



Sir Michael Pitt
Chairman
Legal Services Board
One Kemble Street
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23 February 2015

Dear Mike,

BSB response to consultation on the Legal Services Board's draft strategic plan 2015-18 and Business Plan 2015/16

Thank you for the opportunity to comment on the Legal Services Board's draft strategic and business plans. We very much welcome the LSB's aspiration set out in your Foreword by the Chairman to work in a spirit of collaboration with the widest range of bodies, and we look forward to making constructive contributions from our particular perspective as the front line regulator of barristers.

That aspiration, expanded upon as it is very positively in paragraph 22 of the plan - (*working*) *with regulators in a relationship of openness and trust, cooperating and collaborating in the interests of efficiency and effectiveness* - appears to my colleagues to mark a shift in the LSB's attitude towards the front line regulators. The BSB welcomes and endorses this approach.

We have a number of observations which we think may be helpful to you in relation to the draft plans and I set these out below, moving from the strategic and general initially, to some rather more specific points on the 2015/16 business plan itself.

1. We acknowledge the practical challenge of drawing up a strategic plan at a time of considerable strategic uncertainty, given the electoral cycle, the significant changes in the legal services market which have occurred recently and since the LASPO Act in particular, as well as reviews of the Legal Services Act which have taken place over the last two years. Whilst I appreciate that the "Overview of Strategic Priorities" may be intended to serve as the plan's "Executive Summary", it might be helpful if some of the material in the section entitled "Context for the Plan" was set out earlier. This might allow everyone to see what the LSB's assumptions about the future strategic context are more clearly, both for the sector as a whole and for the LSB itself. Greater visibility and consensus between the oversight regulator and front line regulators about future planning assumptions would enable us all to plan more coherently and deliver better collective results against the regulatory objectives, from our differentiated perspectives and in accordance with our more nuanced responsibilities.

2. In relation to the context you set out in paragraphs 23 – 39, we recognise and broadly agree the four areas into which you have summarised the overall context. We think, however, that your draft gives the impression of devoting attention to those with property law problems, probate issues, small business claims etc, at the expense of those struggling to be heard in the family, criminal and immigration courts. Generally the position of the most vulnerable and disempowered consumers within the market is substantially underplayed and, as a result, regulatory action to meet better the needs of that segment of the market in future features less strongly in the plan than we would wish to see. The needs of business users of legal services risk appearing to be

prioritised. Both are of course important, but the fact that the latter are likely to be more tractable than the former should not deter the LSB or the front line regulators from the challenge. Put more bluntly, neither the LSB nor the BSB should put responding to the significant impact of the changes to legal aid into the “too difficult” box. The LSB plan as drafted risks giving that impression.

3. A key theme in the plan is dealing with the growth in the unregulated legal services market. We agree this requires attention and expect to include action in relation to it in our own next strategic plan. Similarly, the LSB plan seems to be bringing work on the regulatory objective in relation to increasing public understanding of the citizen’s legal rights and duties further to the fore. The BSB welcomes this, having long called for greater attention to be paid to it, and we also expect to include more work on this objective in our own next plan. In general, there appears in this plan to be a greater attempt to attend to more of the different regulatory objectives than we have seen in the past. This is very welcome. It would be unfortunate however if the language and approach of macro-economic regulation which is also very discernible in the plan were to undermine the positive impact of an apparently greater emphasis on a wider range of objectives.

4. Turning to your proposed strategic themes, we would urge that an appropriate balance is kept between the resources devoted to each. In our view, much has already been done to break down barriers to competition, growth and innovation and the supply side of the market needs time to take up the opportunities now on offer, including with appropriate assistance from their relevant front line regulators. At the BSB we want to be able over the next few years to consolidate the many changes we have put in place very recently or which are in the pipeline, and not be distracted from our core mission by needing to respond to, for example, a thematic review that we have not chosen to undertake ourselves, or re-engineering once again our regulatory arrangements to align with new benchmarks from the LSB.

5. Put another way, your second strategic theme, enabling the need for legal services to be met more effectively, is more important than your first, and we would hope therefore your main focus to be on that. We nevertheless will aim to continue to contribute in the leading way we have to date on the development of options for legislative change to which you refer at the end of paragraph 55.

