

# Tailored reviews

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**Legal Services Board response to the call for evidence to  
inform tailored reviews of LSB and OLC**

November 2016

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## Message from the Chairman

The Legal Services Board (LSB) welcomes the opportunity to provide evidence to these Tailored Reviews. Our response is based on eight years' experience of delivering our statutory functions under the Legal Services Act 2007 (the Act).

In January 2009 when we began our work, our goal was simple and clear: we said that *“we will reform and modernise the legal services market place in the interests of consumers, enhancing quality, ensuring value for money and improving access to justice across England and Wales.”*

In July 2016, we published our most recent evaluation of the changes in the legal services market since we began our work. We were able to demonstrate that, overall, there are signs of positive changes in the legal services market. The market has grown. Some consumers have been able to take advantage of fixed fees to buy services at a more affordable price. Moreover, the quality of legal services has improved on most measures following the 2007 reforms.

But unmet legal need persists and progress has been slow towards delivering better market outcomes and access to justice for all. This is frustrating and disappointing but we recognise that these are long-term, multi-faceted problems. The market needs to change further and faster.

Our passion for driving that reform has not diminished since 2009. We will continue to drive the change that is needed to break down regulatory barriers to competition, innovation and growth. And we will maintain our relentless focus on putting consumer and public interests at the heart of regulation and redress, as expected by Parliament.

In answering the questions posed by the call for evidence, we describe how we work, our achievements and the lessons we have learned. We also highlight changes that we believe would enable Parliament's intentions in passing the Legal Services Act 2007 to be more rapidly realised. These include reform options that Ministry of Justice (MoJ) has itself already indicated it wishes to explore, such as reviewing the independence of regulators from representative bodies. We also rehearse the option we believe has the **most** potential for tackling the sector's most intractable problems: complete reform of the Legal Services Act 2007.

**Sir Mike Pitt**

Chairman, Legal Services Board

## Executive summary

### The best delivery model for the functions of the LSB

1. The LSB believes that regulation should be structurally, legally and culturally independent of the professions and government. In our view, this is the most effective way to deliver confidence to consumers, providers and investors, and society more broadly.
2. The LSB is firmly of the view that the statutory functions as presently required by the Legal Services Act 2007 must continue to be provided by a public body. This provides assurance that regulation is truly being discharged in the public interest and is entirely independent of political concerns. It also makes sure the Government can receive advice from an impartial body. **We would welcome a strong and continuing commitment to the importance of statutory independence of regulation as an outcome of this Review.**
3. In June 2015, we provided the MoJ with ideas for improving the current framework by small legislative changes. **Progress on these would be welcome and should include reporting on the July 2016 consultation into reform of alternative business structure (ABS) licensing and implementing agreed changes, and issuing the proposed consultation into making legal services regulators independent from their representative bodies.**
4. In the long-term, however, we do not consider the existing regulatory framework to be sustainable. Our vision is for a single legal services regulator established independently of the professions and government, which is charged with delivering a single overarching statutory objective of safeguarding the public interest by protecting consumers and ensuring the delivery of outcomes in the interests of society as a whole.

### The performance of the LSB and areas for improvement

5. The entirety of the LSB's work programme is calculated to facilitate the carrying out of our functions, in line with the powers given to us by section 7 of the Act. We carry out these functions in an effective, fair and impartial manner and in line with better regulation principles. We defended successfully the sole judicial review brought against us, all the way to the Supreme Court.
6. Continuous improvement is important to us. Since 2010, we have actively reviewed the way we work informed by our experience in practice and by feedback from those we regulate and work with. We have modified the way in which we review the performance of regulators to increase the effectiveness of our evidence-base and reduce the burden of the process on regulators. We have also reviewed our processes for approving changes to regulatory arrangements and introduced greater partnership working into our research activities.
7. We are firmly committed to delivering value for money and securing cost efficiencies. This is central to our aim of increasing transparency in regulation

and, through that, scrutiny of regulatory costs. The table below illustrates the trajectory of the LSB's budget and the impact on levy payers:

LSB budget (including OLC costs)	10/11	11/12	12/13	13/14	14/15	15/16	16/17	17/18
£000	4.931	4.931	4,498	4,448	4,298	4,298	3,998	3,848
Levy amount per person authorised to undertake reserved legal activities	34.38	31.65	27.97	25.36	24.71	21.54	19.02	

### The independence of the Legal Services Consumer Panel

8. We consider the Legal Services Consumer Panel (the Consumer Panel) is sufficiently independent of the LSB. The arrangements required by statute have proved to be effective and we would not propose any change to the statutory arrangement at this stage.
9. For LSB, the principal benefits of the embedded consumer panel model include the concentration of expertise on legal services regulation, ongoing input from the panel members who bring a range of perspectives, and access by the regulator to advice at the early stages of policy development. This arrangement has also proved to be beneficial for approved regulators and the Office for Legal Complaints (OLC) and Legal Ombudsman (LeO).
10. The location of the Consumer Panel inside the regulator uniquely enables the sharing of documents and discussions during the policy formulation stage based on a relationship of trust supported by a regulatory framework with reciprocal duties and powers. It is also a relatively low-cost model, especially in the context of consumer spending on legal services.

### The effectiveness of the three way governance arrangements between the LSB, OLC and MOJ

11. The unusual nature of the three-way relationship does give rise to tensions and can best be described as suboptimal for the following reasons:
  - Confusion and disagreement over responsibilities and accountabilities
  - Risks to the LSB's reputation due to misconceptions about the relationship
  - Legislative gaps make it difficult to properly give effect to our functions
  - Only real *sanctioning* power is to remove the Chair or Board
  - Our role in approving the OLC's budget is circumscribed due to public sector protocols

- Potential for confusion around LSB's function around OLC's Annual Report and Accounts and its relationship to LSB's Accounting Officer.

