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Dear David

### **Legal Services Board Business Plan 2011-12 – BSB response to consultation**

Thank you for the opportunity to comment on the Legal Services Board's draft business plan for 2011-12.

#### **Regulatory Objectives**

The Board is concerned about the overarching approach taken by the LSB in its business plan in relation to the regulatory objectives. The LSB has equated the public interest and the consumer interest and has then treated this hybrid as a predominant objective. We do not believe that accords with the requirements of the Act. Nor did the LSB's paper on Regulatory Objectives, In July 2010, foreshadow such an approach.

The Legal Services Act 2007 does not prioritise the regulatory objectives and it is clear from the Explanatory Notes that this was deliberate. We would accept that "protecting and promoting the public interest" has a good claim to be the predominant regulatory objective and that a number of the other objectives could sensibly be regarded as particular manifestations of this public interest (for example, access to justice and upholding the rule of law). We note that this view has recently been expressed by the Legal Services Institute (Interim Strategic Discussion Paper dated February 2011 "The Regulation of Legal Services: What is the Case for Reservation?") However, it is a quite different matter to treat the interest of consumers as having an equivalent predominant position amongst the objectives. The public interest and consumer interest are quite distinct concepts and are subject to separate objectives. The public interest may at times need to be prioritised over the interests of consumers. It appears that the Legal Services Institute agrees with our analysis in this respect (see p16 of the Discussion Paper).

Prioritising, as a blanket approach, the consumer interest, as the LSB appears to do by treating the "hybrid" objective as underpinning all proposed workstreams, appears to the BSB to run the considerable risk of producing results which do not properly reflect the requirements of the statute. Further, it may quite possibly have the effect of imposing upon the Approved Regulators, in turn, a particular policy as to how they too should prioritise the regulatory objectives, which is not appropriate.

We consider it vitally important to remember that there are 8 regulatory objectives. There is a potential tension between some of the regulatory objectives that requires a considered

judgement to be made in each case as to the right balance to be struck in that particular case. For instance, a risk to the rule of law may outweigh a possible benefit to the profession or to consumers, which would mean that protection of the rule of law ought to be prioritised in the given case. The BSB is firmly committed to understanding and reflecting the consumer interest and recognises that the LSA 2007 requires it to have regard to the regulatory objective relating to the consumer interest, as all approved regulators and the LSB must also do, but it does not follow from this that that particular regulatory objective must be given priority over the others. The BSB urges the LSB to reconsider the approach taken in the business plan accordingly.

### **Role of oversight regulator**

The Act draws a distinction between the roles of Approved Regulators and the role of the LSB as oversight regulator. The LSB is responsible for ensuring that the systems and processes established by all approved regulators (or their regulatory arms) are fit for purpose and that an approved regulator is making its decisions reasonably after considering the correct matters. The Act's enforcement powers envisage that the LSB may only impose decisions by way of directions or otherwise assume a front-line regulatory role if this is not happening (i.e. not only are the regulatory objectives being adversely affected by an act or omission by the approved regulator but that act or omission was unreasonable and enforcement action is a proportionate response: see s49 LSA 2007).

Section 4 is also relevant in this respect. The BSB does not see that section as giving the LSB any primary role, rather it clearly obligates the LSB to “assist... in relation to the regulation *by approved regulators*” [emphasis added].

The statements in the business plan regarding section 4 do not reflect this. Rather they seem to indicate that the LSB sees section 4 as justification for acting directly itself. This does not accord with our reading of section 4, which we see as obligating the LSB to assist approved regulators if they ask for it or if a need is identified by the LSB and the ARs agree that assistance or action is necessary.

Accordingly, the BSB considers that the LSB should, as oversight regulator, be focussing its activity on areas where the ARs agree that assistance from the oversight regulator would help them better promote the regulatory objectives in their own spheres (we accept that there are some areas where a program led by the LSB can help coordinate efforts but it is for the ARs to identify and agree the areas where they want that assistance) and/or areas where action from the LSB in its oversight role is necessary and proportionate to remedy unreasonable acts or omissions by the ARs that are adversely affecting the objectives.

The judgment as to how best to achieve the regulatory objectives within their sphere of responsibility is for the individual Approved Regulators, who must draw up their own business plans, identifying their own priorities in that respect and allocating their own budgets appropriately.

As a general comment, the proposed draft business plan is not consistent with a limited, oversight role. To a very significant degree it risks taking the initiative away from Approved Regulators and requiring them instead to prioritise such workstreams as the LSB determines should be prioritised, in the ways and within the timeframes the LSB determines. This approach to setting the LSB's business plan makes the Approved Regulators, in effect, merely the agents of the LSB in implementing a global business plan produced by the LSB for regulation of the legal services sector as a whole. We believe the direction of travel should be the other way: the LSB's business plan should grow out of dialogue with Approved Regulators as to whether they see areas where the LSB could assist their efforts.