More specific points

6. There is some risk that the wording in the documents regarding the statutory framework could give rise to misunderstandings about the Legal Services Act 2007. There are a number of statements regarding how the regulatory objectives relate to the activities of the LSB or the individual frontline regulators. For example, paragraph 19 refers to the regulators needing “the competence, capability and capacity to *promote and adhere* to the regulatory objectives”. The second bullet point in that same paragraph says that the LSB will “ensure that regulators and licensing authorities perform their duties in ways that *meets* the regulatory objectives”. Paragraph 20 refers to the Legal Services Board’s “statutory duty to *promote* all objectives”.

7. However, neither section 3 nor section 28 describes the LSB’s or our obligations in that way. The obligation in those sections, on both the LSB and the frontline regulators, is that we “must, so far as is reasonably practicable, act in a way which is compatible with the regulatory objectives”. The individual regulatory objectives require different things – we must *protect and promote* the public interest, whereas we must *support* the constitutional principle of the rule of law, for example. As a creature of statute, the LSB can do no more than the statute gives it power to do and must do no more than the statute requires. It would be helpful if the strategic plan clearly reflected the statutory position rather than some revised wording of it.

8. The strategic plan is written in very broad terms for reasons which we understand. This means it can often be a little difficult to discern exactly what it is that the LSB is actually intending to do over the life of the strategic plan in practical terms. In contrast, there are a small number of places in the business plan where the ambitions listed are clear and specific but look wholly unrealistic to deliver within the time and resources available. The most obvious but not the only example of this is the set of research proposals at paragraph 111. We fully share your eagerness

to develop a sounder evidence base for decision-making and policy-development, but we need to be realistic about the challenge.

9. We would urge you to give serious consideration to making the work tasks more specific (SMART even) but fewer in number across the whole of the business plan. This is important because the LSB's individual initiatives have direct impact on the work plans of the front line regulators and our planning and resourcing cycles are not yet aligned. A common aspiration for us all ought to be better common alignment, in subject matter and timing, of work where the LSB relies on the front line regulators for a contribution.

10. At paragraph 76 you specifically ask for views on the priority you should attach to the three areas of work set out there. We would support work being done *only* on the first of those as being targeted and proportionate given the LSB's role, for the following reasons. The LSA07, whether by design or as an unintended consequence, has in fact set up competition between regulators. In those circumstances, the role of the oversight regulator must surely be to balance removing constraints to competition between regulators with preventing regulatory arbitrage.

11. In contrast, work on choice of insurer risks seeing the LSB acting in a sphere where it has no locus: it is not a regulator of the insurance market and has no role in promoting competition in that market. Lastly, on the treatment of under-spend of practising certificate fees, the LSB apparently seeks to understand whether front line regulators follow accounting best practice and the requirements of s51. Primary responsibility for that must surely fall to the front line regulators and those who audit their accounts externally. It also goes to their stewardship of the funds drawn from those they regulate. We can be assured that if this were a major concern from the regulated community in relation to innovation and growth, we would have long since heard about it. This option should therefore be a very low priority for the LSB.

12. Finally on the detail, at paragraph 106 you propose what reads as a substantial change or further development in the standards by which you assess the performance of the front line regulators. I have no doubt that each, like the BSB, is committed to continuous improvement. There is a risk however of costly and distracting disruption to the strategic path on which we are set and making excellent progress, and which we now seek to consolidate, if the "goalposts" are changed in too short a time frame. We therefore strongly urge you to consider whether the review you describe should take place nearer the end of your strategic plan rather than in its first year.

One last thought. You make it plain that, while there is no hierarchy among the regulatory objectives, you intend to put the consumer at the heart of all you do. That is right and understandable, though from our perspective this seems to underplay our responsibility as regulators to protect the proper administration of justice. Your strategy tends to imply that all change is manageable and can be turned to advantage. But there can be little doubt that some unintended consequences of recent changes have had damaging impacts on the court processes with which we as regulators must try to deal.

Thank you again for the opportunity of commenting on the draft plans. Our Director General, Vanessa Davies, will be happy to elaborate on any of the above to your Chief Executive if this is helpful.

Yours sincerely



Sir Andrew Burns KCMG
Chair, Bar Standards Board