)
 Alex Roy Head of Development and Research (items 4 and 5)
 Holly Perry Corporate Governance Manager (minutes)

Item 1 – Welcome and apologies

1. The Chairman welcomed those present and in attendance to the meeting.

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

2. The Chairman declared that he had recently been appointed to the Board of Swanton Care and Community Limited, a wholly owned subsidiary of Barchester Homes. In addition, Ed Nally reminded the Board of his standing declaration of interest in respect of his membership of the Solicitors Disciplinary Tribunal (SDT) (Paper (12) 69 referred, SDT budget 2013).
3. Board Members were reminded to notify the Corporate Governance Manager about hospitality extended and/or received in the course of their LSB work.

Item 3 – Formal noting of matters circulated since the Board's 12 September 2012 meeting

4. The Board noted one item that had been circulated out of committee:

Will-writing consultation – representations

Following publication of the provisional report on 27 September, the Board was required to consent to the application of its rules with the period for representations being varied from two months to the period from 27 September to 8 November. A communication had been sent to the Board on 27 September 2012; the Board had given its consent to the amended period for representations.

Item 4 – Paper (12) 66 – Final draft market impacts/evaluation report

5. The Research Project Manager presented the report, which built on the 2012 interim report agreed by the Board and published in April 2012. This used the Legal Services Act 2007 evaluation framework agreed by the Board in April 2011. It represented the first attempt to baseline the legal services market in its entirety, prior to the full impacts of reform. The revised report represented the LSB's final 2012 baseline.
6. The Board noted:
 - the revised report reflected the full range of feedback that had been received, both positive and negative, as well as the findings of key LSB research projects over the past six months - but was not significantly different in structure from the interim report
 - the report was intended to provide a clear evidence base for the current state of the legal services market, and would allow the LSB to analyse the impact of the Legal Services Act market reforms over time – the drafting would be amended to ensure this focus was properly reflected
 - that the report's scale and breadth was impressive and reflected a comprehensive consolidation of data. As a key user, it was important for the LSB to consider now the sorts of questions it would wish to ask in a given period of time (for example, in three years' time, at the point of the LSB's next triennial review) and to ensure that the report would be able to provide these answers
 - it was also important to think now about how the changes the LSB was introducing would be mapped and whether any specific indicators should be tracked particularly closely. It was acknowledged that it would take some time for statistically significant patterns to emerge, but the intention was to have data that would, for example, show the impact of outcomes focused regulation, and the impact of the introduction of alternative business structures
 - the intention was for the report to be revised annually in October. Ahead of the October 2013 update, the Board felt it would be helpful to debate further the purpose and role of the report, to ensure that while it continued to grow, it did so in a focused and meaningful way. It was, however, acknowledged that other audiences would find uses that it was impossible for the LSB to foresee and that this was a core function of the report
 - there were a number of gaps in the report and it was acknowledged that it would never be 'complete' or 'final'. This made drawing definitive conclusions difficult and therefore a cautious line had been adopted. The LSB's role was not to fill the gaps, but to identify where it could uniquely add value (eg consumer data and analysis)
 - there was a significant and sizable 'knowledge bank' that sat behind the report, in the form of a spreadsheet indicating every source of data available. In terms of the ratio of work involved in gathering data and analysing data, it

was estimated that in the last six months, an increasing amount of time had been spent on analysis after the earlier focus on source identification. The spreadsheet was available to all colleagues at the LSB and was drawn on extensively as part of policy development work. Others beyond the LSB were also starting to use the data, and this would be facilitated further when the revamped research webpages became 'live' in October. An event to alert interested parties to the work was being planned for mid November

- in relation to the 'open data' agenda explained at paragraph 7 of the cover paper, it was agreed that the LSB had a role to bring pressure on the approved regulators, Legal Ombudsman and others to place as much of their raw data as possible in the public domain
- the report included a useful commentary, but a crisper synthesis in the opening pages of the report was felt to be necessary; in addition, there were a small number of sections where the conclusions needed to be more carefully drafted (eg paragraphs 1.27 and 1.33).

7. The Board commended the revised market evaluation report and all those involved in its preparation. The Board resolved to approve its publication subject to the amendments proposed in discussion.

