THE CHAIRMAN
MICHAEL TODD QC

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Dear Nicholas,

Legal Services Board's (LSB) Draft Strategic and Business Plans 2012-15

The Bar Council is grateful for the opportunity to comment on the LSB's draft plans for 2012-15. Our views will be elaborated in the broader response which the Bar Council is developing in relation to the Triennial Review of the LSB by the Ministry of Justice (MoJ).

The continuing role of the LSB should be consistent with the will of Parliament that the LSB should be an oversight regulator (as reflected for example in section 49 (3) of the Legal Services Act 2007), and with better regulation principles. We suggest that the LSB should be mindful of the Prime Minister's clearly expressed wish *'to be the first government in modern history to leave office having reduced the overall burden of regulation, rather than increasing it'*.

We agree with the LSB Chair's assessment that the first phase of the LSB's work has been completed now that the key elements of independent regulation are in place, *'distanced from the inappropriate influence of representative interests'* , and that *'constructive debate with the representative arms...of the approved regulator'* is essential. The Bar Council's representative arm also has an important role to play in helping the LSB achieve its strategic objective of *'helping consumers to choose and use legal services with confidence'*.

The Bar Council shares the LSB's recognition that getting the *'balance of regulation'* is right. In the remainder of this response we indicate where we consider that the LSB has not struck the right balance in formulating its plans.

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The Devil is in the Detail

We observe that in a number of areas the drafts make assertions without giving any guidance as to how they might be translated into practice. We instance the claim in paragraph 64 that the LSB *'will ensure that the recommendations [as to education and training] will deliver the necessary reform in the context of the global legal market'*. Such statements sound effective, but are meaningless without detail. We address below the more important question whether such projects are within the terms of reference of the LSB, and if so, whether it should be venturing into areas where the front line regulators have shown that they are doing an effective job.
The absence of significant detail pervades many other areas of the drafts. By way of further example, the Strategic Priorities for 2012-15 appear reasonable but it is not clear how their success will be measured. The reduction in the LSB's budget is to be welcomed (albeit by only half of what Whitehall have been instructed to achieve, as we highlight below, and still substantially above the level predicted at the time of the Legal Services Bill). It is not clear how this has been achieved (except possibly by treating depreciation differently on the balance sheet). There is no reference to the removal or reduction of particular work streams, or any breakdown of their costs. The LSB's headcount has been reduced but, unlike the last iteration of the plan, no numbers have been given and the organisational chart annexed provides insufficient detail of how the reductions are to be achieved or with what effects.

We note the LSB recognises the need to work collaboratively and in *'strong partnerships'* with others in developing and implementing their plans, but there is little indication of how key relationships with the regulated community might be managed in practice. This does little to reduce the impression that the LSB's preferred mode of relationship management is based on micro-management of front-line regulators to which we referred in our response last year.

Oversight Regulator or Micro-Manager?

We note that in his foreword the LSB Chair comments that the LSB has *'neither the ambition – nor the resources – to assume the role of the frontline regulators'*. However, the LSB's Plans disclose a level of ambition to be involved in areas of activity that we consider are either properly the province of the Approved Regulators themselves, or that fall outside the LSB's terms of reference altogether. Consider the following examples:

- **Licensing Authority:** We do not think that the case has been made by the LSB for it to prepare to become a Licensing Authority. This appears premature (as well as potentially costly) when there is no evidence that a Licensing Authority *'of last resort'* is, or at this stage, will become necessary.
- **Legal education:** For the LSB to be driving forward a broad review of legal education and training at this stage seems to us at best to be second-guessing the outcome of the exercise being carried out by the front-line regulators. In

this connection, we are concerned to note the assertions driving the LSB's views (which appear to be based upon thin anecdotal evidence, and which have not been based upon any proper investigation) that lawyers are being recruited and trained *'for practice in a bygone age'* (page 10) and that *'there is a significant risk that England and Wales will fail to keep up with the changes in global markets for both legal education and legal services'.*

- **Fulfilling general statutory obligations**: Page 28 of the draft sets out the LSB's intention to *'analyse the first year's data [in relation to diversity, that the front line regulators will have procured] to produce a benchmark for future years' analysis'.* We imagine that the LSB would readily accept that the front-line regulators will be carrying out their own analysis of this data. If so, in the absence of compelling reasons to suggest that they cannot properly perform the statutory objectives assigned to them, the front-line regulators should be left to conduct their own analyses and make their own judgment based on their knowledge and expertise. The extra work and cost involved in the LSB's proposed duplication of this activity is unwarranted. Such examples abound in the drafts.
- **Approaches to quality:** The LSB's preference for an approach that is based on micro-managing Approved Regulators is evident from the draft plan when it states it *'will not hesitate to steer more direct interventions'* in this area; this smacks of being heavy-handed and operating in a way that we do not consider Parliament intended when it enacted the Legal Services Act 2007.
- **The use of monitoring:** We note with concern the repeated references in the drafts to the use of monitoring to identify the outcomes and effects of the new regulatory arrangements. We question whether this is an appropriate and effective use of resources – and indeed whether it is possible to conduct such monitoring in relation to the 17 measures set out on page 16 (many of which appear duplicative in any event). For example, how is an improvement in quality of legal services proposed to be measured? What is the benchmark for assessing confidence in the independence and regulation of the sector (and in what way is this different to the 'wide confidence of the public in the standards and ethics of the legal profession')? How is it proposed that access to justice by a higher proportion of the public is to be computed?
- **Stimulation of the market for legal services:** We refer above to the involvement of the LSB in activity that falls outside its terms of reference. Nowhere in the Act (save through an oblique and generous interpretation that is quite at odds with the current economic and political climate) is there any remit for any of the regulators to stimulate a growing market for legal services – and yet this is a role chosen by the LSB for itself (paragraph 6). There is not, we suspect, any public appetite for recourse to the law save where necessary. In that sense, legal services is not a 'market' that should function like others, and use of language borrowed from other sectors is undesirable and out of line with the statutory objectives.

