



The Law Society

**Triennial Review of the Legal Services Board –
Submission from the Law Society**
March 2012



Summary	2
Background	2
The Legal Services Board in practice.....	3
Does the Legal Services Board remain necessary?.....	4
Overall position	6
Future role of the LSB	7
The Consumer Panel	8
Legal Services Board budget	9
Governance arrangements for the Legal Services Board.....	9
Conclusion	10

Summary

1. The Law Society's submission can be summarised as follows.
 - The main purposes for which the Legal Services Board was established were to ensure separation of regulation from representation; to pave the way for the introduction of Alternative Business Structures; and to establish the Legal Ombudsman Scheme. These have now all been achieved.
 - The Legal Services Board should continue for the time being, although the need for its continued existence should be reviewed critically in the next triennial review.
 - The Legal Services Board was intended to operate as a supervisory regulator, intervening only when approved regulators were acting unreasonably. There are disturbing indications of the LSB seeking to move beyond that, to play a more proactive role, and to seek to operate as a regulator of the legal services market. That is unnecessary and undesirable.
 - To help ensure that the Legal Services Board concentrates on its core purposes, the Government should confine that the LSB's budget to no more than £2.5m in 2013/14, and no more than £1.5m the following year.
 - Consideration should be given to bringing the Legal Services Consultative Panel within the overarching body representing consumer interests which is currently under consideration by dBIS.
 - The process of appointments to the Legal Services Board should be improved, to make appointments demonstrably more independent of Government than they are at present.

Background

2. From the time of Sir David Clementi's report into the arrangements for regulating legal services in England and Wales, the Law Society has supported the main provisions of what became the Legal Services Act 2007. In particular, the Society supported

- Regulation continuing to be based on the professional bodies, subject to separation of the representation and regulation role within professional bodies, rather than being based on a single FSA-style regulator.
 - The creation of a new legal ombudsman service, dealing with consumer complaints from all legal professionals, and operating wholly independently of all the professional bodies.
 - The introduction of alternative business structures, including external ownership of law firms.
3. The Law Society also supported the establishment of the Legal Services Board as a light touch supervisory regulator. We recognised that it was desirable to establish an oversight body to oversee the evolution of the legal regulatory structure into what was envisaged by the Legal Services Act.
4. The Society did however question whether the Legal Services Board should be established on quite such an expansive basis. The Society pointed out that the Council for Health Care Regulatory Excellence, the supervisory regulator in the health care field, at the time had 12 members of staff. The CHRE seemed a suitable model, and so it was not clear why LSB needed to have around 40 staff.

The Legal Services Board in practice

5. The Legal Services Board's original priorities reflected the key provision of the Act, as outlined above. The LSB has achieved a considerable amount in a comparatively short time. In particular:-
- The LSB has implemented internal governance rules concerning the way in which regulatory and representative functions should be separated where approved regulators hold both functions.
 - The Legal Ombudsman Service is up and running, and appears to be operating smoothly.
 - There are now two licensing authorities for alternative business structures (the Law Society and the Council for Licensed Conveyancers) and the SRA

has now started to grant ABS licences, including some involving significant new entrants to the legal services market.

Does the Legal Services Board remain necessary?

6. The Legal Services Board has thus to a large extent delivered on those main priorities. Given that the LSB has now completed the work for which it was primarily established, there is a obvious question as to whether or not the Board remains necessary. It is after all inconceivable that a Legal Services Board of anywhere near the current size and cost would be established in order to carry out the remaining functions of the Board.
7. One theme of the programme of triennial reviews has been to consider whether functions currently carried out by non departmental bodies ought in future to be bought within Government, so as to improve accountability. However, that factor will rarely be relevant in the context of regulation of the legal profession. Indeed, it is a matter of some constitutional importance that regulation of the legal profession should not be under the control of a Government Minister. For the majority of the Legal Services Board's functions, the option of transferring responsibility to a Government department would not be acceptable.
8. The Society has sought to consider each of the main functions of the Legal Services Board. Where functions continue to be necessary, the Society has considered whether they are best conducted by a Board operating separately both from Government and from the front line regulators, or whether there are other preferable arrangements.
9. Applying these principles, the Society analyses the matter as follows:-
 - Approval of new regulators under the Act. The Legal Services Board carries the lead responsibility for determining applications from new prospective approved regulators, although its decisions are subject to confirmation by the Lord Chancellor. Prior to the Legal Services Act, these decisions were made

by Lord Chancellor following advice from the Legal Services Consultative Panel. Both processes involved consultation with the senior judiciary and the Office of Fair Trading. This function operated satisfactorily prior to the creation of Legal Services Board, and the Law Society does not consider that this function requires continuation of the Legal Services Board..