12. LSB does not believe these issues are insurmountable and to effect a successful relationship, **all bodies should be focused on making the existing system work better, despite its imperfections**. There must be greater collaboration between LSB and MoJ to ensure that the arrangements to hold the OLC to account for financial and operational performance work seamlessly and address all areas of risk.
13. Any reform of the governance relationship would appear to require changes to legislation and the LSB believes that if such a change is an option that there may be benefits to looking more fundamentally at the model for delivering redress to legal services consumers: a model in which there are greater incentives for performance improvement by the redress body, such as competition for or in the market for redress (as seen in other regulated sectors).
14. If there is no appetite for this degree of reform, and the current statutory bodies remain, then governance reform, if deemed necessary, could go one of two ways. A tighter relationship between LSB and OLC with greater direct accountability on all matters from OLC to LSB; or a looser relationship involving the removal of LSB's responsibilities in relation to the OLC except in matters relating to redress policy. Either would still require statutory change and significant exploration to mitigate introducing further risk and complexity into the system.

## Introduction

15. The LSB is a non-departmental public body (NDPB). Established by the Legal Services Act 2007, and sponsored by the MoJ, the LSB came into being on 1 January 2009 and became operational, taking on the majority of its statutory powers under the Act, on 1 January 2010. The LSB is **independent of Government and of the legal profession.**
16. LSB was last subject to a Triennial Review in 2012.
17. The LSB is responsible for **overseeing the regulation of legal services** in England and Wales. Eleven separate approved regulators, come within the LSB's regulatory remit and together they regulate directly the lawyers and firms practising throughout the jurisdiction. A table showing the approved regulators is at **Annex A.**
18. As well as its regulatory functions, the LSB also has a number of statutory responsibilities, powers and duties with respect to the OLC and the Solicitors Disciplinary Tribunal (SDT). The Act also requires the LSB to establish and maintain a panel to represent the interests of consumers, the Legal Services Consumer Panel.
19. The passing of the Act, and the subsequent establishment of both LSB and OLC, was the outcome of a long-running programme of regulatory reform for the legal services sector. Nine years since the passing of the Act, and six years since the commencement of the LSB's statutory remit, the benefits of the changes to legislation and regulation are being felt for consumers and legal services providers alike. **The pace of change within the sector, however, is not as quick as we would like it to be.**
20. The LSB is uniquely placed to see where the current legislative framework places unnecessary constraints on progress and has been vocal in its calls for a next steps review of legislation in this sector. Where relevant, this response draws attention to these. For the avoidance of doubt, this vision for the future does not call for incremental adjustments to the statutory functions of the LSB, but calls instead for **fundamental reform of both the scope of regulation and the architecture that delivers it.** While we hope that the MoJ will conduct a review of the regulatory framework, **we are fully committed to maximising the potential of the current regulatory framework,** focusing on our regulatory remit and the strategic objectives that we have set.

## Functions of the LSB

21. The LSB derives its statutory legitimacy, role and remit from the Act. The Act includes a requirement that in all of our work, we must act in ways that are compatible with **our eight regulatory objectives** and in ways which we consider are most appropriate to meeting those objectives. As such, the regulatory objectives - and the better regulation principles - are at the core of our work. We are transparent, accountable, proportionate, consistent and targeted in all our activities, and we reflect the obligations of the Regulators' Code, have regard to the Growth Duty and our statutory responsibilities in relation to equality, in what we do.
22. The primary responsibility for devising, developing and implementing regulation for the legal professions in England and Wales belongs to the approved regulators. The role of the LSB is to make sure that they meet this responsibility so as to promote the regulatory objectives.
23. All that we do is designed to ensure that **regulation is delivered independently of representative interests in the legal sector, within the constraints of the current framework<sup>1</sup>**, and that regulators have the competence, capability and capacity to promote the regulatory objectives and deliver their regulatory responsibilities.
24. We have ongoing statutory responsibilities in relation to:
- **Approval and recognition** – we consider a range of applications from both existing regulators (including applications to become a licensing authority, changes to regulatory arrangements and extension of scope) and those seeking to become an approved regulator. We also have approval functions in relation to practising certificate fees charged by approved regulators, as well as the budgets of the OLC and SDT, and OLC scheme rules
  - **Maintenance and development of standards of regulation** - we have a duty to assist in the maintenance and development of standards of regulation by approved regulators
  - **Monitoring and investigation** – we monitor regulators' compliance with regulatory requirements; oversee the performance of the OLC in administering the Legal Ombudsman scheme; and perform specific duties in

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<sup>1</sup> The Act places the LSB under a duty to set rules to ensure the approved regulators carry out regulation independently from representative functions. As part of our work in this area, in February 2014, we decided following consultation to change the Internal Governance Rules (IGRs) so that all new appointments to the role of chair in the largest regulatory bodies must be lay persons. In our view, this measure increases the independence of regulation from representative functions, helping to give effect to Parliament's intention in passing the Act.



relation to the SDT. We also examine the wider market place to identify trends, gaps in regulation, competition issues and how both our own rules and those of regulators are working in practice

- **Enforcement and disciplinary activities** – we ensure that regulators and licensing authorities perform their duties in ways that meet the regulatory objectives and, where necessary, we exercise the powers at our disposal to ensure that this happens. These powers include the power to set targets, give directions, publicly censure a body, impose a penalty, intervene in the running of the body and ultimately recommend cancellation of a body's designation as an approved regulator or licensing authority
- **Scope of regulation** – we have powers to make recommendations to the Lord Chancellor on amendments to the list of reserved legal activities
- **Maintenance and development of standards of education and training** – we have a duty, which primarily we fulfil through guidance and statutory rule approvals, to assist in the maintenance and development of standards in the education and training of persons carrying out reserved legal activities.

