LEGAL SERVICES BOARD

Triennial Review

Legal Services Board response

March 2012

Introduction

1. The Legal Services Board (LSB) is a non-executive departmental body (NDPB), established by the Legal Services Act 2007 (the Act). The Board came into being on 1 January 2009 and became operational, with the majority of our statutory powers, on 1 January 2010.

2. We are responsible for overseeing the regulation of legal services in England and Wales, and do so independently of Government and of the legal profession. Ten separate bodies, the approved regulators, come within the Board's remit, which themselves regulate the circa 130,000 lawyers practising throughout the jurisdiction. The Board also oversees the Office for Legal Complaints (OLC), which administers the Legal Ombudsman scheme and which resolves consumers' complaints about lawyers.

3. The Board's establishment was just one element of a major programme of regulatory reform for the legal services sector that had been many years in gestation. **Annex A** provides a summary of the reform programme.

Functions of the LSB

4. The Act provides the LSB with its statutory role and remit, including our duty to act in accordance with the regulatory objectives, to maintain appropriate standards in the profession and to apply general principles of better regulation. It also provides for the establishment of a Consumer Panel to advise the LSB, including arrangements for the Panel to establish committees and to provide advice to the LSB (including the carrying out of research).

5. In its preparation for the Triennial Review, the Ministry of Justice (MoJ), our sponsoring department, prepared a clear summary of our functions, which was comprehensive and which we re-state below. This summary derives from the Act and all of the Board's activity can be tracked to it:

   "The role of the LSB is to promote and ensure adherence to the regulatory objectives set out in the Act. The aim of the objectives is to ensure that regulators support the rule of law, improve access to justice, protect and promote consumers' interests and the public interest, promote competition, encourage a strong and effective legal profession, increase public understanding of their legal rights and maintain the professional principles of those providing legal services.

   The LSB has a number of powers and sanctions available to it to ensure that approved regulators are fulfilling these objectives.

   The **ongoing statutory responsibilities** of the LSB include:

- **approval and recognition** - considering a range of applications from both existing approved regulators (including applications to become a licensing authority) and those seeking to regulate a reserved legal activity

- **monitoring and investigating activities** - monitoring approved regulators to ensure compliance with the regulatory requirements and monitoring the OLC's performance. It also examines the wider market place to identify trends, gaps in regulation, competition issues and how both its own rules and those of approved regulators are working in practice.

- **enforcement and disciplinary activities** - ensuring approved regulators and licensing authorities perform their duties in a way which meets the regulatory objectives and, where necessary, exercising the powers at its disposal to ensure that this happens. These powers include the power to set targets, give directions, publicly censure a body, impose a fine, intervene in the running of the body and ultimately cancel a body's designation as an approved regulator and a licensing authority.

- **regulation, education and training** - a duty to assist in the maintenance and development of standards of the regulation by approved regulators and also in the education and training of persons carrying out reserved legal activities.

The LSB is also required to make rules concerning the imposition **of a levy on leviab**le bodies. These may be subject to change year-on-year.

6. In addition to the above analysis by MoJ, we also note that in relation to:

    - **approval and recognition** – we also consider applications from those seeking to become an approved regulator; and

    - **monitoring and investigating activities** – we also have duties in relation to the Solicitor's Disciplinary Tribunal.

    We would also add:

    - **scope of regulation** – powers to make recommendations to the Lord Chancellor on the designation of new activities as reserved and the removal of existing designations.

7. We consider that all of these functions continue to remain valid and continue to be discharged, most appropriately, by a body independent of both Government and the profession. Informing this view, we take account of the need for:

    - Government to receive advice from an expert, but disinterested, body on matters to do with the scope of regulation and the acceptability of individual

bodies to discharge regularity responsibility. For Government to seek to duplicate the role of the Board would both increase public expenditure and raise major public interest questions about the balance of responsibility between state and profession;

- Manifest but proportionate assurance to legislature, executive and public that regulation is truly being discharged both effectively and in the public interest – we consider that this assurance has to be provided at arms' length from the bodies discharging the front-line regulatory functions if it is to be credible;

- Clear processes for intervention, which, need to be at arms' length from Government in order to remove any doubt that they are being driven through proper regulatory process rather than by political concerns.