We emphasise that these comments relate to the proper role of the LSB, generally, and are independent of the merit of any given, particular workstream.

We think this symptomatic of a difference of view between ourselves and the LSB as to the proper boundaries of the LSB's role as oversight regulator, which we think it helpful to articulate so that it can be discussed and resolved. As the BSB has previously stated in response to the LSB's consultation on the Compliance and Enforcement Statement of Policy, it is not for the LSB to substitute its view for that of an approved regulator simply because it would have made a different decision had it been the frontline regulator itself. Nor is it appropriate to fetter an approved regulator's discretion in order to force it to make the decisions which the LSB would make, or to prevent decisions that the LSB might not have made, if the Approved Regulator's proposed approach is a reasonable approach to promoting the regulatory objectives.

### Proportionality

The sheer volume of different projects proposed on the part of the LSB within one year will in itself impose a very significant cost burden on ARs, even if it the plan did not also (as we think) in effect dictate their priorities. This in itself raises questions of proportionality.

The LSB's business plan again outlines an ambitious work programme, as was the case last year. We were grateful last year when the LSB understood the demands on the regulators and limited its "root and branch" examinations accordingly. The LSB is aware that the coming year is again a significant one for the approved regulators. Some will become licensing authorities. Others, such as the BSB, will be carrying out significant work in order to make their own decisions about becoming a licensing authority. The education review will require resources that were not anticipated at the beginning of our planning cycle. We also have a significant body of work just carrying out our business as usual activities which all frontline regulators are required to undertake.

The BSB also notes that an ambitious work programme increases cost to the regulated community, and hence to customers. We note the emphasis in the recent Government White Paper on healthcare regulation on keeping down the costs of regulation and consider it may be helpful for the LSB to consider its work programme within this context.

In summary, the LSB is asked to consider carefully the breadth of work it has indicated it wishes to undertake and the burden that will place on regulators in addition to their own work programmes.

### Comments on specific aspects of the business plan

The LSB's business plan has been examined in more detail and comments are attached as Annex 1.

### Areas suitable for LSB assistance

The LSB indicates that it wishes to set out the key principles for education and training against which all reforms will be assessed in section 3D. The BSB is not opposed to this, provided it is at a sufficiently high level to ensure that the frontline regulators still maintain the discretion anticipated by the Act. It would be inappropriate, however, if it were done in a way that removed that ability. There must be scope for variation and the range of options that could be taken. Any targets or outcomes to come out of the education review would necessarily need to be set at a high level. An overly prescriptive or detailed set of targets would mean the LSB would be leaning towards micro-management of the front line regulators and their activities, which is not consistent with the objectives of the Act. (Indeed,

the Act prescribes specific conditions before the LSB can prescribe performance targets for an Approved Regulator and we are sure it is not being suggested that those conditions have been met here.)

The LSB is in a unique central position to generate debate and consider cross-cutting issues. It has a perspective that none of the approved regulators can replicate. The BSB welcomes the LSB working on cross-cutting issues such as referral fees. The BSB encourages the LSB to develop a deep understanding of how referral fees work within all parts of the current legal services market, as well as within the market. Extending this to considering how it might impact upon or potentially distort the post-ABS implementation market would also be valuable. Given the change in responsibility regarding immigration, the LSB's planned work to understand this area and then look at interventions across the sector seems a necessary and sensible part of the work programme.

In terms of other work areas that would be useful, the BSB considers that the LSB might usefully look to develop a work programme to address regulatory objective (g) – “increasing public understanding of the citizen's legal rights and duties”. This is a difficult area for individual approved regulators to progress, so the LSB's unique central position could be utilised to assist in this regard. The BSB would support the LSB pursuing activity in this area.

The BSB is also mindful of the need to ensure we do indeed capture the best of what is happening, not just in the work of approved regulators but within the professions themselves. The business plan could usefully show a greater recognition of the fact that there is significant good practice on the part of many of the people that approved regulators regulate. We know we all have a job to do to improve what's not working effectively but equally we should also be seeking to learn from the good practices where we can. It would be good to see this more consistently or regularly stated by the LSB. Seeing the LSB seeking to acquire a greater understanding of how all parts of the profession operate in practice would be a positive step.

In conclusion, I wish to emphasise that we obviously have much in common. We all want to make sure the Legal Services Act is effective in its operation. We want to make sure that we work well together, recognising the LSB's oversight role and ability to take action if absolutely necessary. We also want to use our limited resources as well as best we can. We want to avoid duplication and we want to get things done. We want the next year to be successful. We think we can achieve that by combining our different skills and attributes at the right levels. In our view that will ultimately meet all the regulatory objectives in the best way possible, protecting the public interest as well as the interests of consumers by doing so. We would be very happy to discuss with you any aspects of this response if that would assist us in meeting those goals.

Yours sincerely



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