



**THE CHAIRMAN
PETER LODDER QC**

Mr Chris Kenny
Chief Executive
Legal Services Board
7th Floor
Victoria House
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London
WC1B 4AD

8 March 2011

Dear Chris,

LSB Business Plan 2011/12

Please find enclosed the Bar Council's response to the LSB's Draft Business Plan 2011/12. The Bar Council welcomes the opportunity to provide this input and, indeed, in future would prefer to so at an even earlier stage, before it was quite so fully formed and the content settled.

You will see that our concerns broadly focus on 3 areas:

1. **Increasing staff costs** – In these straitened times, in which public sector staff numbers and costs are decreasing by around 20%, the Bar Council would expect at least some evidence of the LSB considering how its activities could be restructured to reduce costs. There is none and instead, surprisingly, staff costs are set to increase.
2. **Over extension of remit** – The LSB is taking a rather broad interpretation of section 4 of the Act. On occasion, it seeks to drive the agenda for change and becomes more prescriptive about what the ARs should be doing and how they should be doing it. The ARs increasingly both have to fulfil their own objectives and additionally respond to LSB demands. This has resource implications which are met through increasing practising certificate fees (a cost ultimately passed on to the consumer) and represents the additional 'hidden costs' of the LSB going beyond merely 'assisting' the ARs in discharging their regulatory responsibilities and into micro-management.


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3. **Lack of understanding/experience** – In relation to a variety of issues, which include the QAA Scheme, referral fees, chambers complaints handling and equality and diversity issues, the LSB has shown a lack of understanding (and occasionally judgement) and an unwillingness to listen to the ARs. This can result in time-consuming remedial work and explanation from the ARs, possible extra costs incurred by the LSB and certainly duplication of effort. All of this has the capacity to add to the 'hidden costs' of regulation borne by the regulated community and is not in the public interest. The Act recognises that the ARs have a primary role to actually regulate and the LSB, as overarching regulator, is better positioned to fulfil a strategic oversight role.

The Bar Council is grateful for advance consideration of the LSB's plan. It is hoped this response can inform some pragmatic amendment to it. Next year, the Bar Council stands ready to discuss its own plans with the LSB even earlier and thus inform the development of an LSB plan that takes into account the wealth of expertise and activities already to be undertaken by the AR, enabling the LSB to better focus its own efforts.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Peter Lodder', with a horizontal line extending from the end of the signature.

Peter Lodder QC
Chairman
Bar Council



LEGAL SERVICES BOARD DRAFT BUSINESS PLAN 2011/12

Response by the Bar Council

Introduction

1 The Bar Council is grateful for the opportunity to comment on, and influence the development of, the Draft Business Plan 2011/12, *Putting consumer and public interests at the heart of legal services regulation*, issued for consultation by the Legal Services Board (LSB) on 8 December 2010. This response reflects the views of the Bar Council in its representative capacity. The independent regulator of the Bar, the Bar Standards Board is responding separately to this consultation and their observations are supported by the Bar Council.

2 The Bar Council takes a close, continuing interest in how the LSB discharges its duty to promote the regulatory objectives in the Act as it applies to the LSB as supervisory regulator as well as to the Approved Regulators (ARs) (s3(2) and s28(2)). Between us we have a shared interest in ensuring that our respective regulatory activities are transparent, accountable, proportionate, consistent and in other respects reflective of good regulatory practice.

3 At this time of profound economic uncertainty and changes in government policy designed amongst other things to address the national deficit (including planned cuts in legal aid of unparalleled severity), it is vital that between us, the LSB and the ARs sustain the confidence of the legal profession. The LSB is funded by ARs whose funding in turn is entirely dependent on the members of their regulated constituencies. Our actions and policies condition their professional lives. Our agenda and approach to reflect the themes of the economy which are transforming the public sector. In a very real sense, the LSB and the ARs must account to them for our use of the resources they provide.

4 Against that background, we welcome the recognition in the LSB's draft Business Plan that:

- (a) there needs to be a partnership between the LSB and the ARs;
- (b) we should avoid duplication in research and other work to construct the evidence base for changes in policy and practice; and
- (c) in all our work we seek what will work best for those most directly affected - those who use and those who deliver legal services.

