RESPONSE TO CONSULTATION ON LEGAL SERVICES BOARD BUSINESS PLAN 2010/11

I have practised as a "High street " solicitor in and around Oxford for 27 years, I am a member of the Council of the Law Society and sit on the committee of the Berks Bucks and Oxon Law Society. The views set out in this response are my personal views.

1.The Legal Services Act 2007 (LSA) defines the Legal Services Board (LSB). It sets out its constitution and functions in some detail. It does not give a philosophical or other objective for the LSB: there are no mission statements in the LSA.

2. What there is in the LSA has to be teased out. S3 of the LSA (despite the title of the section) states that in discharging its functions the LSB must act in a manner compatible with the regulatory objectives set out in s1. It does not say (as it could have done) that a freestanding function of the LSB is to drive exhort or promote the regulatory objectives. S4 states the LSB must "assist" in the "maintenance and development" of ".. regulation": it could have said "lead" or promote" but is does not. S49 (3) states in relation to a facet of its job it must bear in mind "… the principle that its principal role is an oversight regulator". The LSB powers of enforcing its will against an Approved Regulator (AR) are governed by s 49(4): it should only act if the AR has been (presumably "Wednesbury") unreasonable.

3. It is clear from its published material that the LSB understands the wording of the Act and that it is an oversight regulator. It is equally clear that in both its general outlook and in detail it is taking a very active role in driving the agenda and determining what regulatory policy should be. This is set out in various places in LSB literature but is most succinct at para 2 page 8 of the business plan 2010/11.I would suggest this goes beyond the LSB's role as set out in the LSA: an alternative and perfectly rational reading of the LSB's role from the LSA would be that its function was to set up the framework for independent regulation following Clementi, set up the framework for the regulation of ABS's and thereafter sit back and make sure things were ticking over, and occasionally if requested to help and co-ordinate initiatives set by an AR (or ARs) under s4.

4. From its various consultations it is clear that the LSB has made up its mind in some areas not only what the problems are but also what the answers are and will drive the agenda until its intended result is achieved. In it's consultation on licensing for ABS's the LSB has clearly come to the conclusion that ABSs are a good thing (para 82 of that consultation and paras 32 and 33 of this plan) and , although I appreciate the position is more nuanced in this respect , that ABSs will increase access to justice. The LSB has set an arbitrary time table for the introduction of ABSs by mid 2011. It has decided that QAA is not only needed but a scheme must be in place and running by mid 2011.

5. I believe that the LSB is potentially exceeding its powers in taking such a deterministic view of the market and that it ought to generally act in 2010/11 in a potentially slower manner and to consider in detail views that oppose or do not co-incide with its own and not to pursue its agenda regardless. Although I am concerned about the detail of what the LSB proposes I am more concerned by the dogmatic attitude it takes in dealing with issues rather than necessarily the issues themselves

6.This attitude is most apparent in respect of two particular matters in the workplan 2010/11.

7.ABS. In 2010 the LSB will spend considerable energy in dealing with the licensing rules for ABSs. The legal and business marketplace is changing rapidly and would be doing so even if the LSA did not exist. Commerce is substantially electronic: methods of attracting and retaining clients, how legal services are provided, by whom and where from are all on the move. The advent of ABS will probably act as a catalyst for accelerated change. However it does not mean that because it is different it is better or worse for either the profession or the client/consumer: it is just different. Time will tell. The LSB may hope it is better but that is not proven and the LSB should not proceed upon the basis it is .In terms of the work to be done by the LSB in 2010 this will be important in several areas.

7.1. In its consultation on licensing rules for ABSs the LSB seeks to prevent LAs from taking a particular view as to the meaning of access to justice and to protect face to face advice. Taking into account the view expressed at para 24 on page 35 of this plan it is difficult to see how this could "improve" access to justice. I do not suggest that LAs should have rules that specifically support face to face high street practice but equally the LSB should not assume ABS will produce a better model and should allow LAs to take into account <u>all</u> factors in considering applications.

