



The Law Society

The Law Society's response to the Legal Services Board Business Plan

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The Law Society welcomes the opportunity to comment on the Legal Services Board (LSB) draft business plan for 2011-12.

We welcome the business plan and whole heartedly agree with the sentiment that the model of oversight regulation requires strong partnership between the LSB and approved regulators. The LSB has quickly got to grasp with the legal landscape and, as the progress with regards to Internal Governance Rules and the structure for regulating ABS show, they have already achieved much. During its existence we have found the LSB to operate in both a professional and consultative manner.

Rather than talk about the areas where we agree with the LSB the Law Society's response will concentrate on the areas where we have concerns.

The Law Society's comments are prepared in the context that the LSB is intended to have a supervisory, rather than a front-line, role in relation to legal regulation. It is the approved regulators who have the primary responsibility (as well as the relevant experience and expertise) for regulating the legal services market.

The regulatory context

The LSB's interpretation of the regulatory context seems to be shifting towards placing increasing emphasis on considering the skills, distribution and make-up of the legal sector. It is doubtful whether this is the proper business of LSB. The LSB was not designed to be an economic regulator, like those governing the utilities; it has a much more limited role. It is important that LSB does not divert resources into research relating to economic regulation, rather than reducing its budget.

We note that LSB proposes to maintain the budget for 2011/12 at the same level as for 2010/11. The Law Society considers that now the Internal Governance Rules have been made, LSB should be looking to reduce its costs. There is no imperative that the LSB must spend its full budget. It is important that the LSB does not duplicate work undertaken by the approved regulators, or initiate projects that sit outside its proper scope as an oversight regulator.

The LSB's describes an ambition to change the client experience in the legal services market by changing regulatory culture through encouraging the movement away from reactive rules-based regulatory framework to an outcomes-focused approach (OFR). Whilst there is always scope for improvement, research suggests

that the client experience is already generally positive. The Law Society doubts whether LSB's ambition is appropriate or achievable. All approaches have their positive and negative aspects. The decision of how best to regulate should be a matter for the front-line regulators after proper consultation. The LSB should restrict their role to ensuring that the principles in the Act are met. The LSB also indicates a wish to conduct a series of reviews to evaluate in detail the effectiveness of unspecified aspects of OFR. It is the duty of each front-line regulator to monitor their performance and analyse the environment they operate in. The LSB's role should be to assess the information generated by regulators and, if this information is not satisfactory, advise front-line regulators what information is missing.

Developing regulatory excellence

The draft business plan says:

“Over our initial period of operation, we have built the machinery for oversight regulation. New systems for approving new rules and wider changes to regulatory arrangements have been developed, as well as processes for designation and cancellation of approved regulator and Licensing Authority (LA) status. We will continue to deliver these systems efficiently, with appropriate review, alongside our partners across the frontline regulators.”

It is important that LSB do not carry out burdensome reviews without a clear sense on what benefit is to be achieved from them. The proposed regulatory scrutiny exercises and thematic reviews must fit in with approved regulators ways of working as it would be disproportionate for the LSB to insist that they do unnecessary work.

Unnecessary work of this sort would substantially increase the indirect cost of LSB – that is the costs which LSB force the approved regulatory to incur. The Society doubts whether the LSB needs to add “four pillars of regulation” to the eight regulatory objectives, five professional principles and five principles of good regulation that are enshrined in the Legal Services Act.

Nor do we think it is appropriate to have an outcomes-driven approach to regulation as a core objective. There does not seem to be a single definition of OFR so it is not entirely clear what the LSB means by this phrase. Furthermore, the approved regulators duty is to meet the principles laid out in section 1 of the Act. It is perfectly possible that they may believe that the best way to do this is through another regulatory method or through a mix of methods. For example, it may be appropriate to have an OFR approach to client relations but necessary to have a rules-based approach to accounts rules. It is not for LSB to prescribe single way forward.

The draft business plan states:

“As an oversight regulator, we need to be able to demonstrate that those that we regulate are effective and are addressing the appropriate risks and issues.” The front-line regulators already need to demonstrate that. LSB's role should simply be to ensure that the approved regulators are properly assessing their own effectiveness.