5 All of this will be served by transparency in the planning and conduct of the LSB's work and that of the ARs. Our work as regulators seeks to ensure (in the LSB's words) "that service users of all kinds are able to make judgements about the quality of service provision as the range of providers open to them diversifies". In the same way, those whom we regulate should be able to judge the quality and cost effectiveness of what we do.

6 It follows that we would expect the LSB Business plan to be clear that:

- (a) its programme of work is limited, but necessary and sufficient to the task and to circumstances;
- (b) there is no avoidable duplication of effort and evidence between itself and the ARs;
- (c) opportunities for delivering projects with or through the ARs are exploited fully;
- (d) efficiencies have been secured, and cost constrained, to the maximum extent possible, and at least consistent with the public sector norm during the planning period; and
- (e) the objectives of work are defined in such a way that it will be clear in due course whether they have been achieved, on time and within budget.

7 It is these themes of *sufficiency, cost-effectiveness, transparency* and *accountability to stake holders*, which inform the Bar Council's response to the LSB's plan. In the remainder of this response we focus our observations on assessing the extent to which these themes are reflected in the LSB's plans for:

- (a) Developing a changing workforce for a changing market (Section 3d of the draft plan); and
- (b) Budget and governance (Section 4).

8 We also make observations on:

- (a) "the compliance burdens on practitioners" (referred to in the Introduction at p 6); and
- (b) "wider public policy" considerations (alluded to in the Introduction at p 7) where we believe the LSB could (and should) demonstrate its independence.

Developing a changing workforce for a changing market

Education and Training

9 We note that the LSB considers that "quality comes from having appropriate education, training and quality assurance mechanisms, as well as a consumer-driven competitive market". Its function, in relation to the workforce, is to ensure that it is

independent, strong, diverse and effective (Section 1(1)(f)). However, the quality of the legal advice and representation provided is a matter which falls to the approved regulator (in this case, the BSB, to assess.

10 The functions of the BSB are to:

- (a) Set the education and training requirements for becoming a barrister;
- (b) Set continuing training requirements to ensure that barristers' skills are maintained throughout their careers;
- (c) Set standards of conduct for barristers;
- (d) Monitor the service provided by barristers to assure quality;
- (e) Handle complaints against barristers and taking disciplinary or other action where appropriate.

11 In our view, the LSB's interpretation of the regulatory objective has led it into an area which is more properly the domain of the BSB. In our view, as the overarching regulator, the role of the LSB should be to direct and monitor the work to be undertaken by the approved regulators and not to undertake that work itself. Were it to be otherwise, there is a significant risk of duplication and thus wastage of the profession's resources.

12 Research and reviews aimed at detailed knowledge of any particular section of the legal workforce is the domain of the relevant approved regulator not the overarching regulator. Thus evidence gathering, research and quality assessment is the domain of the BSB.

13 While the Bar Council agrees that the education and training of lawyers must be fit for purpose in the modern world, we have a number of concerns regarding the LSB's plans:

- (a) It is not immediately clear to us why an assessment of education and training needs is required for 2020 (paragraph 81).
- (b) The perceived oversupply of pupils/ trainee lawyers *vis a vis* the availability of training contracts or pupillages available falls more naturally into the remit of the BSB rather than the LSB (paragraph 82).
- (c) Likewise, exploring the expanding role of paralegals is something that should be undertaken by the Solicitors Regulation Authority (SRA), rather than work which ought to be carried out by the LSB (paragraph 82). We would also add that permitting paralegals to work without regulatory requirements regarding competency standards and training is unlikely to be in the public interest.

- (d) The LSB aims to create an evidence base around the composition of the workforce. While such an evidence base may have its uses, in our view the LSB is not an evidence gatherer but an overseer of the legal profession and thus perhaps this task is one which may properly belong to another body. In any event, in this time of austerity, we question whether this is task which should take priority over others (paragraph 85).
- (e) While the LSB must “assist in the maintenance and development of standards in relation to education and training” (S4, LSA 2007), we do not interpret that section as requiring that the LSB should conduct its own research or act as an evidence gathering body.
- (f) We note that the LSB is considering sponsoring a PhD project exploring education and training in the development of legal professionals. However, we are not clear, and the business plan does not state, the purpose that such research is intended to serve, the need for the research nor whether such an investment should be regarded as value for money (paragraph 93).