### Tailored review question 1a

#### “Should the statutory functions of the LSB be carried out by a public body?”

25. The LSB believes that regulation should be structurally, legally and culturally independent of both the professions and government. This independence is of fundamental importance. It provides consumers with confidence that their interests are placed at the heart of regulation and supports the rule of law and the administration of justice by protecting lawyers from improper political influence.

26. In our view, this is the most effective way to deliver confidence:

- to **consumers** to use legal services, safe in the knowledge that their interests will not be overridden by professional or commercial interests, in an environment in which most consumers are unable to judge for themselves the value or quality of what is being provide
- to the **profession, service providers, and investors** to grow their businesses and innovate without fear that politically-motivated interventions or the interests of incumbent providers will undermine their investments
- to **society** more broadly, that regulation affecting vital public interest outcomes such as the rule of law is transparent, accountable, proportionate and consistent, and is targeted only at cases in which action is needed.

27. As such, the LSB is firmly of the view that the statutory functions as presently required by the Legal Services Act 2007 must continue to be provided by a public body for as long as Parliament requires those functions to be carried out. In reaching this view, we have regard to the well-rehearsed arguments regarding the independence of regulation from Government and from those subject to regulation, namely:

- The assurance that an independent, publicly accountable body can provide to the legislature, executive, public and regulated sector that regulation is truly being discharged both effectively and in the public interest
- The need for adequate distance from Government in order to make clear that regulatory action is not driven by political concerns, particularly given the crucial role played by the legal profession in the rule of law and the effective administration of justice
- The need for Government to receive advice from an expert, but impartial, body on matters to do with scope of regulation and the acceptability of individual bodies to discharge regulatory responsibilities.

## How we operate

28. The **regulatory objectives, the better regulation principles and best regulatory practice** are at the core of our work. We are transparent, accountable, proportionate, consistent and targeted in all our activities, and we reflect the obligations of the Regulators' Code, our statutory responsibilities to equality and our equality objectives in what we do. Circumstances may demand that we focus on specific regulatory objectives on occasion but this does not undermine our statutory duty to promote all objectives, whether in the Act or broader legislation.

29. We maintain an **evidence-based, outcomes-focused approach**, and steer regulators on where to focus their efforts on the market as a whole, the entity or the individual as appropriate in pursuing the regulatory objectives. This builds on the Board's experience and achievements since 2009 and the unique perspective offered by our role.

30. We consult on and publish a Business Plan each year, which fits within the framework of our three-year Strategy.

Our **strategic priorities for 2015-18** are:

- Breaking down the regulatory barriers to competition, growth and innovation
- Enabling the need for legal services to be met more effectively
- Ensuring that the regulators and OLC are operating effectively and that there is a shared understanding of the legal services market.

31. In practice, it means that we seek to:

- Work with the regulators, OLC and Consumer Panel in a relationship of openness and trust, cooperating and collaborating in the interests of efficiency and effectiveness.
- As part of our work with the regulators, we:
  - drive improvements in regulatory performance, through robust analysis of data and intelligence, by ourselves and the regulators
  - advocate implementation of best practice in regulation, mindful of the need to balance consistency of approach against a proportionate response to the nature of different risks
  - seek to maintain a sense of urgency in bringing about change while carefully managing associated risks.
- Sustain productive working relationships with people and organisations both within and outside the sector who can contribute constructively to the debate about how to achieve an innovative, competitive and open legal services market. In addition to those operating in the market, or investing in it, this includes MoJ and other Government departments, the Welsh Government, other regulators and redress providers and the academic community.
- Continue to commission research to provide market data and evidence that informs our work, including research that helps to fill gaps in the evidence base around legal services and regulation and that helps us understand the changes taking place in the sector and the wider economy.

- Learn from and respond swiftly and flexibly to emerging issues and risks to the regulatory objectives, including altering our priorities as necessary and seeking to improve our performance.
- Use the range of powers given to us in the Act where proportionate to do so, but with care and precision, as demanded by the challenges of particular circumstances.

## Tailored review question 2

**“In your view, how well is the LSB carrying out its statutory functions?”**

### **Approval and recognition – how we perform this function**

32. Key to our primary role as oversight regulator are our statutory decision making functions. It is through these we are able to influence the standard and shape of regulation in ways that best promote the regulatory objectives. The range of decisions includes:

- approval of changes to regulatory arrangements (Schedule 4 Part 3)
- recommendations to the Lord Chancellor in relation to designations (Schedule 4 Part 2 and Schedule 10)
- approval of practising certificate fees (section 51)
- approval of the OLC’s annual budget (paragraph 23 of Schedule 15)
- approval of the SDT’s annual budget (section 46A Solicitors Act 1974)
- consent to the OLC’s scheme rules (section 155).

33. The process for the approving changes to regulatory arrangements is set out in the Rules made by the Board in 2009. The applications that we are asked to consider vary widely. Some are relatively simple amendments (for example changes that arise as a consequence of changes to legislation). Others have a major impact, like the introduction of entity authorisation regimes for CILEx Regulation and the Bar Standards Board (BSB). Some result from approved regulators own desire to improve their regulatory arrangements while others, such as the arrangements for the publication of diversity data, arise from LSB initiatives.

34. In considering applications, our aim is to ensure that changes are centred round outcomes and do not impose unnecessary burdens on regulated businesses and individuals. We maintain an open dialogue with the approved regulators to ensure that we understand the rationale for the proposed changes and the intended outcomes. Through this open dialogue we assist the approved regulators in the preparation of the applications which is contributing to improved performance in terms of the speed in which decisions can be reached.