How we operate

8. We set out our approach to delivering our statutory remit in our Business Plan each year. This is always the subject of public consultation. Our approach has remained constant since our inception. Our efforts will focus on ensuring that regulation is proportionate – reduced where possible to remove unnecessary barriers to delivering the regulatory objectives and only imposed where necessary to support consumer and/or public interest outcomes, including to support the rule of law. We will seek to encourage competition while ensuring that regulation reacts and develops to protect against and mitigate for emerging risks. Regulation should support innovation, incentivise a strong consumer focus and restrict the ability of providers to penalise consumers for their lack of knowledge or power.

9. Indeed, our approach to the way we perform our role remains little changed from when we started and is as follows:

    - The Act sets out clear regulatory objectives. These objectives underpin all of the work of the LSB and we will always map our proposals back to them.

    - The better regulation principles are enshrined within the Act – so our activities will always be transparent, accountable, proportionate, consistent and targeted.

    - We expect that the approved regulators will work with us in a relationship of openness and trust and act in accordance with the regulatory objectives, as required by the Act, and reducing to a minimum any requirement for us to duplicate work undertaken competently by others. However, we will not hesitate to do what is necessary, should the need arise.

- We will set out the anticipated impact on consumers and the professions of alternative regulatory options in our consultation papers and seek views from others about whether we have made the right assessment.

- We will work with approved regulators to identify risks and manage them as we open up the legal services market. This means less of a focus on prescriptive rules that apply to everyone and greater supervision of lawyers and businesses that present risks to specified outcomes. We expect that approach to apply both to our activities and to the approach of the approved regulators.

- We will develop strong working relationships with key stakeholders including the MoJ, the Welsh Government, the approved regulators, citizen and consumer groups, the professions, firms and partnerships across the sector, potential new entrants to the market, other regulators and redress providers and the academic community.

- Above all, the public and consumer interest will guide us in our work.

10. At the risk of repetition, all that we do is driven by the regulatory objectives and the need to operate in accordance with better regulation principles. We are obligated to do so and it is right to do so. This obligation extends to the approved regulators also. This mutual underpinning, far from binding those obliged to have due regard to an identical agenda, allows each organisation to develop an appropriate approach to meeting the unique challenges faced. The flexibility though does not extend to what the regulatory objectives mean: they bind approved regulators and the LSB to working to deliver a shared set of outcomes. In July 2010, alongside our Annual Report for 2009/10, we published our analysis of the regulatory objectives[1] (after consultation) so that approved regulators and others could see how we would apply them in the joint endeavours ahead.

11. How far the delivery of the regulatory objectives decided upon by Parliament, and the objectives of the legislation, can be left to the approved regulators alone is what we are working to determine. We have certainly come a long way but few of the approved regulators have a tradition of the kind of approach to regulation that the Act anticipates and requires. This is not surprising given the history of most as professional bodies delivering self-regulation and where, historically at least, the full range of regulatory objectives have not been core to a professional body's approach. Progress under challenging conditions is being made, perhaps inconsistently, but the need for assistance and co-ordination remains. Our current initiative on regulatory effectiveness is the next step in enabling a clear assessment to be made on how effectively regulators are using this freedom.

[1] http://www.legalservicesboard.org.uk/news_publications/publications/pdf/regulatory_objectives.pdf

12. We note also that many of the “burdens” we place on approved regulators are designed to increase the professional standard of their regulation and hence lead to a reduction in the burden placed on the sector itself.

Observations on delivering our functions

Approval and recognition

13. The prevailing need for oversight in delivery of the regulatory objectives is perhaps most evident in our work to consider applications from regulators to make **amendments to their regulatory arrangements**. Our role under the powers provided to us is to assess such applications against the criteria in the Act (Sch. 4, 25 (3)), which support the duties set out in section 28. The Act places the onus on us to approve applications unless one or more of the criteria have not been met. It is therefore our role to consider whether the changes proposed are compatible with the regulatory objectives and have been made in a way which is transparent, accountable, proportionate, consistent and targeted.

14. We have received numerous requests for changes to alternations to regulatory arrangements. We have, as permitted by the Act, provided Rules to govern the process. To date we have issued only one Warning Notice that we are minded to reject an application. But, on a significant number of occasions, we have found weaknesses in the material provided to support the application by regulators in terms of process, substances or sometimes both. In such situations, we have provided guidance and challenge to ensure regulators understand where their applications fall short of the statutory criteria so that we may make approval decisions that are sound and legally robust.

