Response of the City of Westminster and Holborn Law Society to the Legal Services Board ("LSB") Consultation on its Draft Business Plan ("BP") for 2013-14

1 The City of Westminster and Holborn Law Society

The City of Westminster and Holborn Law Society ("CWHLS") enjoys perhaps the most diverse membership amongst local Law Societies, encompassing as it does, a membership ranging from larger firms, including those which have been called in recent years "the silver circle" down to small high street practices and individual in-house solicitors, including those working for public bodies and government. Our membership includes those who practice at all levels of the profession, including those who regularly represent solicitors in SRA investigations and members of the Solicitors Disciplinary Tribunal, and those who have practised extensively in the field of solicitors' negligence and professional indemnity insurance.

Membership is voluntary and CWHLS is run by a committee comprising about 30 solicitors representing a very wide range of specialisms. Its work is carried out by 11 specialist sub-committees, one of which, the Professional Mattes Sub-Committee, concentrates on matters such as regulation of solicitors, and matters affecting their practice, including matters relating to professional indemnity etc.

2 General comment

In our view the BP (following other consultations from the LSB) indicates that the LSB has exceeded (and wishes further to exceed) its remit and proper role; is over ambitious; and adopts an approach to regulation that is predictably going to damage the interests of clients or consumers of legal services.

The LSB boasts that the "*light we have been able to shine on the operation of the legal services market through our investment in primary research is one of our proudest achievements. We have used research, not simply to explore some of the market issues which are obviously amenable to qualitative examination, but also core professional challenges for regulators, such as how to track changes in the level of professional ethics in a measureable way."* We think it regrettable that the LSB has always given the impression that it is not very interested in (and is suspicious of) the experience of those with the most experience of the legal market, namely legal practitioners themselves. In our view this is one of the factors that have caused the LSB to form a very jaundiced and misleading view of the legal profession and the traditionally high professional standards its governing bodies have sought to impose, with the consequence that the LSB adopts a flawed and outdated view as to how best to regulate the profession. In many ways this is diametrically opposed to the best interests of consumers (or clients).

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3 Exceeding its proper role

The LSB is an oversight Regulator. Its website says that "*The Board itself is responsible for overseeing legal regulators in England and Wales."* The Framework Document (an Agreement between the Ministry of Justice and the LSB) states that the LSB will achieve its overall aim "*by seeking to improve the delivery of legal services to the general public, and to businesses, by providing consistent oversight regulation to the legal services sector helping to improve performance by ensuring that the Approved Regulators…carry out their functions to the required standard."*

This implies that the Authorised Regulators will be responsible for the day to day regulation, with the LSB checking that they do so properly. There is a real danger of duplication of effort with accompanying unnecessary cost and confusion to the regulated parts of the legal profession if this division of labour is not adhered to This inevitably will (and does) lead to duplication and the consequent cost burden on the profession, which will then be passed on to clients/consumers. This is a danger that in our view the LSB has paid insufficient regard to.

Section 1 of the Legal Services Act 2007 sets out the regulatory objectives for the LSB and approved regulators and to:

i) protect and promote the public interest
ii) support the constitutional principle of the rule of law
iii) improve access to justice
iv) protect and promote the interests of consumers
v) promote competition in the provision of legal services
vi) encourage an independent, strong, diverse and effective legal profession
vii) increase public understanding of the citizen's legal rights and duties
viii) promote and maintain adherence to the professional principles which are defined as:

   a. acting with independence and integrity
   b. maintaining proper standards of work
   c. acting in the best interests of clients
   d. complying with practitioner' duty to the Court to act with independence in the interests of justice and
   e. keeping clients" affairs confidential.

We can find no justification for the LSB's apparent intention to *"reform and modernise the legal services marketplace in the interests of consumers, enhancing quality, ensuring value for money and improving access to justice across England and Wales"* when that involves a complete upturning of how legal services are provided and virtual dictation as to the make-up of those delivering the services.

The LSB seems to interpret its duty to "*encourage an independent, strong, diverse and effective legal profession"* as meaning that it has to micro-manage the diversity of the profession, including now it seems virtually imposing quotas as set out in paragraphs 60 and 64 of the BP:

- Paragraph 60 states that the LSB is "*seeking to work with regulators to improve the quality of legal advice and the diversity of the profession". Following our review of the regulators" analysis of their first years" diversity data, which will be published at the end of 2012/13, we will be working with regulators to ensure that practical solutions are developed to address the issues raised in the data."*
- Paragraph 64 states that the LSB will be *"working with regulators to ensure that diversity monitoring is effective and transparent at the level of individual organisation as well as the overall profession, that analysis pinpoints where improvements could be made and that practical solutions are developed, implemented and evaluated where required to address issues highlighted in the data. We will continue to expect particular weight to be given to action on social mobility."*

