Response to the LSB's Draft Business Plan

Introduction

I qualified as a solicitor over 30 years ago. I have been in private practice ever since, and have been a partner in my own firm for the last 20 years. I therefore have experience both as a member of a regulated profession, and as the owner of a regulated business.

I have been a Law Society council member since 2002, and therefore have experience of the issues that can arise when a single organisation is responsible for the representation and regulation of a profession. I am a member of the Law Society's Regulatory Affairs Board.

Since September 2008 I have been a Commissioner with Postcomm and therefore have some experience as an external regulator.

The views expressed below are my own.

Legal Framework

S.1 of the Legal Services Act sets out the regulatory objectives and professional principles which the LSB has a duty to promote. The regulatory objectives are:

- Protecting and promoting the public interest
- Supporting the constitutional principle of the rule of law
- Improving access to justice
- Protecting and promoting the interests of consumers
- Promoting competition in the provision of services provided by authorised persons
- Encouraging an independent, strong, diverse and effective legal profession
- Increasing public understanding of the citizens legal rights and duties
- Promoting and maintaining adherence to the professional principles.

The professional principles are:

- That authorised persons should act with independence and integrity
- That authorised persons should maintain proper standards of work
- That authorised persons should act in the best interests of their clients

- That persons who exercise before any Court a right of audience, or conduct litigation in relation to proceedings in any Court, by virtue of being authorised persons should comply with their duty to the Court to act with independence in the interests of justice; and
- That the affairs of clients should be kept confidential.

S.3 of the Act requires the LSB to act in a way which is consistent with the regulatory objectives, and to have regard to the principles of good regulation, which require that the actions and decisions of regulators should be:

- Proportionate: regulators should only intervene where necessary. Remedies should be appropriate to the risk posed, and costs identified and minimised
- Accountable: regulators must be able to justify decisions, and be subject to public scrutiny
- Consistent: Government rules and standards must be joined up and implemented fairly
- Transparent: regulators should be open, and keep regulations simple and user friendly
- Targeted: regulation should be focused on the problem, and minimise side effects.

The regulatory merits of self-denial

In effect, the regulatory objectives and professional standards set out what the LSB is to do, and the principles of good regulation set out how it is to do it. Chapter 4 of the draft plan confirms this in outlining the LSB's role in the future of regulation.

Without the principles of good regulation, the LSB would be free, and perhaps even obliged, to follow its vision to infinity and beyond. However the requirements of good regulation mean that it always has to question its plans, projects and decisions, to ensure that it is working in accordance with the principles. If it sees the principles as a valuable protection against over-enthusiasm, partisanship, and arrogance, it will be an excellent regulator. However if it sees them as irksome restraints on its activities, to be name-checked for appearances, but not truly internalised, it will not.

To take a recent example, if the LSB feels the need to contemplate holding the feet of approved regulators to the fire, it should first consider whether it has the evidence to justify this proposal; whether it has **all** the evidence, whether it is being fair, whether it has been transparent about the process by which it has come to this view and whether this is a proportionate response to the perceived problem.

The LSB, in the draft plan is, not surprisingly, open in its rejection of light-touch regulation, but it needs to be equally aware that heavy-handed regulation can be just as much a breach of the principles of good regulation. In Chapter 2 of the draft plan the LSB points out the risks the legal profession faces if this model of regulation fails, and suggests that failure will be caused by those who do not accept the need for an oversight regulator. Lack of co-operation by any stakeholders will obviously be very unhelpful, but the LSB needs to be careful not to lose the goodwill of those who want to give the new regime a fair wind, and must also be careful not to allow itself to be lured into taking sides in the absence of all the facts and without a proper debate.

Promoting virtue and suppressing vice

If the LSB is to be proportionate in its approach, it must not duplicate the activities of approved regulators: its unique role is to ensure that approved regulators also adhere to the principles of good regulation in their promotion of the regulatory objectives and professional standards. The LSB therefore needs to require approved regulators to be transparent in their policy-making and enforcement activities. In turn, the LSB needs to be transparent and consistent in its policy-making and enforcement processes. This must include sharing any representations from stakeholders with other stakeholders so that it has an opportunity to consider all relevant points of view before making a decision.

The better regulation principles should all have equal weight, however, the regulatory objectives have to be set in a hierarchy, as there are easily foreseeable circumstances in which there would be a conflict between them – for instance the interests of an individual client might conflict with the public interest, and the interests of a group within society might conflict with the principle of the rule of law that all are equal before the law.