14 As the LSB will be aware, since 2008 the BSB has undertaken an extensive, root and branch review of training for the Bar. However we note that the LSB proposes to commission further research while ignoring much of the research that has already been undertaken by the Bar. It is difficult to see how any of the LSB’s planned objectives in respect of education and training differ from the work already conducted by the Bar in this area. The LSB are therefore encouraged to make use of the substantial material already in existence before undertaking, or requiring the BSB to undertake a time-consuming and costly exercise.

15 In our view, the LSB should agree with the ARs what work needs to be done and satisfy itself where work needs to be done, that it is done properly. Instead, the LSB is trying to do the work itself which cannot be cost-effective and is unlikely to result in timely output.

16 Our firm view is that where the LSB identifies a pressing need for evidence or wishes to review an area, the LSB and ARs should first identify whether any extant material may, or could be adapted to, satisfy that need. Only in the absence of such material should resources be committed to obtaining further material. If an AR or body acting in a representative capacity is required to repeat work which has been completed in the same or a similar area the diversion of limited resources from other work (which may well be more pressing) can have disruptive effects particularly for smaller ARs.

Social mobility

17 The Bar Council wholeheartedly supports the emphasis placed by the LSB on the importance of social mobility in the legal profession. We remain robustly committed to ensuring that the Bar continues to become more diverse and socially representative, working with everyone from school students through to mature entrants in order to provide accurate

and incisive information on careers at the Bar to as wide a range of people as possible. The Bar Council works with numerous organisations that have a common interest to achieve this aim, from the Inns of Court, the Circuits and Specialist Bar Associations, to carefully selected charities such as the Social Mobility Foundation and the Citizenship Foundation.

18 The Bar Council supports the LSB's aim to shift the emphasis from what is being done to what is being achieved, and encourages the LSB to consider how it targets and executes its research in this vital area of work. Between September and November 2010, the Bar Council provided accurate and detailed information to the LSB which was intended to inform the publication 'Diversity initiatives of approved regulators'. We were very concerned to find, as we brought to the attention of the LSB in November 2010, that the final published version of this report demonstrated a significant lack of understanding of the Bar and the steps involved in becoming a barrister, despite our efforts to draw the LSB's errors and misrepresentations to their attention. The Bar Council looks forward, in a spirit of genuine partnership which we hope will be reciprocated, to working with the LSB to correct those misrepresentations and to forge ahead with promoting social mobility in 2011/12.

Equality and diversity

19 The LSB's Draft Business Plan has a number of priorities with links to equality and diversity objectives. As already noted, one of its statutory objectives is to "encourage an independent, strong, diverse and effective legal profession" (Section 1(1)(f)). The LSB is a body also subject to the general public equality duty so it must proactively work to eliminate discrimination, promote equality and foster good relations. These are the statutory duties that support its approach to equality and diversity as set out in its business plan.

20 The Draft Plan refers to improving diversity and promoting social mobility as one of the priorities for the re-examination of the education and training of lawyers. The Bar Council supports this initiative and its new Research Section is gathering data and analysis for publication this year on the demographics of the profession (The Bar Barometer and Bar Survey). In addition, the Bar's new database will enable the collection and secure storage of individual level data, as recommended in the Neuberger Report, from students and practitioners across diversity strands and socio economic status. There are some significant gaps in our current data collection (e.g. practice area) but there are plans in place to rectify these. We would hope, and indeed expect, that the LSB will consult with professional bodies and regulators on its research proposals to ensure the research it conducts adds value and does not duplicate information already available.

21 Hitherto, the LSB has not done so and, for example, our Diversity Committee was rightly critical of the quality and value of the proposed study 'Diversity in the Legal Profession in England and Wales: A Qualitative Study of Barriers and Individual Choices' in respect of the Bar as it relied on a small number of individual barrister experiences and did not seek information from professional bodies regarding diversity initiatives and progress.