The LSB needs to bear in mind that this is likely to be burdensome regulation with an inevitable cost attached. Moreover the LSB has some important questions to ask itself about what it is trying to achieve by it. The BP refers to improving "*the quality of legal advice and the diversity of the profession*" as if the achievement of the latter will necessarily achieve the former. They may both be desirable objectives but they are quite separate issues with no necessary correlation between them. Moreover it is quite clear that the LSB has in mind virtually imposing quotas. Not only is this illegal positive discrimination, but it has the potential to be unfair to aspiring (or current) lawyers who do not happen to fall within the minority groups promoted by the LSB. The dangers of this reverse discrimination have been highlighted by Doreen Lawrence (the mother of the murdered teenager Stephen Lawrence). Whilst denouncing the most readily understood forms of racism, she also said that white minority groups are suffering a form of racism in Britain but it is rarely even spoken about. The legal profession of all professions (with its duty to uphold justice, fairness and the rule of law) must not fall into this trap.

On a different subject, the LSB has recently produced a paper suggesting that the "cab rank" rule for barristers is outdated and should be dispensed with. In our view this is an example of the LSB on a frolic of its own which serves no good purpose and could do great harm. Periodically people express scepticism as to the operation of the rule in practice. We think that view is exaggerated. Even if it does not operate perfectly, the rule cannot be said to do any harm to consumers of legal services. In practice we think it is still a positive rule which upholds a noble principle of great importance to the rule of law and access to justice for unpopular individuals and groups. In India recently young men accused of an appalling rape and murder were initially faced with a refusal by local lawyers to act for them. The "cab rank" rule is designed specifically to avoid that happening and to ensure that all accused individuals are entitled to proper representation and the presumption of innocence.

Above all we question why the LSB as an oversight regulator should think it appropriate to initiate such a proposed change. That is clearly within the province of the General Council of the Bar. We can only assume that this is part of the LSB's intention to downplay the importance of professional titles such as barrister.

4 A Flawed Approach to regulating legal activity

In paragraph 57 the BP states:

"*Legal services should be subject to effective, proportionate regulation. This must ensure that core principles are maintained and consumers protected. Of equal importance, however, is the need to identify and remove disproportionate regulation which hinders innovation and growth. Outcomes focused regulation targets regulatory efforts at risk and moves away from a blanket protection approach which layers unnecessary cost on low risk activities. Our work on scope aims to assess how far regulation should stretch across areas of legal activity and to ensure that any regulatory intervention is appropriately targeted and risk-based both in existing and new areas of regulated legal activity."*

We think that this encapsulates the muddled thinking behind the BP. It fails to draw the distinction between burdensome and no-burdensome regulation, and leads to a flawed and dangerous regulatory model. Above all it fails to draw on the experience of the legal profession. To be more specific:

i) At present solicitors are subject to the regulatory jurisdiction of the Solicitors Regulation Authority ("SRA") in respect of all activities they undertake in the course of their practice. Even when they indulge in activities outside the course of their practice as solicitors (which would bring them outside the terms of even the very wide terms of their compulsory insurance cover) they can still be subject to disciplinary action for professional misconduct if they bring themselves or their profession into disrepute.
ii) This seemingly wide regulatory jurisdiction imposes no extra regulatory burden on low risk activities. It requires no extra form filling or monitoring. It does however provide wide client/consumer protection and means that those using the services of solicitors receive that protection whether or not the activities of the solicitor are reserved activities. Much of the work done by solicitors nowadays is not reserved activity.
iii) The LSB's approach starts at the opposite end. Regulating solely by activity carries the inevitable risk that as the work of lawyers alters and adapts so there will develop lacunae in consumer protection. When a lacuna is recognised the LSB has to adopt the anachronistic tool of having it declared a reserved activity. That is heavy-handed and time-consuming.
iv) As we have pointed out in responses to previous consultations, the need for consumer protection is often underplayed by the LSB. The BP states that "*Our starting point is that a competitive legal services market, underpinned by appropriate regulation, will deliver the regulatory objectives most effectively…We believe that such a market - one that works better for consumers and providers alike - would be characterised by: …[inter alia] empowered consumers, able to choose a quality service at an affordable price*." We think that this concept of "*empowered consumers*" is in most cases unrealistic because consumers inevitably instruct lawyers largely on matters where they are not in a position to judge the quality of the legal work carried out on their behalf (as opposed to the service they receive or the price of it). The applicable law is often technical and complicated, and any errors in the advice given may only emerge years later. Even in-house solicitors will often

be instructing outside lawyers because the matter involves areas of law outside their expertise. It is therefore of the utmost importance that lawyers should have the appropriate legal and ethical training, regulatory supervision and protections for clients when things go wrong (as occasionally they are bound to do).