15. We believe that to see such an approach as ‘micro-managing’ is misguided. . We want to see regulation that is fit for purpose and to disregard our statutory obligations when performing our functions to facilitate changes to regulatory arrangements at odds with the Act would both be remiss and, in the medium-term, increase the risk of more extensive and expensive intervention, potentially even necessitating legislative reform. Ultimately, our approach is guided by the quality of the submissions we receive and their compliance with statutory requirements – there have been minimal occasions where submissions have ultimately been rejected, and one statutory Warning Notice. In the majority of cases, applications have either been satisfactory on receipt, or our team has worked hard with regulators to ensure full understanding of the process’s requirements so that submissions can be improved to satisfactory levels.

16. We expect, and hope, that over time we will need to do less of the latter as regulators become more familiar with the regime and improve their regulatory performance. It is in their hands to determine, but it is not improbable that in time the need for a statutory check and balance on such changes is no longer required. But experience shows that we are not there yet.

17. The process represents a significant change from pre-Act arrangements, where only a smaller sub-set of changes to regulatory arrangements required approval – and indeed where approval was at Ministerial level on the advice of the Legal Services Consultative Panel. Aside from the improvements in speed that the new process has brought about, it also more clearly ensures separation of regulation of the legal profession from Government.

18. This need for separation from Government is also relevant to our function in relation to recommending **designation of new approved regulators or licensing authorities for alternative business structures**. It is clear that permitting access to the regulatory sphere is an important decision requiring careful consideration of the proposed body's organisational competence and capacity. Regardless of who takes the decision, currently the Lord Chancellor, it needs to be done on the basis of solid and robust advice. Building up expertise within a body independent of Government ensures that such advice can be prepared on a consistent, expert basis. This is likely to be more effective, particularly in terms of cost, than requiring ad hoc external advice on individual applications as they arise.

Monitoring and investigating activities

19. As regards the Board's responsibilities in relation to the OLC, the Act provides for a governance model that prevents any accusation of influence of either Government or the profession by giving Board member appointment responsibility to the LSB. It also allows for independent challenge on performance, and indeed scope for more prescriptive performance target intervention, by the LSB. This does not duplicate the rightful role of the OLC but does ensure a degree of check and balance. It is perhaps not surprising that Parliament introduced a degree of 'belt and braces' into the oversight of the new redress system in light of the past history of poor performance in this area. It is in line with best practice in other sectors, where, for example, the Financial Services Authority has similar powers in relation to the Financial Ombudsman Service and Ofgem and Ofcom have powers to recognise Ombudsman and other ADR services and to intervene in relation to their performance.

20. In relation to the approved regulators, it is clear that this is core to the role of oversight – are regulators performing at the level society demands? The Act effectively 'passported' pre-existing bodies with regulatory functions into the new regulatory regime with no formal assessment of their competence. New bodies seeking to enter the regulatory regime – quite rightly - face a far higher threshold – and it is the latter that is the standard to which all should aspire. In order to ensure a consistent approach to delivering our oversight role, we have developed a framework to assess whether the approved regulators are acting in accordance with the regulatory objectives and the better regulation principles. Important considerations, such as the appropriateness of their interventions, ensuring

effective risk management, supervision and enforcement and acting out an outcomes-focused approach, will all be priorities – whilst recognising that what is appropriate for a body regulating several thousand professionals may be delivered in a different way to that of a body regulating some hundreds.

Enforcement and disciplinary activities

21. The Board has not had to use its disciplinary or enforcement powers to date. The Board does not consider its occasional use of its S55 powers to gather data as enforcement, but rather as a means to ensure it has all appropriate evidence to underpin its judgements. As stated above, its preferred approach is to work in partnership with approved regulators to deliver shared outcomes. This means ensuring that there is a shared and accepted understanding of what is required. In the Board's view, and in light of its particular role, this is likely to deliver more effective results in the long-term, particularly as much of the Act's ambition is about 'hearts and minds' change. Whilst robust enforcement action has its place – and is certainly essential in any regulator's armoury – deployment must be appropriate to the circumstances.