LSB do not explain why they want to explore the scope for greater alignment of the formal architecture of disciplinary decision-making and appellate bodies. Whilst it is important to ensure that none of the approved regulators seeks additional business by becoming a “soft touch” for those they regulate, it is not clear that that objective requires the imposition of greater alignment of process.

Developing an evidence base

The LSB draft business plan appears to suggest that LSB will take a leading role in researching the legal sector, rather than pooling together and reviewing what individual regulators are doing. We understand that the LSB needs to understand the impact of decisions, but it is important that LSB only commissions its own research where it can add value by doing so, and that it does not duplicate or usurp the role of front-line regulators. Maintaining an appropriate balance will be critical.

The LSB needs to understand the impact that its decisions have on the legal services market. LSB also need to have confidence that approved regulators are appropriately meeting the regulatory objectives. But this does not necessarily mean that the LSB will themselves have to undertake a substantial amount of original research.

The plan rightly states:

“Of equal importance to our own research and evidence-gathering programme, is that undertaken by regulators and others.” Indeed the research undertaken by regulators and others should be of primary importance, with the LSB concentrating on assessing the evidence provided to them and filling in gaps where it is cost-effective for them to do so.

The LSB must ensure that their desire to map out in detail much of the legal services market does not lead them to go beyond the boundaries of their oversight regulator role.

Ensuring effective redress for consumers

The Law Society recognises the need to ensure effective redress for consumers. The Law Society has itself achieved a good deal on this in recent years. The Law Society continues to promote good in-house complaints handling amongst solicitors firms. Our practice note on this issue encourages firms to have an accessible, objective and responsive first-tier complaints handling service. Furthermore the Society’s Legal Complaints Service has performed to a very high level over the last two or three years and, as the organisation comes closer to closure, the LCS performance continues to be impressive.

We welcomed the Legal Ombudsman’s (LeO) Business Plan as it gave approved regulators, regulated community and consumers of legal services a clear idea of how LeO intends to operate in its first full year of running. As the largest approved regulator, we hope that our own experience of creating and maintaining a complaints handling function may be of some use to LeO, although we recognise that the Ombudsman scheme will be very different from the scheme Legal Complaints Service (LCS) have run. We share LeO’s ambition for complaints in the legal sector to be resolved in an effective and efficient manner.

Widening access to the legal services market

The Law Society continues to support widening access to the legal market. The Law Society believes that ABS should be permitted, provided that public and consumer protections are fully secured and that ABS are subject to all regulatory requirements governing other law firms.

The Society believes the way in which ABS are introduced is crucial in terms of maximising public access to justice, ensuring an independent strong diverse and effective legal profession, and securing the reputation of our legal services internationally. But the Society does have concerns about the timetable for implementation, especially if a “big bang” approach is taken. The reputation of ABS firms (and other English and Welsh firms in general) will be damaged if these new business models give rise to serious regulatory issues. The SRA have an extraordinary ambitious agenda. If SRA conclude they need longer, LSB must recognise that it is more important to get the implementation of ABS right than to meet an arbitrary timetable.

We do not understand why the LSB wants all appeals from ABS to go to a single body. This will create inconsistencies between SRA regulated firms which are ABS and those which are not. That would be, highly undesirable. Our strong preference is for the SDT to hear all SRA related cases.

Securing independent regulation

During 2010 the Law Society and the SRA agreed an internal governance settlement which (apart from timing of changes to the composition of the SRA Board) is compliant with the requirements of the Legal Services Act. In practical terms the SRA has full delegated powers to deal with regulatory matters; establishes its own policy (on which it consults the Society and other stakeholders), sets its own procedures, and makes independent decisions on individual cases. The SRA Board has strategic independence when deciding how best to achieve its goals.

Now that IGRs have been agreed we doubt whether it is proportionate for LSB to expect approved regulators to submit a dual self-certificate every year, especially as the LSB will no doubt be informed immediately if independent regulatory arms should perceive any threat to their independence.

Developing a changing workforce for a changing market

The Society supports the SRA in its work on the Education & Training review.