Building an evidence base

22 The Plan refers to the LSB's immediate equality and diversity priority to build an evidence base on the diversity composition of the "legal workforce" and to promote transparency about "workforce" diversity at entity level. It has done much to fulfil this objective and indeed its consultation entitled "Increasing diversity and social mobility in the legal workforce: transparency and evidence" sets out in detail how and by what means diversity information should be collected, analysed and reported by legal service providers and proposes regulators impose a regulatory requirement on providers to ensure data is reported.

23 The Bar Council, as an AR, is subject to the same general public equality duty as the LSB and to the specific equality duties. These require us to publish relevant diversity data by July 2011, conduct equality impact assessments of new and existing policies and publish our equality objectives by April 2012. It is of fundamental importance to meeting our equality duties.

24 We do not question the LSB's aim to build a diversity evidence base on those working across the legal services market for the purpose of equality impact assessment and evaluation of diversity initiatives and its goal to promote transparency at entity level. However, we do question whether it is appropriate for the LSB to prescribe to ARs exactly how they are to achieve these goals. The LSB's current proposal to collect diversity data through legal services providers/entities will not produce this data at the Bar as effectively and efficiently as collecting it through the Practising Certificate Fee (PCF) on-line renewal process. Each regulator is likely to want to adopt the approach best suited to its own circumstances.

25 The LSB will be aware of its requirement to have regard to better regulation principles so that their regulatory activities are "transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed" (reflected in Section 3(3)(a), Legal Services Act 2007). It is doubtful whether in relation to the Bar the relevant proposals described in the LSB's Draft Business Plan are necessary or appropriate to the Bar's circumstances. This is not to say that the Bar's systems are operating well in respect of data collection but the Bar Council has identified problems, it has a plan to address them and it is on target to achieve this.

Budget and governance

26 On the face of it, the LSB's budget for 2011/12 appears not unreasonable. There is no increase on the current (2010/11) budget, despite an increase in work being taken on, mainly as a result of the LSB's assumption of regulatory oversight of the immigration service, from the Office of the Immigration Services Commissioner. Although the regulated community, which bears the full costs of the LSB through their practising certificate fees, might draw some comfort from this Draft Business Plan, we wish to highlight three matters:

- (a) Paragraph 118 alludes to the possibility of the LSB becoming a Licensing Authority. The additional expense of that eventuality (which would have to be borne by the

regulated community) should not be under-estimated. When Part 5 of the Act is implemented and the ABS regime is in force, it will be difficult to predict the level of required or perceived need for the LSB to become more directly involved in licensing/regulation.

(b) The Draft Business Plan is unable to show the hidden costs of the LSB's functions on the regulated community. As the demands of the LSB grow and their involvement in specific issues multiplies, greater demands will be placed on the ARs (or their front-line regulator elements) to approach issues in a certain way or prioritise them as the LSB deems appropriate.

(c) LSB staff costs.

These are considered below.

Additional Licensing Authority costs

27 In relation to the first point, only time will tell whether there will be sufficient Licensing Authorities available to regulate the forms of ABS that seek to enter the legal services market, even though it has been reported that the LSB is already preparing itself to be able to regulate ABSs in the event that the SRA is not able to do so. The Bar Council considers that the LSB should ensure that this is reflected appropriately in its Risk Management (paragraph 130). For example, within the 'ABS Impact Assessment' material recently shared in draft with the ARs, the LSB acknowledges that there is a paucity of data about how the market might develop in relation to ABSs. Whilst the potential benefits are explored, there is very little assessment of the potential risks of the new regime. Since most of the additional costs would come from any required regulatory intervention as a result of the riskier adverse scenarios arising, we consider that the LSB could usefully include greater detail highlighting areas of potential risk. This is particularly important in relation to costs. The LSB has attempted to estimate the additional costs for regulating ABSs based on certain assumptions yet, it should be noted, the SRA (which has been planning to introduce its licensing regime in October 2011) have been unable to forecast those costs because of the various unknowns and key variables. It is insufficient for the LSB to rely on the ARs to mitigate these risks alone. It is only reasonable to expect the LSB, as setting the pace of change, to refer to them in its Business Plan.