Regulation, education and training

22. It seems clear from our own understanding of, in particular, representative bodies' perceptions of the Board, that this is the area that generates most confusion and consternation. Whether it be the amount of research we as a Board carry out, the extent to which we seek to influence activity on important cross-sector initiatives such as the Quality Assurance Scheme for Advocates, education and training or the promotion of diversity – there seems reluctance to accept that it is part of our role to assist with these activities and that such assistance can – and indeed should – be undertaken on our own initiative where justified.

23. The Board remains convinced that this proactive role is necessary and that it does not duplicate the role of front-line regulators. To take the areas referred to above

    - Despite the scale of the market and its vital importance to the public interest, research of the legal services market before the advent of the Board was undertaken only on an "advocacy" basis by professional bodies, as part of formal Government processes by MoJ and its predecessors or the LSC, as a corporate social responsibility issue by bodies such as the College of Law and by a very small cadre of academics and consultants. The sum total of this work was rarely, if ever, sufficient to meet the evidential standards expected in other sectors. The Board's targeted investment in this area has therefore been widely welcomed by stakeholders outside the professions, both nationally and internationally, and been a crucial input into our own practice. We regard the gradual but welcome increase in such activity by some of the approved regulators as a

vital shift in regulatory practice that would not have occurred without the Board's influence. As this activity increases and is sustained, there may be scope for the Board to invest less in future years.

- The sum total of the Board's activity on education and training has been the delivery of two speeches in 2010, which developed the case for a wide-ranging review, agreement to a proposition from three regulators that they, rather than the LSB, should undertake that review, the commissioning of one research report at a cost of £5,000 and the management, at no cost other than travelling expenses to the LSB, of a series of five seminars in support of the regulators' review. We find it hard to see that this can be described as duplication. But we equally find it hard to see how a challenge to undertake a cross-sectoral review of a kind not undertaken for 40 years at a time of the most considerable change in the legal market and workforce can be seen as an illegitimate activity for an oversight regulator to undertake

- In relation to diversity, we note that a Department for Constitutional Affairs consultation on diversity in the legal profession recommended that firms conduct surveys and published data on their website. However, in the absence of a body with the power to force this onto the regulatory agenda, no progress was made, with the issue being seen as one for professional bodies and a minority of enlightened firms. The role of the LSB has therefore been crucial in building momentum in this area in general and in relation to social mobility in particular.

- In relation to QASA, the Board's intervention has been crucial in the maintenance of any momentum behind delivery of the project. We note that the project is an object demonstration of the difficulties faced by the front-line regulators in seeking to cooperate across professional boundaries in the absence of forceful facilitation.

24. We return to the basis for our existence as described by the MoJ "*The role of the LSB is to promote and ensure adherence to the regulatory objectives set out in the Act. The aim of the objectives is to ensure that regulators support the rule of law, improve access to justice, protect and promote consumers' interests and the public interest, promote competition, encourage a strong and effective legal profession, increase public understanding of their legal rights and maintain the professional principles of those providing legal services*."

25. Ultimately, it is indeed for the regulators to devise, develop and implement the reforms required to guarantee the legal profession in England and Wales maintains its undeniable reputation for excellence into the coming century. The role of the LSB is to make sure that they do and that they do so in a way that meets the will of Parliament. We take this active responsibility seriously. In many

respects, it is odd that in doing so we face fierce criticism. Surely even our fiercest critics do not dispute the central importance of legal services to society and to the rule of law? No. Where we differ is on how best to maintain and improve the legal services environment for all who rely on it – whether that is in a personal, commercial or societal context.

26. We remain committed to delivering our statutory responsibilities and guard our independence from Government, the profession and other interests well. It is our objectivity that allows us to see what those embedded in the sector may not and which leaves us well-placed to mitigate the risks faced.

The Legal Services Consumer Panel

27. The Panel has commented itself on the Triennial Review and we take this opportunity to indicate our broad agreement with the thrust of its submission.

28. The Board has already argued, in the context of debate around the consumer landscape, that it considers the retention of expert, independent consumer advice to be essential if it is to meet its obligations to pursue the consumer interest. In reaching that view, it took account of:

- The relative inability of national consumer bodies to engage with the legal services agenda on an ongoing basis in the light of their other priorities;
- As a consequence, the danger of professional interests having – or being perceived to have – excessive “voice” in regulatory decision-making;
- The failure to date of any of the approved regulators to maintain and sustain their own arrangements to ensure independent consumer input into their activities;
- The quality of work produced by the Panel at significantly less cost than would have been involved in its external commissioning.

