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**THE CHAIRMAN  
DESMOND BROWNE QC**

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Ms Cathryn Hannah  
Legal Services Board  
Victoria House  
Southampton Row  
London WC1B 4AD

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*Dear Ms. Hannah,*

**DRAFT BUSINESS PLAN**

Thank you for giving us an opportunity to comment on your draft Business Plan for 2009/10. This is a response by the Bar Council in its representative capacity. The independent, ring-fenced regulator of the Bar, the Bar Standards Board, is responding separately.

**Introduction**

The Bar Council welcomed the enactment of the Legal Services Act 2007 and the report of Sir David Clementi (*Review of the Regulatory Framework for Legal Services in England and Wales, 2004*) on which it was based. We are committed to developing a relationship of constructive engagement with the Legal Services Board (LSB) which will be guided by the regulatory objectives set out in section 1 of the Legal Services Act, the first two of which are “protecting and promoting the public interest” and “supporting the constitutional principle of the rule of law” (section 1(1) (a) and (b)). These objectives are directed to the Approved Regulators as well as to the LSB.

We have already had a number of useful meetings with the LSB and, at the meeting of Bar Council on 24 January 2009, heard about the Board’s objectives and plans at first hand from the Chair, David Edmonds. We look forward to developing these contacts, to building strong working relationships with the Board and its officials, and to informing their work in the public interest.

We wish to emphasise the importance of the relationship between the LSB and the Bar Council as Approved Regulator. It was accepted by the Chair of the LSB, when he addressed the Bar Council in January, that the performance of an Approved Regulator’s regulatory arm is the responsibility in the first instance of the Approved Regulator. It is to the Approved Regulator that the Legal Services Act requires the LSB to look to account for its regulatory performance. The independence of the regulatory arm cannot be used to prevent an

Approved Regulator from taking action in the event of a failure to perform by the regulatory arm. An Approved Regulator has a statutory duty to avoid a failure by its regulatory arm.

Accordingly, the Bar Council will be taking a close, continuing interest in the Board's activities. Not only do the regulatory objectives of the Legal Services Act apply to Approved Regulators as well as the LSB but we have a shared interest in ensuring that our respective regulatory activities are transparent, accountable, proportionate, consistent and targeted.

It is against that background that we turn to review the main features of the draft Business Plan on which we wish to comment.

### **The LSB's vision**

We note that the LSB has developed its vision of the way in which "we want to see the legal services market deliver for consumers in five years time" (para 6) with reference to 6 "components" which to some extent reflect the regulatory objectives which Parliament has approved. Significantly, in our view, the LSB's components do not refer to "promoting and protecting the public interest" nor to the principle of supporting the constitutional principle of the rule of law. Whether this omission is by accident or by design is unclear but we consider it to be an important omission which should be repaired in this section of the Business Plan. The LSB's mandate is determined by statute and the statute is clear. The consumer interest is one of several interests to which the regulatory objectives refer. Plainly it is an important one but it is not the same as the public interest. The significance of this point, which was recognised and accepted by Parliament in the debates on the Bill which gave rise to the Legal Services Act, is highlighted by the Board's recognition (in para 54) that its Consumer Panel will not be expected to represent all the different consumers of legal services (some of whom may be in prison, others may be major commercial organisations: see para 48).

Our concern about the absence of references to the public interest and the rule of law is reinforced (in para 9 of the draft Business Plan) by the Board's comment that its task of implementing a model of regulatory reform "remains subject to debate". We do not share this assessment. The enactment of the Legal Services Act settled the debate. After considerable scrutiny, Parliament accepted that Sir David Clementi's B+ model was the appropriate regulatory model for a reformed legal services market. That model envisaged – and the Act clearly provides – front-line bodies (Approved Regulators) discharging regulatory functions under the oversight of a supervisory regulator, an arrangement which Parliament approved in order to safeguard the independence of the legal profession in our country. As David Clementi has recently said, the Legal Services Board was not intended to be another layer of regulation.