7.2 In its consultation on licensing rules for ABSs the LSB is concerned about artificial barriers to the market. The responses received from previous consultations suggest that most lawyers think there should be equivalent regulation for ABS's as for current law firms: the fabled level playing field. I think it is also important that ABS's are brought up to existing standards rather than allowed to comply with some lower criteria with the rest of the profession then dumbing down. The LSB should not regard regulatory matters which it might be difficult for ABSs to comply with necessarily as mere irritants and barriers but potentially proper regulatory precautions. For example there is no consensus as to whether a single renewal date for PII is sensible or not : ask two " experts " you get two answers. The SRA do not see the merits of a variable date: the Law Society does: the LSB should not predetermine the argument in favour of a variable date just because it might be inconvenient for ABSs otherwise .Proper regulation is not necessarily easy regulation.

8. The LSB has said from an early stage that it would like ABSs to be ready by mid 2011.This was an arbitrary date. I do not think that the LSB should drive the agenda so that this achieved at all costs .I can only deal with the solicitors profession: however the SRA has from almost a standing start to convert to a largely entity based regulator by the autumn 2010, will have to convert to outcomes based regulation by mid 2011 and also have all its ABS's licensing regimes in place by the same time. This is a lot of work: it says it can do it; we hope that it can. However it is better that the system should be right rather than ready in 2011 and if there is slippage against the timetable the LSB should allow this. In this respect I do not think it is appropriate that the LSB should as early as Q2 2010 (activity 3 on page 16 of the plan)set up a scoping exercise to become a LA itself when at that stage it is unlikely it will have formed much opinion as to whether the SRA (and other potential LAs) are on track nor received any formal applications to become a LA. It is implicit from this that in Q1and 2 2011 that if the LSB is dissatisfied with progress it will need to recruit and set up a shadow LA at presumably a potentially large cost (payable by the profession) just because there is a potential delay against its self determined deadline. I would suggest that any consideration of the LSB becoming an LA should be postponed until it is transparently clear either that a major potential LA will be substantially delayed in its application to become an LA or is not capable of making a proper application to become an LA.

9. Quality assurance for advocates.

9.1 Over the past year or so various strands have come together (almost co-incidentally) dealing with the issue of how to bench mark advocacy. These are set our in more detail in the SRA ,BSB and Ilex consultation but include the CPS continuing in-house training and the LSC seeking to ascertain via Cardiff University if it can set up a sensible benchmarking system that it might require those who undertake legally aided work to comply with. It is also true that a greater variety of qualified lawyers are undertaking advocacy and that various parts of the legal profession are moving into areas previously the domain of others. There will always be a few lawyers who are incompetent in their field and there is no reason to believe this does not apply in advocacy. However as the joint consultation states at para 10 all that can be said is that there is ".. anecdotal evidence about a minority of advocates allegedly not performing to appropriate standards". It is a long step from here to suggest that reform is urgently needed and an even further step to suggest that the answer is a " comprehensive quality assurance scheme for advocates" (para 75 of the plan).As the joint consultation states (para 49 p 15) " this consultation paper constitutes the start of a programme of work towards proportionate quality assurance of advocates. It is a long and difficult road".

9.2 There are a variety of routes that QAA could take. The current joint paper is very tentative and only seeks to seek to see if a core set of competencies for a criminal trial

can be agreed. The consultation ends at the end of March 2010.The competencies set out in the paper may be agreed but more probably will be refined .JAG will then need to consider if these can be extended to other fields of advocacy: those in the current paper are crime specific. Although this is not set out in the paper JAG will also need to consider how far and low such competencies should go: should they extend to say interlocutory hearings in chambers in family work before a district judge or tribunal work generally and if so which tribunals. Appeals before Tax Commissioners are very different from immigration work. The current competencies proposed would seem to be aimed lower than the current HRA (and certainly QC) schemes .The paper also sets out helpfully how the profession currently attains the capability of meeting these criteria: they differ but are mainly in the education phase (and CPD) of qualification . If core competencies can be agreed then it needs to be decided what to do with them. At the moment the paper only suggests that they form a template against which to define bad practice. It may be the CPS and /or LSC will adopt them as part of their processes.