- Approval of approved regulators' rules. The Legal Services Board is responsible for the approval of rules made by all of the approved regulators. Before the Legal Services Act there was a variety of arrangements, including the Master of Rolls (for most of the Law Society rules) and the Lord Chancellor with advice from the senior judiciary (for rules relating to advocacy). It is understandable that there was a requirement for external approval of rules when the professional bodies made rules themselves, rather than through regulatory arms. But the rule-making function is now carried out by separate regulatory arms, the boards of which include substantial non-lawyer membership. Furthermore, the regulatory arms consult extensively before finalising rules. In these circumstances, the Law Society does not consider that any external approval should be required for rules made by approved regulators
- Ensuring that approved regulators operate effectively. The Legal Services Board has a variety of powers intended to deal with under performance by an approved regulator, ranging from directions to (in the last resort) removal of approved regulator status. Prior to the Legal Services Act, there was no mechanism for dealing with under-performance by an approved regulator. The absence of such a power did not cause any significant difficulties prior to the Act, and there must thus be a question as to whether the power of this sort – which does not appear to exist in respect of a number of other professional regulators such as surveyors, nor for most accountancy work – is appropriate.
- Resolving disputes from between approved regulators and their regulatory arm. One purpose of the Legal Services Board's Internal Governance Rules is to provide clear mechanisms for the relationship between the regulatory and representatives arms of a professional body. The Act guarantees the right of the regulatory arm to report to the Legal Services Board if it should consider that its independence or effectiveness is undermined by actions of the professional body. There must clearly be a mechanism for resolving such disagreements. In the Law Society's view, it would be unacceptable for these matters to be dealt with by the Lord Chancellor, as a Government Minister. It

would in principle be possible for matters to be dealt with by the courts, but the sorts of disagreements which arise will not all be matters which can readily be dealt with through litigation. Furthermore, they will often require urgent resolution. Immediately before the introduction of the Legal Services Act, there was provision for disagreement between the Law Society and SRA about the budget for SRA to be resolved by the Master of the Rolls. In the longer term, it might be possible to reintroduce a system of that sort, under which senior members of the judiciary resolved issues between a professional body and its regulatory arm. However, in the immediate future it seems appropriate for a body on the lines of the Legal Services Board to deal with such matters.

10. The Legal Services Board also has a number of subsidiary functions, including advising the Lord Chancellor on whether there should be changes to the legal activities which can be carried out only by regulated lawyers (the reserved activities), although decisions on these matters are taken by the Lord Chancellor (in the case of extending reserved activities) and through primary legislation (in the case of activities ceasing to be reserved). It is difficult to see why a Legal Services Board is needed to advise on these issues. The Lord Chancellor could simply take decisions, or initiate legislation, having consulted approved regulators, consumer bodies, the Judiciary and the Office of Fair Trading.

Overall position

11. On the basis of this analysis, the Law Society's overall conclusion is that although the Legal Services Board has largely completed its original main purposes, it is nevertheless desirable for the Legal Services Board to continue for the time being because there are some issues (in particular resolving potential disagreements between approved regulators and their regulatory arms) for which the Board is at present the most appropriate decision maker. Since the Legal Services Board needs to continue for that purpose, it is reasonable for it also to advise the Lord Chancellor on applications from prospective new regulators (or licensing authorities); to advise on reserved activities; and to deal with any major issues arising from the performance of regulatory bodies, even though those functions alone would not justify continuation of the Board.

Future role of the LSB

12. Whilst the Legal Services Board should thus continue for the immediate future, the Law Society believes it important that the Board should operate on a scale more appropriate to the remaining tasks. The principle underlining the Act is that the Legal Services Board should only use its regulatory powers if it judges that an approved regulator has made a decision which is clearly unreasonable in relation to the regulatory objectives as a whole. The Board should not intervene merely because they disagree with a front line regulator's decision.
13. Following the implementation of Internal Governance Rules, all of the regulatory arms take decisions independently of any professional body of which they are part; and all have boards which are appointed after open competition. The Legal Services Board should not second guess their activities, or monitor them any more extensively than the circumstances require.
14. There is a real danger that without decisive Government action to ensure that the Legal Services Board budget is brought down to a more appropriate level, the Board will simply expand its activities to consume all, or almost all, of the available budget. It is in the nature of organisations like the Legal Services Board that it will consider that its work is never done. Indeed, if money were no object, there would no doubt be a limitless range of possible future activity for a legal services regulator.
15. One area to which the Legal Services Board seems to be giving particular focus is research. The potential for research is vast and it is essential to ensure that a proportionate approach is taken. The main responsibility for research on matters related to legal services regulation should rest on the approved regulators, and their regulatory arms. The Law Society welcomed the Legal Services Board's agreement that it should be for the Society, rather than the Board, to lead the current study of High Street solicitor firms.
16. The Legal Services Board needs to adopt this approach across all research activity. The Board's research effort should be concentrated on areas where research cannot practically be carried out by approved regulators or their regulatory arms, and where

it is clear that there is a regulatory justification for incurring the expenditure concerned. Given that research led by professional bodies will generally secure a higher response rate from professionals and their firms, it may be desirable for the Legal Services Board's research effect to focus primarily on consumers of legal services.

