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**THE CHAIRMAN  
MAURA McGOWAN QC**

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Ms Michelle Jacobs  
Legal Services Board  
7<sup>th</sup> Floor  
Victoria House  
Southampton Row  
London WC1B 4AD

4 March 2013

Dear Michelle,

**LEGAL SERVICES BOARD DRAFT BUSINESS PLAN 2013-14**

Thank you for giving us an opportunity to consider the Draft Business Plan 2013-14 proposed by the Legal Services Board (LSB).

This response is made by the Bar Council as the Approved Regulator of the Bar of England and Wales, on behalf of 15,518 barristers (12,756 self-employed and 2,762 employed barristers as at 14 February 2013). We understand that the Bar Standards Board (BSB), the independent regulator of the Bar, will be making its own response to your consultation. In our response we summarise the value of the Bar whose activities the LSB exists to regulate, in the public interest, as well as the consumer interest. We do attach importance to the proper regulation of legal services and, we explain below our general approach to assessing the LSB's business plan for 2013-14 and then focus our commentary on the cost and complexity of regulation and the LSB's plans for research. We also touch on the LSB's plans to review the levy which funds the work of the LSB and the Office for Legal Complaints (OLC).

**The value of the Bar**

The specialist advisory and advocacy services provided by barristers are valuable and they are valued by many of their clients, the consumers of barristers' services, who are being

drawn increasingly from overseas. The Bar makes a significant contribution to the City of London's position as a leading global financial centre. The Bar is making a growing contribution to UK legal services exports overseas. The Bar provides a vital front-line public service and makes an essential contribution to the efficient operation of the criminal, family and civil courts. The Bar has an important community value by providing a significant amount of professional time for free, in the public interest, by carrying out unpaid work and undertaking voluntary work in the community. The Bar has a vital role to play in our constitutional arrangements by supplying a pool of talented men and women from whom the judiciary is chosen, on whose independence the rule of law and democratic way of life depend.

### **Importance of proper regulation**

To ensure that a strong and independent Bar survives and flourishes, it is vital that the public and the consumers of barristers' services are confident that proper regulation exists to protect their interests and the interests of justice. Our approach to the regulation of legal services is based on the simple premise which underpins the administration of justice, namely that the justice system is here to serve the public. Barristers want to play their part in providing the public the justice system it deserves. Proper regulation is absolutely vital to the achievement of that aim.

### **Our approach to assessing the LSB's plans**

The LSB has already achieved much that it was set up to do. Since the new regulatory architecture was put in place by Parliament in 2007, the maze of regulation governing legal services providers has been streamlined and simplified. A unified system of complaints handling has been put in place (and appears to be working well) and greater liberalisation of the provision of legal services has been achieved including the delivery of such services through Alternative Business Structures (ABSs). The LSB, and the Approved Regulators through which it seeks to fulfil the regulatory objectives, have achieved many of the objectives they were set.

### **Generally**

The Bar Council's assessment of the LSB's business plan for 2013/14 focuses on what added value the supervisory regulator can bring in future (within the scope of the LSB's statutory mandate) to safeguard the value of services provided by the Bar and, in the public interest, to enable barristers to flourish. Our assessment is based on several considerations:

- The work which the BSB is currently doing to fulfil the regulatory objectives (having regard to the risk of duplication and overlap with the work plans of the LSB), the cost of which falls on the profession on top of the Bar's share of the cost of the supervisory regulator
- The current operating context in which barristers are seeking to provide services to the public (having regard to the general economic situation and the severe cuts in publicly funded services)

- The costs and burdens of regulation (having regard to the affordability of regulatory initiatives considered in the context of the current operating environment) which have to be passed on to consumers, private as well as public, or absorbed by the profession
- The improvement of greater access to justice (having regard to the processes of rule approval and overall time taken to approve rule changes)

In making our response to the LSB's latest draft Business Plan we recall our earlier observations (made in March 2012) to the LSB's *Draft Strategic and Business Plans 2012-15* and our response last year to the MoJ's Triennial Review of the LSB. Our overarching concerns then were that the LSB was not striking the right balance struck in formulating its plans having regard to what has already been achieved (by the LSB and the Approved Regulators who have a *joint* responsibility to fulfil the regulatory objectives) and what might properly be left for the LSB to do in the future.