Given these factors, it is probable that the Board would seek to appoint a panel with a similar role and function to the current body were a decision made to remove its statutory status.

Conclusion

29. To conclude, we consider that the conclusion of the Triennial Review has to be informed by objective judgement on delivery, rather than simply against abstract criteria. In the period since the Chairman was appointed in April 2008, the Board has consistently delivered:

- **Early** – both its initial establishment and its largest project to date, the delivery of alternative business structures, happened considerably ahead of the time initially set out by Government;

- **On or below budget** – set up was achieved below budget and in its three years of operation, the Board has both lived within the initial cost estimate in the PA and PWC reports and never sought a cash increase in its running costs;

- **Comprehensively** – we have delivered a challenging three-year plan for the period 2009-12 in full, transforming the governance of regulation in England and Wales, establishing more independent dispute resolution than ever before and putting in place the framework for a radically transformed market for the benefit of the public, as both citizen and consumer.

30. While the time will come for a comprehensive review of the 2007 Act – and the related unreformed statutes which sit alongside it – that should happen only after a full evaluation of both the medium-term impact of the changes which the Board has led in terms of the maturity and capability of the front-line regulators and, above all, on the state of the legal services market after a further three years of progress on reform. Any significant change to the current settlement in advance of such a review will divert effort unnecessarily from the current challenging delivery agenda.

Annex A

History of the reforms

1. The Legal Services Act 2007 – and the creation of the Legal Services Board marked the culmination of almost a decade of work.

Background to reform

2. In March 2001 the OFT produced a report, ‘Competition in Professions’, which recommended that unjustified restriction on competition should be removed. The government responded with a consultation paper and report into competition and regulation in the legal services market.

3. The Government’s report concluded that "the current framework is out-dated, inflexible, over-complex and insufficiently accountable or transparent... Government has therefore decided that a thorough and independent investigation without reservation is needed".

Regulatory review of legal services

4. In July 2003, Sir David Clementi was appointed to carry out an independent review of the regulatory framework for legal services in England and Wales. The terms of reference were:

5. To consider what regulatory framework would best promote competition, innovation and the public and consumer interest in an efficient, effective and independent legal sector; and

6. To recommend a framework which will be independent in representing the public and consumer interest, comprehensive, accountable, consistent, flexible, transparent, and no more restrictive or burdensome than is clearly justified.

7. In December 2004, Sir David published ‘Review of the Regulatory Framework for Legal Services in England and Wales’. His recommendations included:

   - Setting up a Legal Services Board - a new legal services regulator to provide consistent oversight regulation of front-line bodies such as the Law Society and the Bar Council.
   - Statutory objectives for the Legal Services Board, including promotion of the public and consumer interest.
   - Regulatory powers to be vested in the Legal Services Board, with powers to devolve regulatory functions to front-line bodies, now called Approved Regulators, subject to their competence and governance arrangements.
   - Front-line bodies to be required to make governance arrangements to separate their regulatory and representative functions.
   - The Office for Legal Complaints - a single independent body to handle consumer complaints in respect of all members of front-line bodies, subject to oversight by the Legal Services Board.

- The establishment of alternative business structures that could see different types of lawyers and non-lawyers managing and owning legal practises.

The reform programme

8. The Government broadly accepted Sir David's report, and in October 2005 it issued a White Paper, 'The Future of Legal Services: Putting Consumers First'. In that document, the Government announced its intention to publish a draft Legal Services Bill which would include proposals to implement the key Clementi recommendations. The three planks upon which reforms were to be built were the new, independent and robust oversight regulator, the Legal Services Board; the single complaints-handling and consumer redress body, the Office for Legal Complaints; and the facilitation of the innovative Alternative Business Structures, helping the legal sector to become more responsive to consumer needs.

9. In May 2006, the draft Bill was published. It underwent Pre Legislative Scrutiny before a Joint Committee of MPs and Peers. That Joint Committee was chaired by Lord Hunt of Wirral, and it published a report in July 2006, making several recommendations about improvements that could be made by the Government but accepting the broad thrust of the reform package.

10. In that spirit of broad consensus, the Government introduced the full Legal Services Bill to Parliament in October 2006. Parliamentary passage was lengthy and scrutiny was thorough, with the Bill receiving Royal Assent over a year later, on 30 October 2007.