BAR STANDARDS BOARD

REGULATING BARRISTERS

Post Legislative Assessment (PLA) of the Legal Services Act 2007 (the Act)

Submission from the Bar Standards Board

General

1. This submission is made by the Bar Standards Board (BSB) to the Ministry of Justice in order to inform the Command Paper being presented to the House of Commons Justice Committee in May 2013 (or before summer recess).

2. The BSB is the independent regulatory body set up in 2006 by the General Council of the Bar, an Approved Regulator under the Act. We regulate barristers in England and Wales, in the public interest. We understand the Bar Council may be making a separate submission. The BSB's submission is made independently and without reference to any made by the Bar Council.

3. We understand the purpose of the PLA to be:

- to see whether the legislation is working out in practise as intended;
- to improve the focus on implementation and delivery of policy aims, and contribute to better regulation;
- to identify and disseminate good practice so that lessons may be drawn from successes and failures revealed by the scrutiny;

- but NOT to replay policy arguments made at the time of passage of the Bill; and

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- NOT to require disproportionate resources.

4. We note that a view has already been formed that "more time is needed to allow the bodies and systems created under the Act to be properly embedded in the legal services system" and that no "heavily detailed or extensive analysis" is proposed. We further note that there is "no intention to give a detailed analysis of the way that individual bodies are undertaking their functions."

5. There are certainly aspects of the Act in relation to which it may well be premature to form a definitive view. There are some aspects in respect of which the BSB is not yet – or unlikely ever to be – in a position to offer evidence, because of its specific remit. We think nevertheless it is a matter of regret that the positions summarised in paragraph 4 above have already been adopted, as they may prejudice the outcome of the assessment.

6. We do not believe it is possible to "focus on whether the bodies have been established in line with the intentions of the Act" without considering the *way* that individual bodies are undertaking their functions. Delivery of their functions is the way in which bodies demonstrate their interpretation of the Act – and whether the intentions of Parliament are being fulfilled. A body is unlikely not to have been *set up* in accordance with statute. It is surely what the bodies are doing and how they do it which determines an assessment of whether Parliament can be satisfied that the Act is interpreted as Parliament intended. Whilst our submission in this regard concentrates on the Legal Services Board (LSB), the principle could equally well be applied to other bodies such as the Approved Regulators (AR) and their independent regulatory arms where those exist. For example, the way in which an AR had approached the regulation of Alternative Business Structures (ABSs) would be critical to any assessment of how Part Five of the legislation was working out in

practice. The fact that it has been decided it is too early to make that assessment tends to reinforce the point. See also below at paragraph 19 in respect of s51.

7. We urge the Justice Committee to undertake a fuller enquiry, if necessary in two parts, the first of which could address those sections of the Act where it is by no means too early to form a view, the second to be scheduled after no more than three years and, for example, to coincide with the second Triennial Review of the LSB. An alternative would of course be to ensure that the second Triennial Review is commenced early enough to ensure its remit can comprehensively cover a wide range of issues including the manner in which bodies set up in the Act exercise their functions.

Detail

8. We set out below our observations, in order of the Parts, Sections and Schedules of the Act. Where no reference is made to a Part, Section or Schedule, it should be assumed we have no specific comments to make. We do not consider what is set out below to constitute a detailed analysis and have confined ourselves to the key points given the stated scope and purpose of the PLA.

Part One, ss1 and 2.

9. These sections set out the regulatory objectives (ROs) and professional principles. The statute makes no hierarchy of the objectives but it is the BSB's repeated experience that in framing its approach and planning its work, the LSB gives substantial priority to and / or makes supraordinate the objectives on competition and consumer protection – and can give very little weight to others. This point has been made repeatedly to the LSB in responses to consultations on their business plans

and in the recent Triennial Review. Each time the LSB roundly refutes the suggestion without ever actually dealing with it satisfactorily.

10. The BSB seeks to hold all the ROs in balance as far as possible. This is of course no easy task. The Justice Committee might wish to consider the two papers (one an update[1] on the other[2]) written on the subject of the ROs and public interest by Professor Stephen Mayson of the Legal Services Institute at the University of Law. Mayson argues, *inter alia*, for a hierarchisation of the ROs and for the public interest to override: then putting access to justice, the rule of law above others. There is little evidence that Parliament intended a hierarchy to exist or to evolve in relation to the ROs, notwithstanding both the actual order of them in the drafting of S1 (1) and the clear focus of other sections of the Act on e.g. consumer protection (Part Six) or the promotion of competition (Part Five).

11. This matters because the LSB uses its view of the special importance of the objectives at S1(1)(d) and (e) to determine its priorities and work programmes and those it imposes, using its other statutory powers, on the front line regulators. This in turn can detract from our ability to concentrate our limited resources on what we reasonably see as priorities.

11. We consider an amendment to the statute could make the position explicitly clear, either by instituting a hierarchy or by stating there is none and that promotion of one RO must not undermine another. Alternatively, and until such an amendment could be made, the Lord Chancellor might exercise his power under s6 (2) (c) and direct the LSB to report formally in relation to these matters, which would require the LSB to put its mind to a different approach.