We welcome the LSB's acknowledgement, in the Foreword to the draft Business Plan, that it needs to change, that it has "listened carefully" during the MoJ's Triennial Review and that it has "taken stock" of where the economy generally and the legal services sector within it now stand.

We were surprised therefore when the LSB Chief Executive admitted at the meeting of the BSB which he and the LSB Chair attended on 13 December 2012 to discuss "Proper priorities for regulation", that the draft Business Plan did not contain any attempt to contextualise its plans with any reference to the plight of legal practitioners in the publicly funded environment (beyond the general remarks in the foreword). We think this is a serious omission and we shall be looking for evidence which demonstrates the LSB's sensitivity to the economic challenges which many practitioners in publicly funded practice currently face.

We note that the LSB's focus of the year ahead will be on holding front line regulators to account on delivery of their performance. We look forward to applying performance indicators which could help, as well as other Approved Regulators and the wider public, to calibrate the LSB's regulatory performance and to receiving information beyond the limited measures which are covered in the section of the draft Business Plan at pages 38-39 which would enable more informed assessments of this nature to be made.

We also note that the Board recognises the challenge for regulatory boards to avoid micro-management of the minutiae of policy issues. We agree. We issue the same challenge to the LSB having regard to our experience of its approval process which dogged the approval of Standard Contractual Terms of Business for Barristers, for example. We very much hope that the LSB's rule approval process can proceed with all due expedition, consistent with protecting consumers, for rule changes in public access which have been approved by the BSB and await approval by the LSB. This will enable, without further delay, more than 4,000 barristers who have been trained to provide Public Access services to consumers, thereby extending consumer choice and improving access to justice.

## Diversity

Given the regulatory objective and the LSB's own priorities (page 13 of Plan) to promote a diverse workforce at all levels in the profession, it is particularly surprising that it continues to ignore the impact of current legal aid funding policies on diversity in the profession and the detrimental reversal on the achievements so far in relation to progression and the retention of diversity. We predicted a fall in diversity because of cuts to public funding of legal work and this appears to be happening.

Even the Lord Chief Justice considered it was a sufficiently important point to make recently when giving evidence to the House of Lords Select Committee on the Constitution on 30 January 2013. His comments followed an expression of concern that the CPS was failing to brief leading Counsel when they should:

"Diversity has many facets. This is one that causes me great anxiety. The overwhelming majority of female practitioners at the bar and people from the ethnic minorities at the bar spend their time doing publicly funded work—family work or criminal work. You have to offer them a reasonable career if you want to get them into judicial office 20 so that, over 15 to 20 years, they can make progress, earn more money, feel better rewarded and gradually demonstrate that they are of the requisite quality. What troubles me about the proposals and, indeed, the reality of the legal aid arrangements, quite apart from its impact on judges, is whether we will end up with a reduced number of women and people from ethnic minorities coming into the legal profession, and in particular the bar, and doing the sort of work that is the bread and butter work of most judges, most of the time. This impacts on diversity 10 or 20 years down the line. I think it is a long-term issue that needs to be considered."

In the Financial Times (27 February 2013), it is suggested that this year's Silk statistics hint at decreasing levels of diversity in the profession. Total numbers of applicants and total number of female applicants for Silk show a significant downward trend over a number of years. Actual BME applications are up this year but BME numbers are small and fluctuate. The FT also comments on a fall in diversity shown in the entry to the Bar figures. This downward trend is not surprising in view of the reports that publicly funded barristers are reluctant to apply for Silk when there is so little Silk work at the publicly funded Bar.