We note (from para 14) that implementation of the LSB's vision will involve a programme of engagement with Approved Regulators "to build and develop a gold standard of consistent regulatory excellence". We share the Board's ambition for gold standards and their aspiration to achieve world class excellence but developing these standards should not lead to gold-plating across the board's regulatory remit.

## **The LSB's role in the future of regulation**

The Board is right to acknowledge (at para 26) that we have a common agenda to ensure that legal services regulation contributes to the rule of law and protects the public interest. The challenge will be to strike an acceptable balance between the roles of Approved Regulators and the oversight regulator in developing the "gold standard" of "excellent independent legal services regulation" (para 31). As the LSB recognises, we have a shared interest in undertaking activity that is transparent, accountable, proportionate, consistent, targeted and in other respects reflective of good regulatory practice.

So the Bar Council will be concerned to ensure that the LSB does not duplicate or overlap its activities with those of Approved Regulators in conducting legal services research, education and training to assist the development of standards, and identifying and disseminating legislation and wider regulatory practice in other jurisdictions. Duplication and overlap in these (and other) areas could easily add unnecessarily and unreasonably to the costs of the Board's operations, for which the public eventually will have to pay. Again, the quest for gold standards should not be gold-plated.

## **Policy Focus**

We note the Board's approach to developing regulatory policy and practice as set out in Chapter 5. We look forward to reading the Stakeholder Engagement Strategy when it is published later this year. The Board will find the Bar Council to be a committed participant in this process. We shall bring the same constructive critical challenge to the LSB's activity as the Board says (at para 27) it will apply to Approved Regulators.

The Board rightly describes (in Section 5d) the importance for Approved Regulators of efficiency and effectiveness in meeting their regulatory objectives, and the obligations placed on them by the LSB (para 89). However, we find it striking that the LSB does not give any indication in its draft Business Plan of how it will measure its own performance. We therefore look forward to discussing with the LSB possible Key Performance Indicators (KPIs) and other key metrics which could enable it to demonstrate its effectiveness to stakeholders and the public at large.

## **Work programme**

Turning to the different elements of the LSB's work programme for 2009/10, which as the draft Business Plan recognises (at paras 42 and 167) is ambitious, we comment as follows:

- ***Putting consumer and public interest at the heart of regulation:*** We have commented above on the distinct nature of these interests. The Board's understandable focus on the consumer should not be to the exclusion of the public interest or to its detriment by marginalising its importance. The challenge, for all concerned, will be to strike the right balance between consumer protection and the public interest in maintaining the independence and integrity of the legal profession.

The Board recognises the difficulties of understanding the needs of the consumers of legal services, which range enormously in sophistication and complexity. It is understandable that the LSB should attach priority to the establishment of a Consumer Panel. However we note, with some concern, that the costs of the panel do not appear to have been contemplated in the LSB's set up costs and that the increase in the Board's expenditure from the estimated £4.1m (the figure given in the Ministry of Justice's Supplement to the Regulatory impact Assessment), to £4.9m is attributable, in a significant respect, to the anticipated costs of the panel to judge from the oral evidence given to the Justice Committee by the Board's Chair on 25 February (*Evidence*, Q32) and para 168 of the draft Business Plan dealing with "Resourcing our strategy".

- ***Widening Access to the legal market:*** We note the very high priority which the Board is giving to the ability of lawyers to form Alternative Business Structures (ABSs). We agree with recent public remarks made by Sir David Clementi that there should be caution before ABSs are introduced. We need first of all to understand how Legal Disciplinary Partnerships (LDPs) perform before introducing ABS. The Board is right to note (at para 63) the steps which the Solicitors Regulation Authority is taking to make significant rule changes to allow it to regulate Legal Disciplinary Practices (LDPs) from Spring 2009. This is a development to which the Bar Council itself is currently giving attention in response to consultations initiated by the Bar Standards Board.

We share the LSB's concerns to ensure that the right regulatory framework is in place to protect consumers, safeguard the independence and integrity of lawyers and manage risk such as conflicts of interests. The Bar Council is considering whether to amend its rules of professional conduct to permit LDPs. This is an area where we consider it is important to proceed carefully in response to reliable and credible evidence of what the public interest demands and to views on appropriate legal structures which could support the necessary regulatory changes.