Our observations about the LSB are borne out by three cross-cutting themes that feature in the LSB's plans which we deal with below.

Lack of Understanding

We consider that there is a real risk of duplication of effort between front-line regulators and the LSB, which results from misunderstanding of its role as an oversight regulator. That role is to satisfy itself that the front-line regulators have the most relevant knowledge, experience and expertise relating to their particular area of the legal services sector. The LSB is entitled to look to the front-line regulators to act appropriately and in accordance with the regulatory objectives in developing and changing their regulatory regimes. In practice, this does not always seem to be the case. For example, in relation to equality and diversity work, whilst the Bar Council welcomes the LSB's commitment to promoting and supporting these issues, it is surprised that the LSB does not recognise that the record of diversity monitoring at the Bar has been an extensive one. Instead, it states that there has been a disappointing lack of progress made in the profession. Similarly, given the LSB's commitments in this area, it is surprising that the LSB makes no reference to the potentially adverse impact on access to, and progression within, the profession of the current legal aid reforms.

Further evidence of the LSB's lack of understanding of the profession of barrister concerns the proposed New Contractual Terms of Work. Leaving aside the fact that the LSB has been advised by a firm of solicitors which had committed itself to certain views (and was a respondent to the Bar Council's consultation), the LSB seems to have misunderstood fundamental issues about the flexibility for barristers and solicitors to agree other contractual terms, the role of the cab-rank rule, the fact that the new terms would not be default terms, the fact that they allow total flexibility to negotiate on terms and price and so on. The result is that much extra and duplicative work continues to be done in relation to this particular Code of Conduct change application.

Another example relates to a lack of understanding in relation to the public access system and the recent associated application to amend the Code of Conduct. The result is that considerable time, effort and cost has been expended on further explanation for the LSB when the BSB, as the responsible front-line regulator of the Bar, had largely satisfied itself of the need for change. Such delays are in no-one's interest including the consumer; there are real public interest reasons for amending the scheme but delay and duplication deny broadening access to justice, and limit consumer choice. Nor does this accord with the Government's vision, which the Better Regulation Executive exists to fulfil, of *'reducing oversight and inspection of organisations where effective self-regulatory systems and controls exist'*.

Lack of Realism

We recognise that the LSB has achieved many of the tasks imposed upon it by the Legal Services Act in a relatively short space of time. Now that the Internal Governance Rules have been implemented, it is clear beyond any doubt that the

decisions of the regulators are made independently of any influence from the representative arms to which they are connected. The need for extensive monitoring or second guessing of the front-line regulators, if it existed, has passed. Now that the first phase of the LSB's work has been successfully implemented, the Bar Council expects that the LSB will have less to do and will step back from several functions (not least because they are being performed by the Approved Regulators themselves, who are closer to the markets they seek to serve than the LSB can be with its necessarily limited statutory remit and resources). Not to do so, particularly in the current economic climate, is unrealistic and unnecessarily keeps the cost of regulation high which ultimately gets passed onto the consumers of legal services. A 9% budget cut is a step in the right direction but is nothing like the 20% savings targets expected of Whitehall departments or the 25% cuts which the Crown Prosecution Service, for example, is expected to deliver. Against that backdrop, the Bar Council would expect the LSB's budget to have been cut by 20%. The fact that the LSB's planning assumptions proceed on a more generous basis fuels the belief among practitioners that the LSB's plans are not sufficiently grounded in realism or reflect the harsh economic realities that many in practice at the Bar (especially the publicly funded Bar) are currently experiencing daily.

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 the front-line 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.'*

Overconfidence

Because of what it has achieved to date, the tone of the LSB's draft plans indicates a degree of overconfidence from the LSB. The Chair comments in the foreword that it could be argued the LSB is *'uniquely placed to identify and articulate the broader strategic risks that need addressing across the legal services sector'* but in doing this, the LSB should be facilitative rather than dictating the approach and second-guessing front-line regulators. The Bar Council is concerned that observations such as references to *'the patchwork of different regulators and different patterns of regulatory protection in different services'* allude to a desire for a super-regulator role rather than one which analyses and corrects the regulatory environment to ensure consistency of approach among all front-line regulators. As the LSB's plans rightly say 'one size does not fit all' but there are other signs which suggest this is the approach that is in reality being taken.

Quite rightly, the LSB focuses on the consumer and its own role of *'opening the market'* but again this should be facilitative only because, as the drafts acknowledge, *'embracing the change is not compulsory'.* Changes to existing models of practice, as recommended by front-line regulators, should be regarded as just as valid by the LSB as opening the market to new entrants and entirely new business models. Instead, some of the views about future changes come across as being absolute.

Conclusion

The LSB has achieved much and should be commended for it. However, the Bar Council believes that the LSB's scale of operations should now be reduced to reflect the achievements it has made, to avoid the risk of mission creep in the future and the encroachment on the roles of front-line regulators which Parliament never intended.

Yours sincerely,

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Chairman of the Bar