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[1] *P. Mayson, Legal Services Regulation and 'The public interest', Legal Services Institute, The University of Law, 2013*

[2] *P. Mayson, Improving access to justice: scope of the regulatory objective, Legal Services Institute, The University of Law, 2012*

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Part one, ss 3, 5, 6 and 7.

12. These sections, in relation to the LSB's functions and governance, are very broadly drawn and as a result, give the LSB significant scope to determine its activity. The reporting and accountability requirements which, whilst robust in theory, have left them to date relatively unchallenged and unscrutinised in practice. Recent responses to the LSB's consultation on its draft business plan for 2013/14 and the LSB's response in turn, together with those of the two previous years, have left stakeholders, and especially ARs, feeling that the LSB is less accountable than it should be. We would urge the Justice Committee to make public scrutiny of the LSB Annual Reports a routine requirement.

13. **s5** (corporate governance). We have noted the MoJ's Triennial Review Report in relation to corporate governance standards at the LSB and as far as we know, there has been no change in the LSB's position on the one area of non-compliance identified (public meeting). The BSB's meetings always have a public agenda and we see no reason why the same good corporate governance practice would not be "reasonable to regard as applicable" to the LSB.

14. Accountability in respect of LSB functions would be given further strength and credibility if the LSB were to apply to itself the same regulatory standards framework and process of self-assessment against those standards that it has imposed on front line regulators, by a combination of its interpretation of its duties under s3(3) (a-b) and use of its power under s55 (see also further below).

Part one, s4.

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15. This section is the one which to date has probably been at the root of most of the BSB's concerns. As interpreted by the LSB, and in association with certain other sections, it appears to provide license to take on a far wider remit than we believe Parliament ever intended. The views of the BSB in relation to this were rehearsed comprehensively, including with specific examples, in our response to the MoJ's Triennial Review of the LSB in 2012. This can be found on our website.[3] Our view has not changed since then. We think that given the manner in which this section is interpreted by the LSB, clarity around statutory interpretation will only come via Judicial Review. The BSB believes fundamentally that the LSB's role in "assisting" should be confined to either responding to requests for assistance from front line regulators, or doing so when a regulator has demonstrably failed, by omission or commission, to act compatibly with s1 regulatory objectives

Part Three

s 12 and s 24 – reserved legal activities; ss 13-20 inclusive

15. The concepts expressed in s12, and the associated process in s 24 for adding to the scope of s12 activities, and the various sections relating to authorisation and entitlement and the related offences, are complex to say the least. We do not consider they assist consumers in their understanding of the protections they have through the Act. Put simply, we believe most consumers think all lawyers are

[3] *Legal Services Board and Office for Legal Complaints triennial reviews, Bar Standards Board, March 2012*

regulated in all that they do. The Act does not require authorisation for reserved activities but it does permit an AR to make the judgment that the regulatory objectives will be better served if those whom it authorises are regulated not just in respect of their reserved activities but also legal advice. In respect of those who continue to be regulated by historic title and the comprehensive Codes of Conduct associated with those titles, this is indeed the case: such lawyers are regulated in respect of all of their legal services, reserved or otherwise, and therefore the public is likely to have better protections than the Act, as it appears to be approached by the LSB, itself provides. This is because there is clear evidence in the LSB's policy initiatives, and in the substance of aspects of its "assistance" that the LSB would like to see a move away from regulation by title to regulation by area of legal activity and authorisation for that. The following public statements and areas of work of the LSB demonstrate this:

- Reviewing the scope of regulation[4]
- Improving access to justice: rationalising the scope of regulation[5]
- Enhancing consumer protection, reducing regulatory restrictions[6]
- Modernising the scope of legal services regulation[7]

16. Whilst it might be thought that radical exploitation of these sections, especially in association with the provisions in Part Five for ABSs, might enhance consumer choice, the scope for confusion and regulatory arbitrage are likely to be very detrimental from a consumer protection perspective. Again we come back to the *way* in which the LSB undertakes its functions, rather than inevitable implications of the Act's provisions: if the regulatory objectives on promotion of competition and

[4] *Reviewing the scope of regulation, accessed 12 April 2013 (http://www.legalservicesboard.org.uk)*
[5] *Improving access to justice: rationalising the scope of regulation, accessed 12 April 2013 (http://www.legalservicesboard.org.uk)*
[6] *Enhancing consumer protection, reducing regulatory restrictions, 28 July 2011, accessed 12 April 2013 (http://www.legalservicesboard.org.uk)*
[7] *Modernising the scope of legal services regulation, accessed 12 April 2013 (http://www.legalservicesboard.org.uk)*

protection of consumer interests are not held in appropriate balance, the public interest will be undermined.

Part Four

Ss27- 49

17. Key provisions here are in respect of regulatory independence from representative functions. The LSB has taken a purposive approach to interpretation of the Act in this regard and a robust and largely coherent approach to implementation. This is wholly welcomed by the BSB and we have been grateful for the LSB's support especially with regard to the provisions of s30.