17. There have been worrying signs over the last year or two of the Legal Services Board carrying out activity of at best marginal value. For example, the Board is about to engage on an intensive programme of monitoring the effectiveness of individual approved regulators, initially through requiring each of them to undertake a detailed self assessment. Although periodic assessments of that sort can be useful, the Legal Services Board's approach is unduly prescriptive. This work will consume significant resources both in the Legal Services Board and in the regulatory bodies. It is being carried out without any apparent evidence to show that there is a problem requiring LSB intervention on this matter.
18. The Legal Services Board have also sought an inappropriate degree of influence on the review of legal education, on which the three largest regulatory arms are engaged. The LSB at one stage sought to lead the review. Even now, the LSB has decided to organise a programme of seminars on the areas covered by the review. It is unclear why it was thought necessary for LSB to arrange seminars of this sort.

The Consumer Panel

19. The bias towards over-activity is reinforced by the existence of the Legal Services Consumer Panel. The Law Society supports consumer involvement in the regulation of legal services . It is important for legal regulatory bodies to include a significant proportion of non lawyers on their boards; and for them to consult fully with consumer groups (as well as with lawyers) in the development of their policy, and about their performance generally. But the Law Society does not consider the existence of an additional Consumer Panel, as part of the Legal Services Board arrangements, is necessary. In the summer dBIS started a consultation process to look at reducing the complexity of the arrangements for securing consumer input to policy making. In an environment where there will be an increasing fluidity between different services it may well make sense to incorporate the Legal Services

Consumer Panel's responsibilities into the proposed overarching consumer representation body.

Legal Services Board budget

20. In order to ensure that the Legal Services Board concentrates on its core priorities, the Law Society considers the LSB budget should be significantly reduced from the current year's budget of £4m. The work of formulating the Internal Governance Rules, establishing the Office for Legal Complaints, and facilitating the introduction of Alternative Business Structures is now complete. The remaining work of LSB cannot possibly justify a staff of anywhere near the current size nor expenditure of £4m a year. The Law Society believes the budget should not exceed £2.5m in 2013-14, and that the Government should require the Legal Services Board to operate on a budget of no more than £1.5m per annum by the time of the next triennial review, in 2015.
21. Direct budgetary constraint of this sort is essential. Otherwise, since the Government quite rightly has no power to direct the LSB to carry out its responsibilities in a particular way, it will be impossible to ensure that the LSB takes a more proportionate approach. The Law Society consider that, within whatever budget is approved, the Legal Services Board should ensure that it takes a disciplined approach to spending. The Board should justify, with a proper cost benefit analysis, any new initiative which it undertakes. Such analyses should consider the costs which initiatives would impose on the approved regulators, as well as costs which would in the first instance be met by LSB.

Governance arrangements for the Legal Services Board

22. The programme of triennial reviews requires departments to consider governance arrangements for those bodies continue to operate outside the departmental structure.
23. The Law Society considers the Legal Services Board should continue to be governed by a Board which is not subject to direction by the Lord Chancellor, or by any

Government Ministers. However, the Law Society considers that there is scope for improvement in the appointment mechanism.

24. At present, the Chair and other ordinary members of the Legal Services Board are appointed by the Lord Chancellor after consultation with the Lord Chief Justice. Although the Government gave assurances that the Lord Chief Justice will be consulted not just about the names which it was proposed to appoint, but about all the arrangements for the appointment process, the mechanism still falls short of requiring the approval of the Lord Chief Justice to appointments. In the Law Society's view, it would be beneficial – in order to reinforce the independence of the Legal Services Board from Government – for all appointments to the Board to require the approval of the Lord Chief Justice, rather than merely requiring consultation with him.
25. Another possibility would be for a properly balanced appointments panel – consisting perhaps of a senior judge, a member drawn from the legal profession, and a member drawn from consumer bodies – to be responsible for the appointments, in a similar way to the process followed for some appointments to the Judicial Appointments Commission.

Conclusion

26. The Law Society would welcome the opportunity to expand on the views set out in this submission, if the Ministry of Justice would find that helpful.