

BAR
STANDARDS
BOARD

REGULATING BARRISTERS

Cathryn Hannah
Board Secretary
Legal Services Board
Victoria House
Southampton Row
LONDON
WC1B 4AD

13 March 2009

Dear Ms Hannah,

Legal Services Board (“LSB”) Draft Business Plan 2009/2010

The Bar Standards Board (“BSB”) welcomes the opportunity to respond to the LSB’s new Business Plan.

Introduction

1. As the independent regulatory arm of the Bar Council, the BSB has worked closely with the LSB to date and will continue to do so. The LSB’s Business Plan, in setting out its forward programme, presents the BSB with an important opportunity to identify areas of common interest, co-operation and joint working.
2. The BSB is particularly interested and pleased to see the LSB place an emphasis on working closely with partners in pursuit of a modern legal services market in which quality, access to justice, a diverse and independent legal profession, value for money and the interests of all consumers are the focus. We welcome measures which support proportionate, independent and cost-effective regulation.
3. The establishment of the LSB, and now its Business Plan, represent important steps in ongoing activity to implement the provisions of the Legal Services Act. The BSB shares the LSB’s focus on the quality of service and looks forward to engaging in further efforts to operate in the public interest within the new arrangements for the legal services sector.
4. The BSB agrees that these are all key areas. The protection and promotion of the public interest, in its widest sense, must inform everything the LSB seeks to achieve. Issues of independence, complaints handling and acting in the public interest are at the heart of the BSB’s current work. It is very important both for

the front-line regulators and the LSB to engage with the regulated professions and all partners in ensuring that the LSB delivers its mission.

5. It must be remembered that the LSB and the ARs are also charged with securing the regulatory objectives of supporting the constitutional principle of the rule of law and improving access to justice. These objectives may be harder to articulate in terms of policy initiatives (and this may explain the comparatively sparse references in the draft Business Plan), but they must not be overlooked or their importance diminished.

The Role of the LSB and Developing Excellence in Legal Services Regulation (Sections 4 and 5D)

6. The LSB, under the Legal Services Act, is an oversight regulator. Inherent within the model of regulation devised by Parliament is the risk of duplication by the LSB of functions that can and should more properly be carried out by the front line regulators.
7. The BSB would expect to see the LSB reduce in size once it is satisfied that it has put in place frameworks which safeguard and promote the regulatory objectives under the Act; the building and delivery of a “gold standard of consistent regulatory excellence” by the ARs (Paragraph 14). A key part of putting the interests of consumers at the heart of the regulatory process is ensuring proper and effective independence of the regulatory functions in the ARs.
8. Once these frameworks have been established, the LSB’s role will primarily be to oversee the operations of the ARs; to monitor the performance of the ARs and to take proportionate corrective measures when necessary to ensure that the ARs are delivering the “gold standard”.
9. If the LSB develops, whether by accident or design, into an “expensive bureaucratic burden on professions already struggling to make ends meet” (Paragraph 10) then it will have failed. The BSB, as regulator of the Bar of England and Wales, considers that such a failure would not only fail to promote the regulatory objectives under the Act, but would positively endanger them. Those practitioners, whether at the Bar or in practice as solicitors, who presently provide publicly funded access to justice simply cannot afford to fund a bureaucratic and overly interventionist super regulator.
10. The goal of the LSB, which the BSB endorses, is to ensure the provision of “robust, yet proportionate, modern regulation” (Paragraph 37). We endorse the approach set out in Paragraph 89.

Putting the Consumer and the Public Interest at the heart of regulation (Section 5A)

11. The protection and promotion of the interests of consumers rightly features as one of the major regulatory objectives. It has been one of the key strategic objectives of the BSB since its inception. The BSB sees the critical areas for consumers to be quality assurance and resolving complaints (see Section 5 below). Complaint handling also involves the wider public interest of the maintenance of rigorous professional and ethical standards and effective monitoring and sanctions (where appropriate).

12. The BSB has found that its own Consumer Panel has been useful in informing and shaping the BSB's policies. In establishing its own Consumer Panel, the LSB must work with the ARs to ensure that there is not duplication of work.

Widening Access to the Legal Market (Section 5B)

13. The BSB recognises the importance of ABSs to the objective of promoting competition and the interests of consumers, but as the LSB recognises there are significant challenges including, in particular, consumer protection and the independence and integrity of lawyers (Paragraphs 64-65). The BSB is already in the second phase of detailed consultation on the regulatory changes that should be made to facilitate ABSs.
14. The BSB recommends that the LSB make it a priority for 2009/10 to assess and decide how to address the regulatory risk inherent in the proposed ABS regime, which necessarily involves a relaxation of the controls over the way in which legal services can be delivered (Paragraph 61). A relaxation is likely to expose consumers and the public interest to business-driven initiatives that are (as the experience of the FSA has painfully shown) inconsistent with the regulatory controls necessary to protect consumers and the public fully.
15. On the other hand, increased regulatory controls designed to protect consumers and the public fully will not only tend to stifle business innovation but will imperil the cost savings that are a substantial part of the rationale for the ABS regime. We therefore urge careful appraisal and caution at this stage
16. In the light of the above, we would suggest that the LSB should look to learn from the experience of LDPs before deciding on its policy for ABSs, but we consider that this will take significantly longer than the timescales implied in the draft business plan, especially if the start date for the SRA-regulated LDP regime is put back, as now seems likely.
17. We would strongly encourage the LSB to do extensive market research to find out how much interest there is and in what kinds of business vehicle (Paragraph 69). This is not something that the BSB has had the time or the resources to do and is better done centrally by the LSB rather than by individual ARs.
18. We look forward to hearing from the LSB in relation to the proposed discussion paper to be issued in Quarter 1 of 2009/10 and would welcome the chance to discuss with the LSB the intended content of that paper before it is published.