18. ss31-48: these provisions have – happily – not to date been invoked in respect of the BSB. However, the drafting of s32(1) provides a useful illustration of the points we make in paragraph 15 above. The approach to its role and the circumstances in which the LSB should, in our view, impose initiatives or require action short of a formal direction using its powers under s32 ought to be driven by the principles expressed in this drafting and not by liberal and sometimes arbitrary application of its current interpretation of s4. "assistance."

19. Section 49 appears to the BSB to envisage that the powers in sections 31 to 45 (and 71) will be used only when an AR takes an unreasonable approach (see the requirement in subsection 4 for what the statement of policy must include). The BSB in commenting on the LSB's policy statement pointed out that this was analogous to a Judicial Review style test, consistent with an oversight role and not with second guessing the AR's judgments. The LSB's response was that it does not agree with that interpretation. As I have said, formal use of these powers has not taken place, but the LSB's interpretation of its role as one of imposing an agenda on the ARs,

rather than being limited to assisting ARs and stepping in when they act unreasonably, has a very significant impact on the ARs, who face the risk of the use of these powers if disagreements as to which initiatives they prioritise or how they go about their work cannot be resolved. We believe that clarification as to the interpretation of these provisions and hence as to the limits of the LSB's statutory powers, would be helpful to all.

s51 – permitted purposes

20. ARs have taken different approaches to the implementation of the provisions of s51, which could be argued to satisfy other provisions within the Act to varying degrees of consistency. To date the LSB has taken a purposive rather than narrowly prescriptive approach to the provisions in s51, allowing ARs some latitude to decide some matters themselves. For example, activity falling within a number of the permitted purposes (s51 (4) (c), (e), and (f)) is delivered in our case not by the regulatory BSB but by the representative Bar Council. This is currently appropriate but we would expect the LSB to keep the rules it makes under s51(6-7) to be kept under review, to prevent the provisions of s30 being undermined.

S55 – provision of information to the LSB

21. The approach taken by the LSB to implementation of s55 has on occasions been inappropriate and heavy-handed and therefore unhelpful in maintaining constructive relationships between the LSB and ARs. The BSB's evidenced position on this was detailed in our submission to the Triennial Review[8]. We would in particular draw attention to the end of that submission and the annexed letter from the BSB to the CEO of the LSB of March 2012. We are aware the Bar Council has recently received

[8] *Legal Services Board and Office for Legal Complaints triennial reviews, Bar Standards Board, March 2012*

a s55 notice and we understand they may hold recourse to it as having been unnecessary. I am informed that other front line regulators have had analogous experience of the LSB's use of s55. In none of the instances relating to the BSB or Bar Council have the provisions of s55(4), in contrast, been drawn on by the LSB. These relate to the facility for the LSB to pay reasonable costs of those on whom s55 notices are served.

Part Five – ABSs

22. The BSB is currently drawing on the provisions of this part in regulatory arrangements it is developing for approval and so will not comment further at this point. If a more detailed enquiry is made at a later point, or when the second Triennial Review of the LSB takes place, we would expect to have more evidence on which to base a view.

Part Six – Legal Complaints

23. The BSB has in general been pleased with the manner in which the Office for Legal Complaints has implemented provisions from s114 onwards in this Part. Our comments in our response to the Triennial Review reflect this and our position has not changed.

24. The one exception to the above has been the LSB implementation of the provisions in s112 and the manner in which the LSB did this. The BSB expressed legitimate concerns in 2010 and in 2011, relating to the special challenges for authorised persons in the historically largely referral profession of barrister in applying a set of requirements for "first tier complaints handling", the design of which by the LSB were driven by the practice of the majority of authorised persons, ie

solicitors. These concerns were repeatedly ignored by the LSB. The problems the BSB predicted in 2011 have indeed materialised and alternative approaches to implementation of the provisions have been required. This has been wasteful of scarce resources and has arguably delayed the promotion of the regulatory objective of protecting consumers which was intended by Parliament. This is a final point reinforcing our view that a successful PLA cannot exclude consideration of the way in which bodies set up under the Act undertake their functions.

Part 8, s 194

25. The Access to Justice Foundation (the charity brought into existence in order to be the designated charity under section 194 to receive and distribute the proceeds of pro bono costs orders) has been playing a valuable additional role in distributing funds over and above those raised by pro bono costs orders. The extension last year of the pro bono costs order regime to the Supreme Court is welcomed by the BSB. Awareness of the pro bono costs order jurisdiction under section 194 is increasing all the time but could be raised even further still.

Conclusion

24. The BSB has welcomed this opportunity to contribute to the PLA and inform the considerations of the Justice Committee. We will be happy to answer any further questions the MoJ or the Committee may have.

25. It is our normal practice as far as possible to publish on our website responses to consultations however informal those may be. We will let you know if and when we decide to publish the present submission.

Dr Vanessa Davies

Director (chief executive)

Bar Standards Board