Item 5 – Paper (12) 67 - Scoping of Regulation: Common Risks for Individual Consumers of Legal Services

8. The Head of Development and Research presented the paper to the Board. In the LSB's paper *Enhancing consumer protection, reducing regulatory restrictions* report, it had been proposed that the current pattern of reserved and unreserved work was no longer fit for purpose. The Board had subsequently agreed to conduct a more wide-ranging review of general legal advice given to consumers. The paper set out the LSB's approach to how it might investigate the scope of general legal advice and how evidence would be collected.

9. The Board noted:

- the intention was first to identify what the current risks were to the Regulatory Objectives from the provision of general legal advice, and whether these risks warranted further consideration. The intention was to group together generalised risks, and attempt to identify a common risk – then to consult, and return to the Board with advice on how to proceed
- the work linked directly to the LSB's regulatory objectives to protect and promote the interests of consumers and to promote competition. The balance between them would need to be carefully thought through and communicated
- there should be no assumption of extending regulation into general legal advice unless absolutely necessary; existing safeguards such as general consumer law would be articulated and evaluated in the initial assessment, to show clearly that while there may not be a regulator operating in the sector, there were nevertheless relevant regulation and protections that already existed
- there was potentially a need to articulate the possible outcomes at the outset, to set out the alternative approaches that might emerge – the challenge was to keep the propositions general enough to be workable but the analysis of risk appropriately robust
- the timetable for the scheduling of work has been amended from that previously proposed to the Board. It was agreed that the timetable needed to be amended, so as to avoid reaching a conclusion on next steps so close to

the next general election. The milestone would be pushed back or brought forward by approximately six months as appropriate

- the links to the not for profit sector would need to be explored and therefore reflected in the initial assessment.

10. The Board resolved to agree the proposed approach and the indicative timetable, subject to the points raised in discussion.

Item 6 – Paper (12) 68 – Review of process for applications for approval of alterations to regulatory arrangements

11. The Head of Statutory Decisions presented the paper. This followed the Executive's commitment to review processes following the three major BSB rule change applications dealt with over the summer (diversity, aptitude test and standard contractual terms rule).

12. The Board noted:

- the LSB had dealt with some 45 rule change applications since its inception, reflecting a considerable acceleration in volumes and speed of turnaround relative to the previous arrangements. This should be reflected in any consultation document
- overall, the Head of Statutory Decisions' analysis concluded that the right decisions had been reached, but that the process to reach those decisions had on occasion been harder than it had needed to be. Four key process improvements had been identified: to "normalise" issuing Warning Notices; ensure engagement with regulators at an earlier stage and commission necessary external advice more rapidly; clarify what was expected of Board Members in the process; and minimise dual handling between those doing policy work and the team processing the rule change
- in implementing these changes, it was possible that the LSB would need to make some amendments to its formal rules on handling rule changes, which in turn was likely to require consultation
- in respect of Warning Notices, these would be issued where matters were more complex – they were not likely to be issued as a way purely of managing the timetable (given the option of issuing extension notices). The Act was clear about the LSB's powers to issue Warning Notices: notices gave the applicant the benefit of the matter being considered over a longer period, perhaps with advice to the LSB from external stakeholders, and were not therefore intended to be perceived negatively
- a possible approach to be explored was the explicit setting out of requirements for approved regulators' opening submissions – where approved regulators failed to cover the criteria required, the issue of a Warning Notice could be expected
- it was important that more decision-making in this area did not automatically reach Board level. The Audit and Risk Committee would consider the list of matters reserved to the Board and the scheme of delegations at its next formal review of the Governance Manual, scheduled for discussion at the 15 October meeting. Final recommendations would be put to the Board's 28 November meeting for agreement. However, the Board provided a steer that it did wish to determine all refusal decisions itself.

13. The Board commended the paper, and the Head of Statutory Decisions for her role in conducting an open analysis. The Board resolved to note the

main conclusions from the review of the rules change application process, and the proposed future actions.