In 2015/16, the average time for completing an application was 29 days, compared to 33 days three years before.

In 2012/13, 55% of the applications received were completed within 28 days; in 2015/16 this had risen to 77%.

35. Since 2010 we have been asked to consider 102 full rule change applications from approved regulators seeking approval for changes to regulatory arrangements. By engaging early and often with regulators as they consider changes to their regulatory arrangements, we have only had to refuse two applications on the basis of insufficient evidence.

36. In line with our commitment to be transparent, all applications are published on our website and our decision notices reflect the issues that have been considered in an application. For most cases, the decision we make is that the proposed regulatory arrangements are “fit for purpose” – it is only when the arrangements are put into place that they can be properly tested. Increasingly, approved regulators are recognising this and, in response to our queries, are including plans for future reviews on the applications.

37. Approval of changes to regulatory arrangements can be achieved through issuing an exemption direction; 108 exemptions have been issued to date. Typically this process is used for small changes with limited impact on the regulated community. The changes are still subject to an appropriate level of scrutiny but can be processed more efficiently and proportionately.

38. Recent analysis undertaken by Oxecon in support of the LSB's market evaluation examined the impact of the changes to regulation processed by LSB from 2010-2015. This analysis concluded that **"the likely cumulative market impact of all changes to regulation is by and large procompetitive and that these changes can be expected to have acted as drivers for procompetitive changes in the legal services market and relevant segments of that market."**<sup>2</sup>

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<sup>2</sup> <https://research.legalservicesboard.org.uk/wp-content/media/2015-2016-FINAL-Market-Evaluation-OXECON-economic-advice-report.pdf>

### *Challenge to this function*

39. We have heard it said that, if there is confidence in the independence of regulators, then there is no longer the need to secure LSB approval to changes to regulatory arrangements: the LSB's role could be removed from the process, reducing the time taken to implement changes that are designed to deliver improvement and change.
40. Our response to this challenge is that the LSB provides an important check and balance on the regulators, which each deliver an important public interest function, in lieu of their being directly accountable to Parliament (as is the case with most other regulators in the economy). It also, in the novel environment of different regulators being able to regulate the same activities, allows for the LSB to bring a degree of coherence to regulatory arrangements.
41. The fact that the LSB maintains this scrutiny of change is important. It ensures that the approved regulator explains and justifies the proposals and allows it to demonstrate that objections have been properly considered (even if not accepted). It also provides some assurance to those bound to follow the regulatory arrangements that the proposals are reasonable.
42. Our role in relation to designation applications is to make a recommendation to the Lord Chancellor that the organisation be designated. **Since 2010, we have made seven recommendations all of which have been accepted.** The majority of the decisions have been made within the 12 months specified in the Act but designation itself requires action by others. This is particularly so when an order is required under section 69 of the Act to modify the functions of the applicant. Such orders are complex and this, coupled with the requirement to consult on the proposals can mean that actual designation is many months after our decision. We work closely with the applicant regulator and the MoJ to ensure orders, which are issued by MoJ, are made in a timely manner without undue delay while respecting the requirement to consult on the proposals.

**Five approved regulators have been able to expand their scope of regulation**, either through becoming able to authorise additional reserved legal activities or by becoming a licensing authority. In 2014, **the first new legal services regulator was designated** when the Institute of Chartered Accountants in England and Wales (ICAEW) became an approved regulator and licensing authority for probate activities. **This is a major development with significant implications for the legal sector.** It has expanded the range of legal service providers available which in time should contribute to closing the gap of unmet legal need.

### *Approving practising certificate fees, SDT and OLC budgets*

43. The approval of practising certificate fees is an important method through which we are able to keep the spotlight on the cost of regulation and we assess and approved eight of these applications each year. By seeking more information from approved regulators, particularly where practising certificate fees are set to increase, we seek to improve the transparency of information available to fee payers.
44. A similar rationale applies to our role in scrutinising and approving the budgets of the SDT and OLC.

### **Maintenance of standards of regulation - how we perform this function**

45. Section 4 of the Act places a positive responsibility on the LSB to assist in the maintenance and development of standards in relation to regulation by approved regulators of authorised persons. Our regulatory performance work is a key means through which we drive improvements in the performance of regulators and ensure that there can be public confidence in legal services regulation.
46. **We have completed two rounds of full assessments against a standards framework that was developed in 2011.** The standards cover: outcomes-focused regulation, risk assessment, supervision, enforcement and capability and capacity. The first assessment indicated that generally the regulators were at the start of their journey to meet the minimum standards necessary to perform as a regulator.

The principle conclusions from the second full assessment (completed in May 2016) were that in general **the regulators have made substantive progress since the initial exercise in 2012/13.** The regulators were either performing at the minimum standard necessary or were exceeding this standard. But there is still progress to be made and this will require LSB encouragement.

47. While the different size and structures of each of the approved regulators inevitably means that they carry out their functions differently, we considered that:
- overall they were more outcomes-focused
  - most regulators had some risk assessment methodology and risk-based approaches to supervision (though with varying degrees of sophistication) in place
  - regulators had maintained, and in some cases, improved their performance against the enforcement standard

- most regulators had made positive changes to their capability and capacity so that they were better able to deliver the regulatory objectives.

48. We also considered that the regulators were better able to judge how they are performing against the standards. We think this is an indication that the regulators have an improved understanding of their own strengths and weaknesses. Where areas for improvement were identified, action plans have been agreed and there is ongoing monitoring against delivery of those plans. Enforcement action by LSB remains a backstop power.

49. From the two assessments undertaken, we can demonstrate that our regulatory performance work is driving changes in the regulators' approach to their work and the activities that they undertake. We consider that this work supports the regulators to make the necessary changes by both enabling scrutiny and challenge to the regulators' current performance by both themselves and ourselves and by sharing good practice and lessons learned amongst the regulators.