The LSB says that they will assess how education and training requirements can be used as a regulatory tool to ensure the acquisition and maintenance of proper standards of professional and ethical competence across the legal workforce. We understand that the LSB, as an oversight regulator, would want to know how front-line regulators are achieving this aim. LSB must ensure that any such monitoring is done in a proportionate manner. It is primarily for approved regulators to fulfil this function – including choosing how best to meet the expected standards. The LSB must resist the urge to micro manage the process.

The business plan refers to the current mismatch between the numbers of students completing the vocational stage of training and the number of training contracts and pupillages available. We would caution the LSB that while there is currently a large disparity, this has not always been the case, and in the case. In the case of the solicitors’ profession at least, at a number of points in the last 20 years there have been more training contracts available than LPC graduates. The current situation is naturally of concern and students should be warned of the high competition. However the LSB must not assume that a problem that has been exacerbated by the recession will necessarily be ongoing. All potential students should be made aware of what is happening in the legal market, but the choice of whether study for an LPC should be left to individuals.

The Law Society has for a long time been committed to ensuring that our organisations promote equality and diversity in dealings with staff, members of the profession that we represent and regulate, the users of legal services, and the wider public. We recognise the vital importance of ensuring that solicitors serve effectively the needs of all the users of legal services and society. This can be best achieved by recruiting and nurturing talent into the profession from all communities.

LSB refer to the issue of building an evidence base around the composition of the workforce in order to inform targeted cross-sector policy responses. The Society will comment on that in its response to the specific consultation that deals with this matter.

Improving access to justice: rationalising the scope of regulation

The Society believes that the LSB approach to access to justice is flawed. In the Society's view, even where an initiative improves access to justice in certain areas, neither LSB nor front-line regulators can properly ignore the potential risk of some clients not being able to receive a suitable service particularly if it is disadvantaged individuals who are likely to lose out. Everybody needs to access to competent and independent advice on legal issues which affect them.

The LSB's focus on collecting data about the market is not a substitute for ensuring that Licensing Authorities are aware of the possible risks, and have plans to mitigate them. It is not sufficient to rely solely on after the event research, which may show that access to justice has diminished but will not do anything to avoid such damage occurring.

ABS provide a potential means for widening access to legal services. Nevertheless, there is also a potential risk from some forms of ABS in some areas of the country. In the Society's view, there is a particular risk if large new providers, concentrating on easily commoditised work, provide a limited range of legal services in some less heavily populated parts of the country. The impact of that could be to render unviable existing suppliers, who provide services in more complex areas of law. The LSB should insist that Licensing Authorities have appropriate strategies in place to deal with this potential risk.

The Law Society welcomes LSB's commitment to launch a specific examination of how best to regulate will writing and to look at the question of reserved activities more generally. The Society will be happy to assist LSB with both projects.

Budget and governance

Over the next three years the LSB has budgeted £900,000 for externally funded research. This suggests that the LSB is in danger of duplicating the work of others and/or expanding its remit beyond that which was intended for it. Our preference is for the LSB to rely primarily on information that is already collected by front-line regulators, critically assessing any proposals for bespoke research to ensure that the likely benefits justify the cost, and that it is more cost effective for LSB than for approved regulators to carry out the work.

The LSB business plan does not acknowledge the indirect cost that its requirements have on the approved regulators. Almost everything the LSB does has an impact on the workings and resources of those they oversee.

The business plan draws attention to the possibility of legal actions arising which approved regulators may bring (or defend) against the LSB. It is clearly right that where the LSB is successful in such litigation, the LSB's costs should be attributed only to the approved regulator (or approved regulators) involved, rather than shared amongst all the approved regulators. However, where the approved regulator is successful, it would plainly be wrong, as the business plan suggests, for the individual approved regulator concerned to bear the LSB's costs. For a regulator to be expected to bear the LSB's costs when the LSB has misused its powers could not accord with any recognisable principle of justice. Any such approach would itself be bound to lead to further legal action. But nor would it be satisfactory for these costs to be borne by the other approved regulators. In the Society's view, if this situation were to arise, the Government will need to meet the costs since it is the Government which is responsible for establishing the regulatory structure.