Item 7 – Paper (12) 69 – SDT budget approval 2013/14

14. **Ed Nally declared an interest in respect of the paper, on the basis it concerned the Solicitors Disciplinary Tribunal (SDT) of which he was a member, although he had taken no part in drawing up the budgetary submission.**
15. The Head of Statutory Decisions presented the paper which sought the Board's consent to the SDT's budget for 2013/14. On 28 September, the SDT had agreed to revise its 2013 budget application to £2.78m (an 8% decrease on 2012) as the LSB had noted two key expenditure categories that required revising and/or omission from the original budget application received on 18 September. An explanation of the two key expenditure categories that were revised was set out at paragraphs 4 to 6 of the paper.
16. The Board noted:
 - the LSB was required to consult The Law Society on the SDT annual budget allowing no less than 28 days for comment. The due date for a response was 16 October; a response had not yet been received
 - SDT was progressing with the submission of quarterly performance reports to the LSB, and was understood to be close to agreeing a business plan – overall, the direction of travel was positive
 - the cost per case had risen some 10% in the period, which was felt to be sizeable. Anecdotally, this was understood to arise from the increased complexity of cases, leading to cases taking longer to conclude, and the fact that there was now more 'case management' of cases taking place.
17. **On the basis that the The Law Society response did not raise any significant or material issues, the Board resolved to approve the SDT budget 2013 application set out at Annex A. If the TLS response raised material issues, the Executive would revert to the Board for a written resolution [Post meeting note: no material issues raised in TLS response]. The Board also resolved to agree the recommendation that quarterly reporting against key performance indicators should continue for the next twelve months.**

Item 8 – Paper (12) 70 – Report on regulatory standards self-assessments

18. The Director of Regulatory Practice introduced the paper, which covered the LSB's analysis of the regulatory self-assessments for the Council for Licensed Conveyancers (CLC), Costs Lawyer Standards Board (CLSB), the Faculty Office, Intellectual Property Regulation Board (IPReg) and Ilex Professional Standards (IPS). It did not contain assessments for the Solicitors Regulation Authority (SRA) and Bar Standards Board (BSB), which were being undertaken to a different timetable. The paper contained a number of proposed next steps, drawn from some of the feedback from the Board's 12 September strategy session and to be built upon for the 2013/14 business plan. The intention was to meet with each approved regulator in the coming weeks (Chairman and Chief Executive level) to discuss the LSB's findings and provide a limited opportunity for comments.
19. The Board noted:

- overall, the assessments build on the LSB's existing knowledge of the approved regulators – the exercise had assured the LSB that its baseline knowledge developed over three years of operation was robust. Nevertheless, the assessments had improved the LSB's overall understanding of the approved regulators
- the quality of assessments was variable – CLC and IPReg had submitted high quality responses, both of whom had sought external review for their self-assessments. There was clear evidence that the self-assessments had benefitted from the element of this independent input. For the remaining approved regulators, the quality of assessments was poorer – with reliance on assertions and a lack of supporting evidence
- all approved regulators had been strongly advised to secure independent external challenge – the failure on the part of some not to do so was regarded as unacceptable. Although enforcement action may not necessarily be proportionate, the failure to follow clear guidance would need to be reflected in future decisions. For example, if the LSB considered that the approved regulator had failed the 'comply or explain' test in relation to external validation, the LSB was likely to take the view that there could be no extension of an existing approved regulator's scope of work
- generic areas of concern included: a lack of understanding of consumers' needs; a lack of consumer engagement; a failure to use the common framework developed by Oxera to analyse the markets being regulated; difficulties between the approved regulators and the Legal Ombudsman in terms of data exchange
- in relation to next steps, once the assessments had been published, the intention was to begin targeted monitoring of approved regulators' action plans. The Board gave a steer that the planning assumption should be to repeat the exercise bi-annually
- the issue of publication of the reports on the smaller approved regulators ahead of publication of the reports on the SRA and BSB was considered carefully. It was agreed that the plan would not be adjusted, but the rationale for the separate publication dates would be clearly set out in communications accompanying the publication. There was felt to be the benefit of an undiluted focus on the smaller bodies in this approach. The meetings with approved regulators to discuss the draft reports were scheduled for late October/early November and on this basis, publication for the smaller approved regulators was expected to be around the end of November. There would be a gap of around six to eight weeks before publication of the reports on the SRA and BSB
- there had been considerable progress on the part of the SRA and BSB in respect of their self assessments in the past month (the final reports for both bodies would be considered at the Board's January 2013 meeting). For SRA, the latest draft which had been submitted in late September was felt to be genuinely self-reflective and a great improvement on the earlier draft. For BSB, its submission had been received on 5 October and was considered on an initial review to be comprehensive. The submission had been prepared with the input of number of the BSB's Board Members.