Dealing with hidden costs of regulation

28 The risk that the LSB's priorities take precedence over those which have already been identified by ARs carries the concomitant risk that the ARs seek not only to meet the priorities of the LSB but also to deliver on their own business plans with the result that more resources are required to deliver both elements. The additional resources have to be met by ARs through increases in practising certificate fees. Although they will not appear on the face of the LSB's business and financial plans, these additional costs have to be borne by the regulated community as a whole. The 'hidden costs' associated with the LSB's interventions

in directing the activities and functions of the ARs could be (or become) significant and they cannot be ignored.

29 However a proper consideration of the role of the LSB as set out in the Act, envisages a relationship of partnership, based on mutual support and guidance between the LSB and ARs. In particular it is worth setting out in full Section 4 of the Act which provides:

(1) The Board must assist in the maintenance and development of standards in relation to—

(a) the regulation by approved regulators of persons authorised by them to carry on activities which are reserved legal activities, and

(b) the education and training of persons so authorised.

However, paragraph 24 of the Business Plan only paraphrases that section when it says:

Section 4 of the Legal Services Act 2007 provides that the Board must 'assist in the maintenance and development of standards in relation to regulation...'

This difference in emphasis is significant because the interpretation of the authors of the Draft Business Plan changes the role of the LSB from that of guiding ARs along a regulatory agenda to leading that agenda and setting the pace of delivery. The hidden costs of regulation which is passed on to practitioners will ultimately be passed on to consumers through higher professional fees. It is therefore in the public interest for ARs to have some input into the development of the LSB's Business Plan at a much earlier stage in the planning process to ensure that the costs of planned activities are reasonable and proportionate.

LSB Staff costs

30 We note, from the LSB budget for 2010/11 and predicted budget for 2011/13, that LSB staff costs are increasing although in the public sector, staff numbers and costs are decreasing by about 20% in order to reduce the national deficit. When there is clear downward pressure to save costs in the economy, the Bar Council would expect to see the LSB review the scope of its activity in order to establish whether and, if so, how a re-structuring of its activities might be undertaken in order to reduce its costs. It is not apparent from the Draft Business Plan whether such a review (in consultation with the regulated community or at all) has been undertaken. Such a re-structuring could be achieved by undertaking fewer activities, or by re-prioritising planned activities, or by looking to the regulated community, after consultation, to assume some of the functions and activities undertaken by the LSB's staff; a "Big Society" approach by ARs would surely resonate with the needs of the time. At the very least, the need for the LSB to work in genuine partnership with the regulated community, and in close consultation with those who fund its activities, is clear against the challenging economic circumstances facing the vast majority of practitioners.

Compliance burdens on ARs and practitioners

31 A sensitivity to the economic circumstances of the time, which we would expect to see reflected not only in the way the LSB develops its plans in consultation with the regulated community, settles its priorities and works collaboratively with the regulated community, should emphasise to the LSB the importance of minimising the costs and burdens of compliance, for example by avoiding the need for unnecessary research and information-gathering exercises to which we have referred above.

33 In enacting the Legal Services Act 2007, Parliament never intended that the LSB should supplant the role of front-line regulators (ARs) or micro-manage their activities. The LSB is required (Section 3(3)(a)) to have regard to the principles which should govern its interventions, namely transparency, accountability, consistency and targeted in approach. In addition to the costs and burdens that arise from duplication of, or unnecessary, activity which have been already referred to in relation to education and training as well as equality and diversity, we set out below three examples where LSB intervention has imposed unnecessary burdens and done little to instil confidence in the LSB with the profession at a time when the costs of regulation have to be accounted for:

- (a) **QAA Scheme:** It is entirely appropriate for the LSB to monitor progress towards the development of a Quality Assurance scheme for criminal advocates, but its intervention in December 2010, threatening enforcement action, was not only premature (because related consultations by the ARs were still live) but also misjudged, caused perhaps by a lack of knowledge and expertise in this area. As a result, the Bar Council was put to considerable effort in responding to the LSB. The exchanges which took place provided ample evidence to a number of practitioners that the LSB was seeking to do more than fulfil the statutory requirement to 'assist' the ARs and to develop a scheme according to its vision and to manage that process directly.
- (b) **Referral Fees:** Considerable time and effort had also been devoted by the Bar Council to provide a full exposition of referral fees as they affect the Bar. However, little notice appears to have been taken of those views with the LSB suggesting that they do not even exist in publicly funded criminal work (and that all that does is fee sharing amongst lawyers). The inference has been that if lawyers have suffered as a consequence of such arrangements that is permissible, whereas consumer detriment is not. However, to adopt this position is to give undue weight to certain of the regulatory objectives because the Bar Council would argue that this at least also impinges on access to justice, competition amongst service providers and adherence to professional principles issues.
- (c) **Chambers Complaints Handling - Signposting requirements:** The rationale underlying the LSB's insistence that barristers should inform their lay clients directly of their right to make a complaint to their chambers, and to provide information about their lay client's right to make a complaint to the Legal Ombudsman was understandable but there was a fundamental lack of understanding about how the working relationships between barristers, solicitors and clients actually work in

practice. As a result onerous compliance requirements were placed on chambers which have proved difficult to comply with in the way originally proposed. Although the LSB's stance has since modified and a revised approach is under discussion, a great deal of time has been expended to create a workable solution.

Wider public policy

34 We note, from the Introduction to the Draft Business Plan (p 7), the LSB's reference to "Ministers' continued recognition of the importance of our role as independent both of Government and the profession has strengthened the rule of law." We think it surprising, to put it no higher, that the LSB does not appear to have entered the public debate and to have considered the regulatory impacts of the reform of legal aid or the reform of civil litigation funding and costs reform, both the subject of major consultation exercises by the Ministry of Justice.

35 If it was serious about demonstrating its fidelity to the regulatory objectives, in Section 1(1) of the Legal Services Act 2007, we would have expected the LSB to want to demonstrate its independence of Government by participating in the debate, the outcome of which will have profound consequences for the nature, size and scope of the market for legal services of the future.

36 The regulatory objectives which the LSB must promote (Sections 1 and 3) give rise to corresponding duties on ARs to act in a way which is compatible with the regulatory objectives (Section 28(2)). It follows that the LSB must not only have an interest in the effects of cuts in legal aid on the environment within which ARs operate and the ability of providers of legal services to offer services to consumers, but also in the effects of such cuts on the LSB's ability to discharge its statutory duties. The ARs are also impacted because their action (or inaction), on behalf of their members, must be compliant with the regulatory objectives.

37 The Bar Council has argued that the Government's proposals undermine the regulatory objectives laid down by the Legal Services Act 2007. In summary, we argue that they run counter to the "public interest", will inhibit rather than improve "access to justice", and far from "protecting and promoting the interests of consumers" will undermine these interests. Given the acknowledged discriminatory impact of the proposals, the legal profession will not emerge "independent, strong, diverse and effective"; rather the reverse since countless women and BME practitioners – whose practices rely more extensively on public funds than their other professional colleagues – will be forced away from the work.

38 Far from delivering a simpler justice system, which is more responsive to public needs and which encourages people to resolve their disputes out of court using simpler, more informal procedures, the Bar Council fears that the Ministry of Justice proposals could lead to further disintegration of the justice system, higher costs and more delays. That is why the regulatory impacts of the proposals need to be studied very carefully to see how far they preserve or curtail access to justice. For the Bar Council's detailed analysis of the regulatory impact of the Ministry of Justice's proposals for legal aid reform, see: <http://www.barcouncil.org.uk/assets/documents/Bar%20Council%20Response%20->

[%20Green%20Paper%20Legal%20Aid%20Reform%20-%20Final%2014%2002%202011.pdf](#) in particular at paragraphs 38-53.

39 We therefore look forward to receiving an indication from the LSB of its response to the proposed legal aid reforms and how the results of its analysis will be reflected in the final Business Plan setting out its plans and priorities for 2011/12 in what will be a very tough operating environment for most legal practitioners.

Conclusion

40 The LSB's Draft Business Plan 2011/12 outlines another ambitious programme and we hope that these observations will be of some use. We are happy for these comments to appear on the LSB's website and, in accordance with our commitment to transparency and openness, we shall be placing a copy of this response on the Bar Council website.

41 We look forward to the publication of the LSB's final Business Plan and to working in partnership with the Board in the year ahead.

[3 March 2011]