50. Whilst we recognise the positive impact our regulatory performance work has had to date, it has been some time since the framework was developed. We consider that now is an appropriate time to examine the framework to assess the extent to which it enables us to operate in a risk-based, proportionate and targeted way and to ensure that it is clearly linked to the regulatory objectives and the better regulation principles. This work, which is being informed by the contributions of the approved regulators, is part of our 2016/17 programme of work.

### **Monitoring and investigating – how we perform this function**

51. Even where regulators are performing well, in order to make sure that regulation keeps pace with the changing legal services environment, and is alive to the need to mitigate for new and emerging risks, the LSB needs to monitor the regulators' activities and the operating context for those regulated. Our position as oversight regulator allows us to target resources into emerging areas of potential risk, such as unbundling of legal services and the increasing use of digital delivery, as well as addressing long standing policy concerns and proposing modernising reforms, such as removal of business ownership restrictions. In identifying areas for investigation, we prioritise carefully and consider where we can best make a meaningful difference alongside the work of the regulators and others, such as the Panel and the Legal Ombudsman.

52. As examples, since 2010, **we have used the powers given to the LSB in the Act to hold regulators to account for their activities around first-tier complaints handling, to encourage diversity in the profession and to modernise education and training** (see below). Through collaborative working



and review activity with the regulators, we have sought to update guidance issued to regulators in these areas.

53. Other formal powers in the Act also support our monitoring activity, namely our section 55 powers to gather data. The LSB sees these powers not as enforcement, but rather as a means of overseeing regulators' performance to ensure the LSB has all appropriate evidence to underpin its judgements. A primary example of how the LSB has used its section 55 powers was their invocation in 2013 to require monthly data submissions from the Solicitors Regulation Authority (SRA) on the time taken to process applications for ABS authorisation between 2013 and 2015. This notice was revoked in April 2015 in light of data showing substantial improvement in timeliness.

By the end of September 2016, there were just under 800 licensed ABS across the four current licensing authorities (SRA, Intellectual Property Regulation Board (IPReg), Council for Licensed Conveyancers (CLC) and ICAEW). Our research shows that ABS are more innovative than traditional solicitors firms, as well as being more productive and better at complaints

54. The LSB has also used its powers at section 120 and 121 of the Act to require reports of the OLC and to set performance targets for the OLC. These powers are an important way for the LSB to deliver its responsibility to hold the OLC to account for its effective administration of the Legal Ombudsman scheme. Full details of the use of these powers to date can be found at [http://www.legalservicesboard.org.uk/about\\_us/office\\_for\\_legal\\_complaints/olc\\_board/index.htm](http://www.legalservicesboard.org.uk/about_us/office_for_legal_complaints/olc_board/index.htm) and range from requiring reports on complaints (i) outside of jurisdiction and (ii) related to price transparency to requiring a report on a detailed proposal for future scheme performance measurement. Additionally, for the period 1 June 2015 to 31 March 2016, the LSB used the powers in section 121 to set performance targets for timeliness, cost and quality, with the intention of supporting the OLC's own ambition to see a step change in performance and to mitigate potential risks to consumers and providers.

*Regulation informed by evidence*

55. We use the insights from primary research alongside other market **information to help set the strategic direction of the organisation, inform policy development and support the delivery of our statutory functions**. This work improves the quality and legitimacy of our decision making, and that of the regulators, while also informing government policy and industry thinking. Our research also helps to inform international perceptions of the legal services market, in particular as other jurisdictions consider adopting the Legal Services Act's market liberalisation reforms.

56. This can also have **economic benefits that far exceed the cost of the original spend**. We know from our discussions with a number of established providers and new market entrants, including entrepreneurs looking to deliver services such as comparison websites, that they have used the evidence generated by our research to inform their business development, attract investors and shape innovative business ideas.
57. Our research has also identified those areas of regulation which providers experience as high cost or claim act as barriers to innovation, allowing us to ensure that regulation is targeted and proportionate. Without research it would be very difficult to determine where the regulatory system could become more efficient and effective. And it is not possible for us to obtain the research and evidence from other sources as the research we do is not being carried out by anyone else.
58. This sound evidence base on which to understand and assess our operating environment is essential to meeting our statutory obligations. Without it, our regulatory decisions and work, would be open to challenge and judicial review. Such challenges are very costly and indeed can exceed the cost of the original spend associated with obtaining essential market information and data. For example, our successful defence of a judicial review on our decision to approve the Quality Assurance Scheme for Advocates in the High, Appeal and Supreme Courts saw our procedures, processes and decision-making tested in great detail by the three courts. Our reliance on appropriate evidence as supported by research was key to our defence. It has been unfortunate that work on this scheme has had to be paused whilst the outcome of Government's consultation on the quality of criminal advocacy is awaited.
59. **Our research also provides the strategic context for policy reform**. For example, our periodic market evaluation is a meta-analysis of research findings, data and trends to assess to what extent the outcomes associated with successful delivery of the regulatory objectives are being met. And many of the deregulatory reforms initiated by the regulators aim to address the high levels of unmet legal need identified by our major quantitative surveys of individuals and small businesses.
60. In addition to these high-level strategic benefits, our research has supported specific initiatives that are benefiting consumers, the public and practitioners, for example:
- **Innovation in legal services** – this was the largest ever study of innovation in legal services, jointly funded with SRA. HM Treasury and BEIS referenced the research in their Better Deal announcement, with the evidence used to support the intention to make ABS licensing more straightforward. The research also contributed to the introduction of SRA Innovate – a support

service to help firms navigate regulatory issues related to new business ideas

- **Prices in individual legal services** – this provided the first robust picture of the prices paid by consumers for key legal services and revealed a low level of price transparency. This has been highly influential in shaping the Competition and Markets Authority's (CMA's) views in its Interim Findings Report about the need for policy action to improve market transparency for consumers in order to enhance the competitiveness of the sector
- **Public access** – our joint research with the BSB provided the first detailed picture of the operation of the public access scheme and is being used by the BSB to support a review of its current regulatory arrangements
- **Cost of regulation** – our research revealed a low level of awareness among providers about what their practising certificate fees pay for and a common perception that regulation offers poor value for money. This has resulted in current work seeking to improve the transparency of regulators' costs
- **ABS survey** – our survey of ABS firms led to targeted action which has improved the SRA's authorisation process for ABS.