We continue to work with the JAC diversity Forum, report our progress as members of the Judicial Diversity Taskforce to increase judicial diversity and organise a range of information and outreach events to support progression and de-mystify application processes. However, there is no reference in the response to the LSB's business plan to all the activities the Bar Council is engaged with to promote diversity, yet this is another area of activity which the LSB could usefully tap into rather than taking a unilateral approach.

## Cost and complexity of regulation

We are pleased the LSB has responded to our concerns about the growing cost and complexity of regulation of legal services. We have commented on this issue in successive

responses to earlier invitations for views on the LSB's draft business plans and this issue featured prominently in our evidence to the MoJ Triennial Review of the LSB.

The growth in the LSB's costs and the steady growth in its regulatory ambition, have direct effects on the costs of front-line regulators. Between 2006 and 2012, overall expenditure of the Bar Council has increased by some 70% (up from £7.6m to £12.9m), a significant part of which can be accounted by an increase in regulatory activity much of which is driven by the LSB's plans. Preparing to meet the LSB's expectations in the Regulatory Standards Framework has resulted in a significant increase in planned expenditure by the BSB. Accordingly the LSB needs regularly to take proper account of the affordability of regulation, the cost of which falls directly onto the profession. While the cost of regulation has been increasing, the remuneration of many at the Bar who depend on public funding has been decreasing and the market for their services has been contracting. The LSB needs to be aware in formulating its plans for regulatory oversight activity that between 2010-12 barristers who undertake Crown Court cases where the trials lasts between 1 and 40 days have had their fees reduced by 13.5%. In longer cases their fees have been cut by as much as 40%. From April of this year, the scope of publicly funded work will contract significantly as the Legal Aid, Sentencing and Punishment of Offenders Act takes effect.

We are concerned that the LSB appears to avoid referring to significant changes such as these, which are having such profound effects on the environment in which barristers practise their profession. If regulators are insufficiently sensitive to the combined effects of cuts in legal aid and reductions in the scope of public funding, coupled with general economic austerity, the credibility of the oversight regulator as well as the Approved Regulators to ensure proper regulation, which the profession needs, will be undermined.

We shall wait with interest to hear more about the LSB's plans (referred to in paragraph 73 of the draft Business Plan) for investigating the cost and complexity of regulation. We look forward to being given a full opportunity to participate in the LSB's inquiries including in relation to the proposed "analysis of the cost imposed on the market by expenditure of representative bodies on permitted purposes." The costs in issue relate to representational activity in education and training, the provision of practical support and advice about practice management, participation in law reform and the legislative process, and the promotion of relations between the Bar Council as an Approved Regulator and relevant national or international bodies, governments or the legal professions of other jurisdictions (see section 51(4) of the Legal Services Act 2007). We see these activities as being "public goods" for which, as a responsible profession, the Bar undertakes to carry a share of the costs, in the public interest and not in its own self interest.

In relation to investigating the cost and complexity of regulation, we urge the LSB not to lose sight of the need to consider the total burden of compliance. Examination of compliance cost should not be confined to direct costs but the full cost of compliance which could include the costs of overcoming barriers to entry (as well as exit costs in appropriate cases such as run off indemnity costs).

Finally in relation to this matter, we repeat the point we made in our response the LSB's *Draft Strategic and Business Plan 2012-15*. In common with the Bar Council's budget and business planning processes, the LSB should similarly have to provide a developed case to justify any new regulatory initiative which would result in further costs for itself or Approved Regulators, in much the same way as the Government's Better Regulation Executive requires Whitehall departments "to consider the net cost to business or civil society organisations of any new regulatory cost."

## **Research**

In their Foreword to the draft Business Plan the Chairman and Chief Executive record (at page 8) their pride on the light the LSB has shone on the operation of the legal services market through the LSB's investment in primary research. They comment on the recognition they have received for this from many in the legal services community, including academics, but they note their inability to generate a similar level of enthusiasm from representative bodies and many regulators. Like all the LSB's other activities, research commissioned by the LSB has to be paid for and it is the profession which pays the LSB research budget (£250,000) when practitioner resources are already stretched and the Approved Regulators have their own research programmes. We understand the LSB wishes to expand its research activity for which it is seeking partners to join it in funding or co-funding specific projects.