Resolving Complaints Effectively (Section 5C)

19. The BSB is committed to establishing systems to identify areas of risk to consumers; to take action to remedy poor performance by barristers (or members of the profession); and, where things go wrong, to provide an efficient and fair complaints and disciplinary system.
20. The objective of any scheme must be to provide an effective and efficient system for dealing with complaints that is fair to complainants and lawyers alike, based on the accepted best practice principles of complaints handling.

21. The BSB has already begun work on anticipating the structure and framework of the OLC and its work. The relationship between the OLC and the ARs is critical to developing an effective and efficient complaints handling process that achieves the above objectives.
22. The BSB considers that early consideration and care is required in devising a mechanism for handling "hybrid" complaints (i.e. complaints that raise both issues as to professional conduct and inadequate professional services).

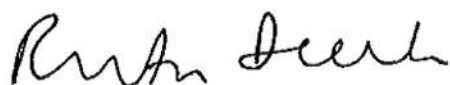
Securing Independent Regulation (Section 5E)

23. The BSB has already engaged with the LSB on constructive dialogue about this important issue and it endorses the LSB's comments in Paragraph 99.
24. The Internal Governance Rules ("IGRs") are key in establishing a regulatory framework which properly and demonstrably safeguards independence.
25. The BSB considers that IGRs must set out the clear principles of independence and separation of functions against which the internal arrangement and rules of the ARs must be measured. The clearer the principles of entrenched independence and separation of regulatory/representative function in the IGRs, the more likely it is that the regulatory arms of the ARs will be able to discharge their regulatory function without prejudice from the representative function and, correspondingly, the less likely that it is that the LSB would need to intervene in the regulatory functions of the ARs.
26. From a practical point of view, the adoption of high-level principles in the IGRs would permit the LSB to monitor and review their efficacy and to supplement or amend the principles in a responsive, proportionate and evidence-based manner. An overly prescriptive or detailed set of IGRs runs the risk of the LSB being seen to be micro-managing the regulatory role which is not consistent with the objectives of the LSA.
27. The BSB regards the critical areas of independence to be appointments (which term is used to embrace initial appointment, renewal and termination of office) and funding. If the IGRs are going to provide robust governance arrangements which clearly separate representative and regulatory functions (Paragraph 98), they must set out clearly how independence is to be achieved (and monitored) in appointments and funding.
28. The BSB has already identified what it believes are the key indicators of regulatory independence (letter of 5 February 2009). We regard these as the litmus test of independence without which an AR cannot claim (or be seen) properly to have separated its regulatory and representative functions. Whilst we consider that it would be open to ARs, under the IGRs, to go further in entrenching regulatory independence and separation of regulatory and representative functions, we believe the issues we have identified are required properly to safeguard regulatory independence, to protect the public interest and to promote public confidence in the regulatory framework.
29. The BSB has already begun its own work in the area of regulatory independence and will look forward to the LSB's consultation in this area and the draft IGRs.

Education and Training

30. The BSB is pleased to note references to the processes of education and training in the Business Plan. Education and training are of critical importance in all the regulated professions and underpin a large number of the regulatory objectives set in the Legal Services Act. It will largely be through the maintenance of rigorous education and training standards that the LSB's goal of consumers receiving a "quality of service" from professionals who "strive to improve standards of practice, quality and education" will be achieved.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Ruth Deech', written in a cursive style.

Baroness Ruth Deech
Chair, Bar Standards Board

BSBChair@barstandardsboard.org.uk

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25 MAR 2009

Mr David Edmonds CBE
Chairman
Legal Services Board
Victoria House
Southampton Row
London
WC1B 4AD

24 March 2009

Dear David,

Following the recent Bar Standards Board meeting we are now submitting our supplemental response to the Legal Services Board draft business plan. I hope that you find our response helpful, and note also that we are trying to subscribe to the principles of the Plain English Campaign.

Yours sincerely



Baroness Ruth Deech
Chair, Bar Standards Board

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Cathryn Hannah
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23 March 2009

Dear Ms Hannah,

Legal Services Board ("LSB") Draft Business Plan 2009/2010

Further to my letter of 13 March 2009, the BSB Board met on Thursday 19 March 2009. The LSB kindly indicated that it would be willing for the BSB to supplement its response to its Draft Business Plan.

We have one further substantive area upon which the BSB should like to respond and one erratum to my letter of 13 March 2009.

Equality & Diversity

1. The BSB welcomes the policy focus placed by the LSB on promoting access to a diverse legal profession, and the emphasis placed on promoting fair access and high levels of competence. We see an evidence-based approach to equality and diversity with a focus on achieving hard outcomes as fundamental to making a tangible difference both to the profession and the public.
2. We also welcome the LSB's proposals for a collaborative approach to addressing the frequently complex challenges in this area across different partners; indeed the BSB and Bar Council are already working successfully together on joint initiatives to promote greater diversity at the Bar. As identified in the Draft Business Plan, the area of education and training is critical and we would highlight the importance of Continuing Professional Development in this area for the existing professional membership. We look forward to sharing our existing initiatives and achievements with the LSB and to the Board's support for exchanging good practice with others.

Erratum

3. In Paragraph 13 of my previous letter, the final sentence should read:

"The BSB is already in the second phase of detailed consultation on the regulatory changes that should be made to facilitate LDPs."

4. We also acknowledge that the timescale for implementation of LDPs was due to commence on 31 March 2009

Yours sincerely,



Baroness Ruth Deech
Chair, Bar Standards Board

BSBChair@barstandardsboard.org.uk