61. We endeavour to extract the most value from research including making sure it is fully accessible to a wide range of stakeholders. In particular, we follow best practice by publishing the underlying raw data for our quantitative surveys consistent with the open data agenda and the Finch Report on Expanding Access to Published Research Findings.

*Monitoring and investigating case study - open data*

62. **The LSB and Legal Services Consumer Panel both champion greater transparency and access to data in order to support the empowerment of consumers** through the development of 'choice tools' such as comparison websites. We have been working with the regulators and others to open up data held in the legal sector. Working with the Consumer Panel, we now have all of the regulators making a basic level of information about the providers they regulate available to comparison websites in a reusable format consistent with the Government's open data agenda.

63. The progress we have made provides a solid foundation for our wish to see regulators go further by making a richer dataset available. To this end, in 2015 we commissioned the Panel to provide advice on the information regulators should collect and publish to inform consumer choice. Our response to the Consumer Panel set an expectation for the regulators to both make more information available and to do so in a way which is easier for consumers to

access. The CMA's final legal services market study report is likely to recommend further action in this area and we will give careful consideration to its findings. More broadly, we have played a significant role in alerting the CMA to the on-going issues in the legal services market such as high levels of unmet need. We have provided much of the research evidence base which the CMA has used in its market study and we have strongly supported the CMA in continuing the work started by the Office of Fair Trading in examining whether the market is functioning effectively.

64. The LSB has engaged in the open data more broadly through our participation in the UK Regulators' Network (UKRN) study into comparison websites. We have also inputted to the early stages of the CMA's new market study on digital comparison tools.

### **Enforcement and disciplinary activity – how we perform this function**

65. Our preferred approach is to work in partnership with approved regulators to deliver the objectives of the Act. 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 changing the culture around the provision of legal services. Whilst robust enforcement action has its place – and is certainly essential in any regulator's armoury – deployment must be appropriate to the circumstances.

66. **The Act gives the LSB a range of enforcement powers.** In 2013 we undertook an investigation into the Bar Council and BSB arising from concerns about their behaviour in relation to the development and submission of an application for a rule change. In particular these concerns related to behaviour incompatible with the principle of regulatory independence and the adverse impact this behaviour had on the regulatory objective of promoting and protecting the public interest, thereby engaging qualifying conditions for considering use of enforcement powers by the Board. In line with the provisions in the Act, while considering use of its enforcement powers, the Board accepted undertakings offered by the Bar Council and BSB to resolve the matter informally. These undertakings addressed the issues identified in the LSB's investigation.

67. Our experience of using formal powers in the 2013 investigation of the Bar Council was that different procedures and time limits for different enforcement measures proved unnecessarily complicated in practice.<sup>3</sup> In a ministerial submission in 2015 we proposed a review of procedural aspects of these

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<sup>3</sup> The 2013 LSB investigation into the Bar Council was resolved informally, see: [http://www.legalservicesboard.org.uk/news\\_publications/LSB\\_News/PDF/2013/20131125\\_LSB\\_Publishes\\_Results\\_of\\_Investigation\\_Into\\_Bar\\_Council\\_Influence\\_On\\_The\\_BSB.pdf](http://www.legalservicesboard.org.uk/news_publications/LSB_News/PDF/2013/20131125_LSB_Publishes_Results_of_Investigation_Into_Bar_Council_Influence_On_The_BSB.pdf)

enforcement measures. **Simpler enforcement procedures would provide more consistency with better regulation generally and the Macrory principles.**<sup>4</sup> Scaling back the prescription in the schedules and making procedures more consistent would not affect other principles and requirements that guide LSB's enforcement procedures, such as general principles of public law. Neither would it alter the requirement under section 49 of the Act for the LSB to set out in a statement of policy how it will use its enforcement powers.

### **Scope of regulation**

68. The Act anticipated that the scope of regulation may change over time and provided the Board with powers to recommend to the Lord Chancellor that she makes changes to the list of reserved activities and to the designations of individual regulators.
69. In 2013, following extensive research and consultations with the sector, the LSB recommended to the then Lord Chancellor that will-writing activities should be reserved on the basis that the risk of detriment to consumers was significant enough to warrant regulation. This followed a recommendation from the Legal Services Consumer Panel in 2011. On 14 May 2013 the Lord Chancellor announced his decision not to accept the LSB's recommendation. While accepting that consumer detriment had been identified in the will-writing market, the Government's opinion was that alternative measures have not been sufficiently exhausted to warrant new regulation.
70. This recommendation, alongside other powers in the Act, led the LSB to a more systematic review of the unregulated sector and the alternatives to regulation. Section 163 of the Act gives the LSB powers to enter into voluntary arrangements for the purpose of improving standards and best practice in any legal activity (not just reserved legal activities). In 2015/16 we undertook substantial desk and market research into the for-profit unregulated sector, with the objective of understanding whether or not there was evidence to support the LSB exercising its powers under section 163 of the Act. Our work concluded that establishing such arrangements would be unworkable in practice.
71. The Act also gives the LSB powers to approve and recommend changes that allow regulators to authorise additional reserved activities and also to become licensing authorities (see paras 32 to 42 above).
72. **These developments are changing the shape of legal services regulation and have the effect of facilitating competition between regulators for authorised persons, and in particular for authorised firms** (both lawyer and non-lawyer owned ABS). We are currently exploring the potential impact of this emerging market in authorisation. In particular we are seeking assurance that

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<sup>4</sup> Macrory R. 2006. *Regulatory justice: making sanctions effective*.

consumers' interests are adequately protected as the regulation of legal services continues to change.