- ***Improving service by resolving complaints effectively:*** The Bar Council agrees with the Board's ambition to instil a "right first time" approach to complaints handling by providers of legal services (para 13). We will continue to work hard to ensure that complaints about barristers' performance, whether concerning inadequate service or professional conduct, or a combination of the two, are handled quickly, effectively and fairly. We are putting arrangements in place to ensure that each set of chambers has a complaints handling process to ensure consumers have an opportunity to resolve complaints directly in the first instance, in fulfilment of the statutory requirements (para 78). Where complaints about poor service cannot be dealt with adequately in-house, the Office for Legal Complaints (OLC) will need to be involved.

We look forward to working with Elizabeth France, the Chair of the OLC and to sharing the Bar's experience of complaints handling (which, without wishing in any way to be complacent, has been acknowledged by the Legal Services Ombudsman and independent commentators over many years, generally to work very well). In

particular, we expect to be consulted about the development of scheme rules for complaints' handling (including hybrid complaints involving a combination of service and professional conduct) and the development of a Memorandum of Understanding whereby arrangements can be made for providing assistance in handling complaints to the OLC (under Schedule 15, para 18 of the Legal Services Act 2007), to which Ms France referred in her evidence to the Justice Committee on 21 October 2008 (Q6).

- ***Securing independent regulation:*** Our early acceptance of Sir David Clementi's recommendation that there should be a separation between the representational and regulatory functions of the Bar Council was recognised when we created the Bar Standards Board, in January 2006. It is vital that Approved Regulators should, so far as reasonably practicable, ensure that their regulatory functions are not prejudiced by their representative functions. The Bar Council has already developed internal governance arrangements to secure the independence of these functions; and further developments are planned in order to enhance the effectiveness of these arrangements.

We look forward to being consulted shortly about the LSB's proposals for internal governance rules under section 30 of the Legal Services Act 2007. We agree with the Board's assessment (para 104) that these rules, which need to apply to all of the Approved Regulators, should be as capable of effective adoption by the smallest regulator, as well by the largest. We recognise that the rules will need to strike a balance between being of sufficient specificity to meet the public interest in demonstrably independent regulation and the need for proportionality and avoidance of overly prescriptive solutions.

We will work with the LSB to ensure that rules made under section 30 and section 51 (specifying the purposes to which Approved Regulators are permitted to apply amounts raised by practising certificate fees paid by their members) are workable and help to devise mechanisms for monitoring the effectiveness of these rules. We believe that a process of dual self-certification (whereby the regulatory and representative arms of each Approved Regulator certify to the LSB that they are compliant with the rules) would be effective.

- ***Promoting access to a diverse legal profession:*** We entirely agree with the LSB's assessment (para 111) that it is essential for the legal profession to be, and be seen to be, open to anyone with the requisite abilities and ambition, irrespective of their background. The legal profession must be representative of the society that it seeks to serve in all its diversity. This has been reflected in a number of initiatives which the Bar has launched over the last 15 years to become a more open, diverse and genuinely meritocratic profession. The 57 recommendations of the Neuberger Working Party on Entry to the Bar, which reported in 2007, was the most recent example of the Bar's efforts to promote wider access to the profession across all stages of a barrister's career.

We recognise that there is more work to do and the Neuberger Implementation and Monitoring Group is spearheading this work. Their progress can be measured on the <http://www.barcouncil.org.uk/news/NeubergerMonitoringandImplementationGroup/> website. The Bar is currently sharing its experience with the Government's Panel on Fair Access to the Professions whose report, expected this Summer, will no doubt provide momentum to the LSB's plans in this area.

We shall be pleased to share best practice with the LSB and to update the Board on our progress, in partnership with the Inns, Circuits, Specialist Bar Associations, schools, universities and colleges as well as Government, in implementing the Neuberger recommendations.

