

## **Legal Services Board and Office of Legal Complaints – Triennial Review**

### **Introduction**

- 1) The Lord Chief Justice, the Master of the Rolls and the President of the Queen’s Bench Division welcome the invitation to respond to the triennial review by the Ministry of Justice (‘the MoJ’) of the Legal Services Board (‘the LSB’) and Office of Legal Complaints (‘the OLC’).
  
- 2) The purpose of regulating the legal profession is to ensure that those providing legal advice and representation adhere to the highest standards of expertise, accessibility, value, independence and integrity. There are three reasons why the judiciary has a special interest in maintaining these characteristics throughout the legal profession. First, judges have a duty to ensure the effective delivery of justice, which cannot be achieved without a legal profession which lives up to these standards. Secondly, it is only so long as the legal profession in this country achieves these standards that our judiciary, whose members are recruited from professional lawyers, will continue to be of such high quality. Thirdly, every day they sit in court, judges are consumers of the professional services of advocates and other litigation lawyers, and therefore have an interest in these standards being maintained, and an opportunity to assess the extent to which they are being achieved.
  
- 3) We understand that the present review is primarily concerned with (i) assessing whether there is a continuing need for the LSB and the OLC, and, if there is such a need, (ii) deciding whether there are appropriate arrangements in place to ensure the LSB and OLC comply with recognised principles of good governance.
  
- 4) This response focuses on the LSB. So far as the OLC is concerned, the reasons for its creation, primarily the need for a single body, independent of every part of the profession, to consider consumer complaints, remain as valid now as they did when the Legal Services Act 2007 (‘LSA 2007’) was introduced. It remains essential that a cost-effective, efficient and simple consumer redress scheme is in place for those who have had inadequate professional service.

- 5) We have no direct specific experience or knowledge of the manner in which the OLC has operated since its creation. It may well be the case that improvements could be made to its governance, its complaint-handling processes and whether the measures it can take are properly proportionate. The MoJ will no doubt obtain and consider that evidence in reaching its findings.

### **The Legal Services Board**

- 6) The LSB is an oversight regulator, intended to provide proportionate oversight regulation, a point made clear by Bridget Prentice MP in her evidence to the Joint Committee on the Draft Legal Services Bill<sup>1</sup>, and is reflected by section 4 of the LSA 2007, which places a duty on the LSB to assist in the maintenance and development of standards in relation to the regulation by approved regulators of persons authorised to carry out reserved legal activities and the education and training of such persons. The LSB was also intended to oversee the implementation of the structural reforms introduced by the LSA 2007, e.g. the separation of representative and front-line regulatory functions, and the introduction of alternative business structures ('ABSs').

### The LSB's Regulatory Approach

- 7) The LSB was empowered to carry out its role as an oversight regulator independently of the government and to do so in accordance with the regulatory objectives, set out in sections 1 and 3 of the LSA 2007. In reviewing the LSB's governance arrangements consideration should be given to examining how the LSB has approached these two aspects of its role.
  
- 8) First, it is of fundamental importance that the LSB carries out, and should it be retained continues to carry out, its regulatory role in a manner which is, and is perceived to be, fully independent of government. This, for instance, should be expressed properly in the framework document agreed between the MoJ and LSB<sup>2</sup>. Further consideration should be given to strengthening the LSB's governance structures and thereby ensuring that the perception cannot arise that it is not fully independent of government.

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<sup>1</sup> See HC 1154-II, HL Paper 232-II,  
<<http://www.publications.parliament.uk/pa/jt200506/jtselect/jtlegal/232/232ii.pdf>>

<sup>2</sup> MoJ and LSB, *Framework Document* at 1.1 <  
[http://www.legalservicesboard.org.uk/about\\_us/lsb\\_framework\\_document/pdf/moj\\_framework\\_agreement\\_june\\_2011.pdf](http://www.legalservicesboard.org.uk/about_us/lsb_framework_document/pdf/moj_framework_agreement_june_2011.pdf)>

- 9) Secondly, the LSB, and the approved regulators, are required to further all the regulatory objectives. The LSA 2007 does not give precedence to any specific regulatory objective, although we believe that, as a matter of fundamental constitutional propriety, if the LSB was to give precedence to any of the objectives, it would have to be ‘supporting the constitutional principle of the rule of law’: section 1(1)(b) of the LSA 2007.
- 10) The MoJ should in its review scrutinise the approach taken by the LSB to the application of the regulatory objectives. In doing so it should give careful consideration to: (i) the question whether too great a weight has been given to the regulatory objective of protecting and promoting the consumer interest (section 1(1)(d) of the LSA 2007) at the expense of the other seven regulatory objectives; and (ii) to which steps need to be taken to ensure that all eight regulatory objectives are properly pursued as the LSA 2007 requires.