20. The Board resolved to delegate final sign off of the report and arrangements for its publication to the Chairman and Chief Executive, subject to the points raised in discussion. The Board also resolved to note the next steps.

Item 9 – Minutes of the 12 September meeting of the Board

21. **The Board resolved to agree the minutes of the meeting held on 12 September 2012, subject to one minor amendment and to submit them for signing as an accurate record to the Chairman.**

Item 10 – Report of action points

22. All actions were on track, scheduled for discussion at future meetings or were covered by papers on the agenda.
23. **The Board resolved to note the Report of action points.**

Item 11 – Paper (12) 71: Chief Executive’s Progress Report: October 2012

24. The Chief Executive presented his progress report for the month of September.
25. The Board noted:
- completion of the LSB’s annual monitoring report on the Welsh Language Scheme. This year, the LSB had increased Welsh content on the LSB website and more recently the LSCP website, and had therefore completed all the actions that had been committed to over the first two years of the Scheme. Activity over the period (October 2011 to October 2012) had demonstrated that the LSB had embedded the Scheme fully
 - a colleague engagement survey was in final draft, following its development through a working group of a cross section of colleagues. The survey would be issued later in October, and a report on the findings of the survey would be presented to the Remuneration and Nomination Committee at its 30 November meeting
 - SRA performance was generally progressing positively and the LSB’s requests were being responded to. The SRA’s move to new premises in Birmingham had been successfully achieved; the LSB’s management team had visited the new building on 9 October and had been impressed with the energy and enthusiasm of staff. IT resilience testing was progressing with the SRA’s practicing certificate IT system, and the LSB was continuing to monitor the position carefully through regular bilateral discussions involving the respective Chief Executives, and the Chairman and President as appropriate
 - the Chief Executive reported that he had now received a response to his letter of 21 September about operational risks arising from delayed IT deployment from Antony Townsend. The SRA had provided evidence that it was beginning to address the full range of issues, but there was further work to do in relation to risk, and what could realistically be achieved in 2013 and then 2014/15
 - in relation to the Chief Executive’s letter to the Law Society of 28 September (Annex A of the paper) in relation to independence issues and oversight of papers for the Budget and Oversight Committee. TLS had responded requesting an urgent meeting to discuss the issues and a meeting had been fixed for 7 November. Although progress had been made, there was a need to retain a degree of scrutiny on the issue
 - in relation to independence more generally, the Chief Executive provided verbal reports on a number of issues relating to TLS/SRA, the Bar Council/BSB, Association of Cost Lawyers/CLSB and IPReg and the Trademark and Patent Institutes – the instances demonstrated that it was unlikely to be possible for the LSB to reduce its role on independence issues

- significantly in the foreseeable future
- in relation to the Quality Assurance Scheme for Advocates (QASA), there had been some reaction to the Criminal Bar Association's threat to judicially review the process. The LSB was currently undertaking a thorough risk analysis of the position. On initial review, parts of the submission appeared to reflect a fundamental misunderstanding of the provisions of the Act
- the Chairman and Chief Executive's introductory meeting with the Minister was scheduled
- dates had been agreed for presentations to the SRA Board (Chairman and Chief Executive attending on 28 November) and BSB Board (Chairman, Board Members and Chief Executive attending on 13 December)
- the Director of Finance and Services provided a verbal update on the latest position with regard to Claims Management Companies, following the report to the 12 September Board meeting. HM Treasury approval was still awaited for MoJ to become a leivable body. Discussions continued on Legal Ombudsman's costings.

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

Item 11 – Paper (12) 72: Q2 performance report covering the period 1 July to 30 September 2012

27. The Corporate Director presented the paper, which set out the second quarterly performance report for 2012/13 for Ministry of Justice, and which included the quarterly Consumer Panel Activity report and statutory decisions report. Based on an assessment of the status of individual projects, the status of the LSB's overarching programme in the second quarter 2012/13 was 'green'.
28. The Board noted the Executive's solid progress, and success in meeting its public programme of business.
- 29. The Board resolved to agree the draft Q2 performance report and agree its use as a basis for discussion with the MoJ.**

Item 14 – Any other business

30. There were no further items of business.

Item 15 – Date of next meeting

31. The Board would next meet on 28 November, 13:30 to 17:00. The venue would be LSB's offices at Victoria House, Southampton Row, London WC1B 4AD.

HP, 15/10/12

Signed as an accurate record of the meeting

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Date
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