- ***Developing research and public legal education strategies:*** We note that the Board sees itself acting as a "fulcrum on debate, research and practice development in the field of legal services regulation" (para 125). We welcome the Board's recognition (at para 128) that, in order to be effective, this has to be a highly collaborative activity. It will also need focus. Otherwise there is a real risk of duplication of effort (and wasted expenditure) between the Board and Approved Regulators, many of whom (like the Bar Council) have their own research agendas and programmes.

We note (from para 168) that the provision of a research budget (like the budget for a Consumer Panel) does not appear to have been taken into account in the original budget planning and that it accounts for a share of the £800,000 higher set up costs than was planned when the Legal Services Bill was going through Parliament. It will thus be important for the LSB to have its research activity clearly targeted. We look forward to being consulted on possible activities and to sharing the results of our own activity in this field.

There is no limit in theory to which a LSB-led public legal education strategy might go but plainly there are important resource constraints. It is debateable how far the profession itself should undertake the role of government in providing public legal education and informing citizens of their legal rights and duties. In developing its recommendations, the Neuberger Working Group, for example, concluded that public education about the function of law, the legal system and lawyers was essentially the responsibility of government. Although it is one in which the profession clearly has an interest, it is not one whose cost members of the profession can reasonably be expected to have to pay.

Rather than seeing itself as a think-tank commissioning research projects, we see the most cost-effective role of the Board in this area as helping to co-ordinate research activity that is being undertaken elsewhere, for example by Approved Regulators and universities, and to disseminating the results of their research (such as by organising the occasional symposium).

## **The Levy**

We look forward to being consulted by April on levy rules under section 173 of the Legal Services Act in relation to the apportionment of the levy in accordance with fair principles. These should reflect regulatory risk.

We also need to reach agreement, as soon as reasonably practicable, on the arrangements for collection of the levy. As our preliminary discussions with the Board's officials have already shown, it will be important to ensure that these arrangements are made in good time to inform the budget planning procedures and timetables of the Approved Regulators and to enable the amounts to be collected efficiently. The Bar Council sets a budget for its 1 January – 31 December financial year in October.

We noted (at para 144), with concern, that the LSB appears to consider that the recovery of implementation costs might be recovered in one lump sum. However, the Board will recall that a ministerial assurance was given by Baroness Ashton, during the parliamentary passage of the Legal Services Bill, that the collection of implementation costs would be spread over several years: *Official Report* (HL, 6 March 2007 at col 155). The draft Business Plan appears to accept that later on (at para 169). In our view, the period of recoupment for implementation costs should be 5 years.

## **Resourcing the LSB's strategy**

We have already commented on the increased LSB set up costs of £800,000, attributable to provision for a Consumer Panel and a research budget, which exceed the estimate given to Parliament by the Ministry of Justice in their Supplementary Regulatory Impact Assessment when the Legal Services Bill was passing through Parliament. We do not accept that this increase in planned expenditure can be justified by the claim that the OLC's implementation costs are likely to be less than forecast when the savings in the OLC's budget would otherwise have accrued to the profession.

At a time when many (almost half of the self-employed members) of the Bar are facing repeated cut backs in legal aid for publicly funded work, it is essential that the Board keeps a tight lid on its current and planned expenditure. Against the background of deteriorating public funding and the current economic recession, we very much hope - and expect - that there will be no further increases in the LSB's budgeted expenditure.

## **Conclusion**

The LSB's draft Business Plan maps out an ambitious programme and we hope that these comments will be of some use. We note that the period allowed for publication of this programme fell short of the minimum 12-week period recommended by the Better Regulation Executive (*Criterion 2, Code of Practice on Consultation, 2008*). We hope that future LSB consultations, especially the forthcoming ones on internal governance and the levy, will provide sufficient time for responses together with impact assessments (including consideration of the costs and benefits of the proposals).

We are happy for these comments to appear on the LSB's website and we shall be placing a copy of this letter on the Bar Council's website.

We look forward to the publication of the LSB's final Business Plan for 2009/10 next month.

*Yours sincerely,*

*Deemid Browne*