We also understand that in order to be effective regulatory policy development needs to be evidence-based and that may include the commissioning of independent and credible research. It is therefore essential that any research commissioned by LSB is relevant, is not going to duplicate research being undertaken elsewhere and will deliver Value for Money.

We will be responding separately to the recent publication of the research into the Cab-rank rule, conducted in the period covered by the previous Business Plan. We have serious reservations about this particular piece of research, the need for which is not clear. We are even keener to better understand these drivers following receipt of a response to the Bar Council's FOIA request for information related to that research. We are concerned that £21,367 was spent on research that the Bar Council believes is of questionable quality and which the LSB itself indicates will not result in any sort of consultation. If the driver was to better inform the LSB itself of the background and application of this rule, it must be said that there is a wealth of knowledge, expertise and material at the BSB, as front-line regulator, which arguably should have been accessed before incurring new costs which have led nowhere.

We have already indicated our interest in understanding the cost and complexity of regulation and we note this is listed among a number of potential research projects identified at pages 28-29 of the draft plan. We look forward to learning more about how externally commissioned research would illuminate this issue and the added value this would bring to what Approved Regulators themselves would be able to contribute before any decision is taken to include it in the LSB's final research plan to be published in April 2013. We note the inclusion in the list of potential projects one on public access to the Bar to "improve understanding of the role that public access plays and the clients served." We

would be very concerned if conducting such a project had the effect of delaying the approval for rule changes in public access which have been submitted to the LSB by the BSB, for which the Bar has been calling for some years in order to widen consumer choice and to improve access to justice.

We also note, amongst things, in the list of potential projects, a project to conduct research into "Client communications" in order "to explore how best to deliver client communications". In relation to another project described, somewhat opaquely, as "General legal advice" a project to test "the risks of general legal advice". We are not at all clear why these projects have been selected for consideration nor what the drivers behind them are, nor the costs of the individual projects listed nor the benefits which might be expected to flow from undertaking such research. We would expect much tighter definition of potential research projects to be provided to address these points. We note the existence of the LSB's Research Strategy Group (referred to in paragraph 78) which, presumably, has a role to play in this respect and we look forward to being involved in its work to satisfy ourselves of its relevance, to provide the needed degree of specificity and to assure ourselves of the value for money we would expect.

### **Reviewing the levy**

We note that (paragraph 95) the LSB intends to review the methodology for collecting the LSB and OLC levies and a timetable for this work is outlined (paragraph 102). We would be interested to see what possible amendments might be contemplated at the earliest opportunity in order to be assured that there is sufficient notice to implement efficiently any subsequent changes within the Bar Council's practising certificate fee collection timetable (currently itself subject to review and potential amendment).

### **Conclusion**

We conclude this response as we did last year by commending the LSB for much of what it has achieved since it was established. We want in this response to reiterate the need for the Board to focus on its core duties of regulatory supervision, to avoid mission creep and the duplicating activities properly to be undertaken by front-line regulators and to ensure that its research is relevant. In relation to mission creep for example, we find it hard to understand the justification for the LSB to incur costs of £1,856.25 plus VAT in relation to the preparation of written submissions for the Supreme Court hearing in the *Prudential PLC and Prudential (Gibraltar) Ltd v Special Commissioner of Income Tax and Philip Pandolfo (HM Inspector of Taxes)* case. As well as those direct costs, the costs of staff time of the LSB in-house legal team and attendance at the Supreme Court also have to be added.

We welcome the LSB's intention to be open about these matters and look forward to reading the final version of the Business Plan for 2013-14. We shall look forward to being provided with information in the year ahead to enable us to measure the LSB's performance as a regulator. We are content for the LSB to publish this response on its website as we shall do on the Bar Council website.

Yours sincerely,

A handwritten signature in black ink that reads "Maura McGowan". The signature is written in a cursive style with a large, prominent 'M' and 'G'.

**Maura McGowan QC**  
Chairman of the Bar