5 Review of regulatory sanctions and appeals processes

Paragraph 34 of the BP states that: "*The current systems for taking action against lawyers (and others) who have breached their regulator's code of conduct have been built up over many decades and are often based on historical practices rather than the requirements of the Act".* This is not backed up by evidence. We do not believe (and the BP does not state) that this applies to the way in which solicitors are disciplined. In particular the Solicitors Disciplinary Tribunal ("SDT") has a good reputation. It should be preserved (and perhaps built upon by widening its jurisdiction). It would be a scandal to throw away that experience and expertise.

When it comes to disciplinary matters the SDT should only be used for cases of professional misconduct where the respondents are thought to be personally blameworthy. We agree with an article by Gregory Treverton-Jones QC in the Law Society's Gazette of Thursday 5 July 2012 that the SRA's current policy of prosecuting cases before the SDT cases of strict liability for rule-breaking regardless of personal liability serves no sound purpose of client protection and is wrong in principle. "*The SDT should only be required to deal with the most serious examples of professional misconduct committed by solicitors. The less serious matters can and should be dealt with in-house by the SRA, either through the 'supervision' process, ie a sensible dialogue to address shortcomings and prevent recurrence, or if there is a need for 'enforcement' then by way of proportionate penalty."*

Cases of the seriousness that should proceed to the SDT can have very serious consequences for the respondent; and the criminal standard of proof should always be required, as the law (and the human rights of the respondents) currently requires.

6 Conclusion

We are submitting our response as solicitors (who make up more than 80% of the lawyers who fall within the LSB's jurisdiction). However what we say below applies to most other lawyers.

The LSB should work on the principle that all those seeking authorisation to practise law should be subject to the jurisdiction of an Approved Regulator in respect of all their activities (as is currently the case with solicitors) unless they can show good reason why they should not be. This will provide proportionate regulation and enable the LSB and frontline regulators to manage changes within the legal profession without jeopardising the interests and necessary protections of consumers. It would also cut out the need for much of the costly research which the LSB seeks to indulge in, such as its proposed instruction of external commissions with a view to "*mapping the unregulated market*" and "*testing the risks of general legal advice*" to support the work of "*scope of regulation*".

The LSB's proposed budget of £4,272,000 (excluding the £176,000 for the OLC Board) seems to include overheads of £3,866,000 as follows:

ITEM	£
Staff	2,585,000
LSB Board	194,000
Accomodation	610,000
IT/facilities/finance	245,000
Office costs	101,000
Depreciation	90,000
Consumer Panel	41,000
TOTAL	**3,866,000**

That leaves £250,000 for "*Research and professional services*", £72,000 for "Governance and support services, and £84,000 for "*Legal reference/support*" (assuming that these last are not overheads).

The Research therefore represents the majority of the LSB's proposed initiatives for 2013/4

The BP says about this proposed research: "*This year we will be considering potential research projects in the following areas, and possibly others added as a result of consultation, where possible seeking funding partners… We acknowledge that this programme is ambitious for a budget of £250,000 and it can only be delivered in its entirety if funding is shared with partners. We would welcome the opportunity to talk to potential research partners with an interest in working with the LSB on research in 2013/14, or from those who may already be planning to do work of this nature. The greater degree of external funding we are able to secure, the more value we will be able to deliver from our research budget and indeed, there may be some limited scope for budget reduction. We will publish a final research plan in April 2013, informed by responses to this consultation."*

The funding partners sought by the LSB seem to be the Legal Ombudsman or Approved Regulators. The "*limited scope for budget reduction*" would appear to be a mirage from the point of view of the legal profession as a whole. It is just a question of finding the money from another pocket paid for by the profession. The LSB therefore has ambitions beyond its budget. Much of it is the result of its deeply flawed proposed regulatory model and related and equally flawed ambition to completely reorganise the delivery of legal services in this country. Both are likely to be counter-productive and damaging to consumers. They should be abandoned. The adoption of a more modest and realistic role would enable the LSB to reduce its budget and be less burdensome to the Approved Regulators and the legal profession.

To adopt the expression attributed to Bert Lance, the Director of the Office of Management and Budget in Jimmy Carter's 1977 administration: *"If it ain't broke, don't fix it."* He explained "*That's the trouble with government: Fixing things that aren't broken and not fixing things that are broken."* This is a lesson which we think that the LSB needs to constantly have in mind. Instead, it gives the impression of

wanting to break the legal profession as it now is and start again from scratch. That is arrogant, dangerous and bound to cause unnecessary tears to the LSB, other regulators, lawyers and above all to consumers