### **Maintenance of standards of education and training – how we perform this function**

73. Section 4 of the Act allows (and indeed imposes a positive duty on) the LSB to take action to help in the development of regulatory standards and specifically education and training<sup>5</sup>.

74. Intervention by the LSB prompted the setting up of the Legal Education and Training Review (LETR) in 2010 carried out by an independent team of academics led by Warwick University. Commissioned jointly by the SRA, BSB and CILEx Regulation, this was the most penetrating enquiry into the training needs of lawyers since the Ormrod Review in 1971. The LSB agreed the central questions that the review would consider with the regulators<sup>6</sup>. In summary, the review concluded that the current system provides, for the most part, a good standard of education and training enabling the development of the core knowledge and skills needed for practice across the range of regulated professions. At the same time it identified a number of ways in which the quality, accessibility and flexibility of education and training needed to be enhanced to ensure the system remained fit for the future<sup>7</sup>.

75. Following publication of the LETR's independent report, **in 2014 the LSB published statutory guidance to the approved regulators on their regulatory arrangements for education and training**<sup>8</sup>. The guidance made clear our expectation that all regulators should consider the evidence and recommendations contained within the LETR and complete a review of their regulatory arrangements for education and training. It also set out the principles that we expected approved regulators to take into account in their reviews.

76. There has been a significant amount of activity across the regulators since the report, consistent with our statutory guidance, including major reform programmes by the two largest regulators and specific initiatives by others. The focus of this work has included, for example, designing new approaches to

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<sup>5</sup> Section 4 states 'The Board must assist in the maintenance and development of standards in relation to: (a) the regulation by approved regulators of persons authorised by the approved regulator to carry on activities which are reserved legal activities, and (b) the education and training of persons so authorised.'

<sup>6</sup> The review assessed current arrangements against the skills and competencies needed for the workforce of the future, the ability to increase workforce diversity, and the degree to which continual professional development was ensuring lawyers were capable of adapting to changed practices. It also looked at the major challenges facing educators, regulators and the profession in reflecting current practice, as well as analysing the impact of market changes expected over the next decade.

<sup>7</sup> <http://www.lettr.org.uk/the-report/index.html>

<sup>8</sup>

[http://www.legalservicesboard.org.uk/what\\_we\\_do/regulation/pdf/20140304\\_LSB\\_Education\\_And\\_Training\\_Guidance.pdf](http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/20140304_LSB_Education_And_Training_Guidance.pdf)

qualification, the development of competence statements and a shift in approach in CPD away from minimum hours requirements to outcomes-based measures. We have maintained a 'watching brief' on education and training over the last few years and maintained oversight through the rules approvals process.

77. Our draft business plan for 2017/18 includes a proposal to review the effectiveness of our guidance on education and training. **We plan to undertake work to highlight best practice and make sure our guidance continues to reflect best practice and supports regulators to make improvements.**

### Tailored review question 3a

**“Does the LSB carry out any activities beyond that required to facilitate meeting its statutory functions?”**

78. The LSB's main funding source (other than fees) is the levy it imposes on approved regulators. The Act is clear that the levy must only be used for 'leviable Board expenditure' defined primarily as "*the expenditure of the Board incurred under or for the purposes of this Act or any other enactment*". As a body also subject to the requirements of Managing Public Money, and with its own Accounting Officer with personal obligations under that framework, the LSB is ever alert to the need to track all of its activities back to its statutory remit.

79. Any spend on any activity that could not be justified by reference to a statutory responsibility, function, power or duty would be ultra vires.

**80. The LSB asserts firmly that all of its activities, as described in paragraphs 16 to 58, are calculated to facilitate the carrying out of its functions, in line with the powers given to it by section 7 of the Act.**

81. In developing its work programme each year, the LSB consults publicly on its plans, testing with the public, the regulated community and regulators the rationale for proposed work and seeking contributions. There have been those who do not agree with the decisions made by the LSB on its work programme. For instance, in recent years, it has been suggested that the LSB should:

- Not carry out certain primary research – suggesting that it either duplicates work undertaken by others or that it is out with the scope of the LSB's remit. As can be seen from paragraphs 55 to 61, and from analysis of the many gaps that remain to be filled by data in this sector, this is a criticism that we believe is unfounded.
- Not look at the unregulated legal services market because, in effect, the work would be 'paid for' by members of the regulated professions and a sense that, as such, it would be an inappropriate use of the levy to fund work into the unregulated sector. Whilst the LSB recognises the concern, its statutory

powers extend to all “legal activities”, including the ability to recommend that new activities be brought within the scope of the reserved legal activities. Parliament therefore expects the LSB to exercise discretion over the appropriate focus of its resources to promote the regulatory objectives across the sector.

82. In all of these areas, the LSB has exercised its judgement in determining how best to deploy its scarce resources – a declining budget currently at £3,998m and 32 FTE – to most effectively meet its statutory obligations.

#### **Tailored review question 4**

**“How might any of the functions performed by the LSB be improved?”**

83. We are interpreting this question in two ways:

- Can the LSB improve the way it performs its functions?
- Can the statutory functions given to the LSB be improved?