9.3 Once the competencies have been agreed the consultee ARs will then need to decide if there is a regulatory issue and is so how to deal with it and if/how compliance with the standards is to be monitored/ enforced. This may differ between the Bar, solicitors and Ilex members and others. They may conclude the education/ training requirements need to be amended/ tightened up. They may decide that some form of accreditation scheme (or schemes) is required and if so they would need to agree what areas of law/ practice it covers and whether or not it should be compulsory. It would need to be considered how the adherence to the standards should be tested : should it be by self certificate: should it be by attendance at CPD event as a one off or periodically : should there be a written test; should there be a practical role play exercise or personal interview of some sort .The soft skills of advocacy and court work are more difficult to assess than black letter legal topics: it is often subjective: the LSB will be aware of the difficulties the Judicial Appointments Commission has had in agreeing a system which is fair to all. In all these deliberations the ARs will need to consider what the cost of administering the scheme both in terms of cash and resource would be to the ARs and to the profession They will need to consider how many lawyers it might cover: if it is widely drawn then there might be tens of thousands applying and possibly on the same date. If it is a regulatory issue the cost and effort of compliance would need to be proportionate to the mischief being addressed and the level of public concern (s28 (3) LSA)

9.4 QAA is a topic which is suited to LSB's role under s4 LSA although it is difficult to see why there need for " early progress" and why it is more important and more urgent than other topics. It might be said SRA and the other ARs have quite enough to do in 2010 already. It would be perfectly appropriate for the LSB to "assist" the ARs in seeking a solution. However this is not what the LSB has done. It has jumped from the beginning

of the current consultation paper to the end result that there must be a compulsory quality assurance scheme (without giving any reason whatsoever) and that it must be in place by mid 2011. It has not apparently considered any of the other possibilities (presumably because they have not been canvassed yet) and indeed had come to that conclusion (by putting it in this business plan) at least three months prior to the very first consultation ending. This is not "assisting": indeed the LSB does not pretend it is : in an interview with the Times on 14th January 2010 Dave Edmunds said "We will not prescribe how the assessment will be done or its cost…. our job is to take the lead and ensure something happens". I would suggest that this is substantially beyond the LSB's remit under s4 and if driven through at such speed and without regard to cost it is reckless as to the possible outcomes in breach of S3(3) and most unlikely to end up with a workable or sensible scheme .

9.6 This plan mentions QAA at para 75 but this is not actually carried forward into the workplan at page 26.However upon the assumption that this is actually in the workplan I would urge LSB to move in 2010 at the pace of the SRA,BSB and Ilex process, not to impose pressure on them to move faster or further than they wish to, and not to bash on regardless for the sake of it . As I say above in relation to ABS it is better to get a model that works and is proportionate rather than having something/anything on a fixed date

10. It may seem that I have moved from blue sky principles to the minutiae of grass roots detail without pausing to consider the broad (level) leas in the middle. I would not want to give that impression : there is much in this plan that is sensible appropriate and necessary to which I have no objection at all. I do not oppose change just because it is change nor seek to preserve the status quo: I am entirely neutral as to whether ABS 's will turn out to be beneficial for consumers and lawyers. I do not object to the fact that regulation is now outside the direct control of the profession and that the SRA and LSB can impose requirements on the profession with which it (and I) may not agree. All that I suggest is that in carrying out its duties and in particular its workplan for 2010 that the LSB proceeds as a true oversight regulator under the terms of the Act and not as a body implacably pursuing its own pre-set agenda.

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