#### Whether to retain the LSB

- 11) While there may be reasons to retain the LSB, albeit only for a further two to three years, we consider that the MoJ should, to put it at its lowest, give serious consideration to replacing it, in the way suggested below, by 2015. The arguable reason for maintaining its existence now is to enable it to oversee, in a properly proportionate manner, the completion of the structural reforms to the legal profession introduced by the LSA 2007.
- 12) The regulatory structure created by the LSA 2007 is disproportionately and unnecessarily complex and overly expensive. The LSB exists to oversee the regulation of ten front-line regulators, which have overlapping jurisdictions. For example, the Solicitors Regulation Authority (SRA) and the Bar Standards Board (BSB), amongst others, regulate advocacy rights; the SRA and ILEX Professional Standards Ltd, amongst others, regulate the right to conduct litigation; and multiple regulators can regulate ABSs. By duplicating regulatory functions, this structure is (i) Byzantine in its complexity, (ii) leads to uncertain, and the risk of reducing, standards, (iii) confuses those who provide legal services, (iv) ironically, confuses consumers of legal services, (v) causes unnecessary work, and (vi) causes unnecessary cost, which is ultimately passed onto users of legal services. None of this is in the public interest (or, if it is different, in consumers’ interest).

- 13) The principal rationale for maintaining this structure, with the LSB sitting above it, is that every lawyer should be regulated by the professional body to which he or she belongs, e.g. solicitors by The Law Society, barristers by the Inns of Court and Bar Council, legal executives by CILEX. That rationale is no longer valid for two reasons. First, any justification for a link between professional body and regulatory entity was removed by the functional separation of regulation and representation introduced by the LSA 2007. Secondly, if two regulators regulate the same activity, they will either do so to precisely the same standards, which would be correct but indefensibly duplicative, or to different standards, which would be absurd, even dangerous.
- 14) It is a misconception to think that duplicative regulation is beneficial because it introduces choice for those who are regulated, and, therefore, competition among regulators. If two regulators have precisely the same standards, there is no public benefit from the competition between them, and any possible resultant improvement in efficiency would be more than outweighed by the cost of duplication and the risk of confusion. If two regulators have different standards, then that is not only inappropriate in principle, but it would inevitably mean that those who are regulated will choose the weaker regulator, which would be positively disadvantageous to professional standards and thus to consumers: it would represent the drive to the bottom.
- 15) The MoJ should give urgent and serious consideration to simplifying the present regulatory structure and introduce activity-based regulation, which would be independent of the Executive. This could properly be done in either of two ways:
- i) by replacing the LSB with activity-based regulation. This would require specific regulators regulating specific activities; thus only one regulator would regulate advocacy, and only one other regulator would regulate the right to conduct litigation and so on. The concern in relation to this option is the sheer number of reserved and legal activities which cross various categories of practitioner;
  - ii) by replacing the LSB and merging all the current front-line regulators to create a single Legal Services Regulator. The single regulator should have a management board appointed by an independent appointments commission which could properly

be composed of representatives of the profession, the judiciary and significant lay representation. It could then be organised so that it had specific divisions, each dedicated to a specific regulated activity i.e., the right to conduct litigation, the exercise of rights of audience and so on. In this way regulatory specialism, and excellence, could be properly maintained, while costs could be minimised.

16) As will be obvious, either approach would render the continued existence of the LSB as an oversight regulator redundant. However, they would enable regulation to take place subject to the regulatory objectives prescribed by the LSA 2007. Oversight of any regulatory structure which replaced the LSB could be effected by giving the Legal Ombudsman the power to bring judicial review proceedings against a regulator whom the Ombudsman believed to be guilty of a failure to regulate appropriately.

### **Conclusions**

17) In the light of the above discussion, we submit that it is in the public interest to simplify the present regulatory regime for legal services by the replacement of the LSB by 2015 at the latest through the introduction of activity-based regulation.

18) So long as the LSB remains in existence, serious consideration should be given to ensuring that it is seen to carry out its functions in a proportionate manner, as the LSA 2007 intended, and does so independently of the MoJ and generally in accordance constitutional principles and each of the regulatory objectives set out in the LSA 2007.