The rule of law will always be pre-eminent and absolute, and the independence of the legal profession should be seen as an essential requirement for its promotion.

The draft business plan refers to *"a programme of engagement with the approved regulators to build and deliver a gold standard of consistent regulatory excellence".* It is quite right that the LSB should require the highest standards of regulators, but it must be careful not to fall into the trap of assuming that a regulator which requires the highest standards of the community that it regulates is, by definition, a gold standard regulator.

One of the professional principles that the Act requires regulators to promote and maintain is that authorised persons should maintain proper standards of work. This standard needs to be good enough to comply with the regulatory objectives, in particular protecting and promoting the interests of consumers, but an approved regulator which attempted to require authorised persons to achieve higher standards would not be acting proportionately or in a targeted way. Having considered the regulatory objectives, professional standards and principles of good regulation, they must set a floor below which standards must not fall, but can merely exhort, rather than compel, higher standards. Market forces will ensure that there will be a variety of standards of work according to the needs and wishes of different consumers, and the LSB should ensure that approved regulators do not seek to use their regulatory powers to interfere in matters which should be left to the market.

They can, and should, demand the highest possible standards of themselves, and should welcome input from those they regulate as to whether they are achieving these standards.

Don't throw the baby out with the bathwater

In dealing with approved regulators, the LSB should be mindful of the fact that Parliament has provided for approved regulators to have both regulatory and representative functions and, in the interests of proportionality and accountability, the LSB should not interfere in the relationship between representative and regulatory functions unless it is clear that the regulatory functions are prejudiced by the representative functions. The LSB should not find that there is such prejudice unless it is provided with cogent evidence that an approved regulator's ability to promote the

regulatory objectives has been undermined by its representative functions, and that interference by the LSB would be proportionate and targeted.

The LSB should assume that, as Parliament has provided for approved regulators to also have representative functions, it must seem some merit in such an arrangement. It would be useful for the LSB to identify these merits, as this will be something to be put in the balance when considering whether guidance or intervention is necessary.

One of the reasons why the FSA failed to regulate the financial services industry in the public interest was that it did not understand a number of the more innovative activities undertaken by the financial services sector. Clearly, if an approved regulator is to do its job properly, it needs to understand the activities of the regulated community. The legal services sector is already extremely diverse (inevitably, as the law is ubiquitous) and the LSB should ensure that approved regulators understand the activities of those they regulate. This is most likely to be achieved if approved regulators work closely with those representing the regulated community, as representative bodies are likely to have this detailed understanding.

Many regulatory regimes, one regulatory standard

In less than a month it will be possible for legal services to be provided by legal disciplinary partnerships, where eight types of lawyer, - solicitor, barrister, legal executive, licensed conveyancer, patent agent, trademark attorney, notary and costs lawyer, can enter into partnership and 25% of the partners can be non-lawyers offering ancillary services, such as tax advice. Within a few years the Act will allow further alternative business structures, such as multi-disciplinary practices, and the external ownership of legal businesses. Depending on the make up of the partners/owners, these entities may have a choice of approved regulator.

It seems likely that entities which have a choice will choose the least restrictive regulatory regime. Of course the LSB will need to ensure that this regime is sufficient to protect the regulatory objectives, but it should also be ready to challenge the regulatory justification for more onerous regulatory requirements by one approved regulator where another approved regulator, covering the same field, had satisfied the LSB that its regime is sufficient to comply with the regulatory objectives.

Generally, the LSB should be inviting the approved regulators to aim for convergence of rules wherever possible, so as to minimise inconsistency and confusion for the public and professionals alike.

Managing the known unknowns

It is part of the LSB's vision that there will be new entrants to the market, new combinations of those already within it and new ways of delivering services to consumers. Regulation should not be allowed to get in the way of innovation, save if it is necessary to do so in the interests of the regulatory objectives. So that innovation is not stifled through fear of falling foul of a regulatory regime, the LSB should require approved regulators to respond to requests from authorised persons that proposed new combinations or new ways of working be checked in advance and confirmed as compliant or non-compliant with the regulatory regime.

Those who cannot remember the past are condemned to repeat it

In his book "The Great Crash" J.K. Galbraith suggested that regulators have a defined life cycle. To ensure that approved regulators do not become sclerotic and less effective over time, the LSB should require them to have a robust process of self-examination and self-renewal. Of course the LSB should also have its own effective process of self scrutiny.

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