#### **Can the LSB improve the way it performs its functions?**

84. **The LSB is committed to continuous improvement.** As a brand new regulator, with functions, powers and duties that had not previously been performed, we had to develop all of our processes from a standing start. As time has progressed, we have been conscious to review the way we work informed by our experience in practice and by feedback from those we regulate and work with. A number of examples of the way we have changed our approach are described below:

##### *Reviews of regulatory performance*

85. In our 2015/16 review of regulatory performance, we improved the evidence on which to base the assessments by collecting a standard set of data from the approved regulators. We also sought feedback (through both a survey and individual meetings) with people and organisations that had interactions with the approved regulators. This additional information (albeit limited to some extent) allowed us to develop a more rounded view of approved regulators’ performance.

##### *Changes to regulatory arrangements*

86. A review of our process to approve requests for changes to regulatory arrangements in 2015 identified a number of improvement opportunities which we are in the process of implementing. These include expanding the number of LSB colleagues who can lead on assessing applications to ensure that we can respond promptly when applications are made and expanding the information in



an exemption direction so that readers can understand the types of change for which this approval method may be appropriate.

### *Partnership working*

87. We continue to develop ways in which we can improve the evidence base for the legal services sector in ways that are most cost-effective. In 2015/16 we collaborated with The Law Society and together co-funded a large scale online survey of individuals' responses to legal issues. Because of the co-funding arrangement, we were able to generate a sample size that was large enough to allow in depth analysis by segment for the first time.

### **Can the statutory functions given to the LSB be improved?**

88. There are small-scale legislative changes which could be made to help the LSB deliver its existing functions more effectively. In particular, we have explored areas of consensus between regulators about legislative changes that could be made within the current regulatory framework to reduce the burden of regulation and improve the efficiency of the regulatory process. The output of this work was a set of proposals for minor changes to the Legal Services Act 2007 which was submitted to Ministers in June 2015<sup>9</sup>. **One set of proposals concerned specific provisions around the licensing of ABS and we are pleased that the MoJ has consulted on proposals which we consider will have a net deregulatory effect on legal services, allowing regulation to be more targeted and proportionate.** We look forward to seeing the MoJ's response to this consultation shortly, and we hope that parliamentary time can be found to make the necessary amendments.

89. In addition, **we and the regulators have suggested that Schedules 7, 8 and 9 of the Act could be reviewed resulting in less prescription in the LSB's enforcement methods.** While appearing to have strong enforcement powers, in our experience, the requirements around the exercise of these powers as set out in these schedules are convoluted and time-consuming.

90. More substantively, however, and as the MoJ will be aware, **we do not consider the existing regulatory framework to be sustainable in the long-term and have published a vision for legislative reform**<sup>10</sup>. Our vision is of risk-based regulation by activity that is fully independent of both the professions and government. We have proposed that a single legal services regulator be established to deliver this, and that it have a single overarching statutory

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[http://www.legalservicesboard.org.uk/what\\_we\\_do/pdf/20150720\\_Proposals\\_For\\_Changes\\_To\\_The\\_Current\\_Legislative\\_Framework.pdf](http://www.legalservicesboard.org.uk/what_we_do/pdf/20150720_Proposals_For_Changes_To_The_Current_Legislative_Framework.pdf)

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[http://www.legalservicesboard.org.uk/news\\_publications/LSB\\_News/PDF/2016/20160909LSB\\_Vision\\_For\\_Legislative\\_Reform.pdf](http://www.legalservicesboard.org.uk/news_publications/LSB_News/PDF/2016/20160909LSB_Vision_For_Legislative_Reform.pdf)

objective of safeguarding the public interest by protecting consumers and ensuring the delivery of outcomes in the interests of society as a whole. While we hope that the MoJ will conduct a review of the regulatory framework, **we are fully committed to maximising the potential of the current regulatory framework**, focusing on our core regulatory remit and the strategic objectives that we have set.

91. Our vision document notes that we have very limited scope to promote the regulatory objectives where our statutory functions are not closely related to these objectives. This is the case in relation to the current objective concerning public understanding of citizens' legal rights and duties, for example. The regulatory objectives are best understood as a series of considerations that we must keep in the front of our mind when carrying out our statutory functions, rather than goals that we can pursue independently of our functions. This distinction is not well understood by our stakeholders and has been reflected in some frustration about a perceived lack of activity by us in some areas. We are not advocating change to our core statutory functions whilst the current framework is in operation, but any longer-term change should ensure that statutory objectives and functions are well-aligned.

#### Tailored review question 5a

##### **“Does the Consumer Panel demonstrate sufficient independence?”**

92. The Act sets out Parliament's intentions as regards the Consumer Panel in sections 8 to 11. The embedded consumer panel model is common across a number of regulated sectors and we understand that legislators were conscious of the models operating in other sectors as the Act was passed.
93. Establishing the Consumer Panel was an early action of the LSB, which recognised the value that advice provided independently and from a solely consumer interest perspective can add to a regulator's work. This is especially so in a sector where there are very few informed consumer voices relative to the voices of legal services providers and their representative bodies. As such, the Consumer Panel was able to start its work on 1 November 2009, before the LSB's regulatory powers came into effect, and so that their advice could be available at the very start of the LSB's work.
94. Since that time, **the Consumer Panel has provided invaluable advice to the LSB and others on the interests of consumers and has proved itself to be a credible, informed commentator**. Independence of thought, informed by hard evidence, has been at the heart of establishing that credibility with the LSB. The value that the LSB places on the independent advice provided by the Panel is acknowledged in the level of resources that the LSB ring-fences to provide for its support. Two permanent members of staff are funded, with role descriptions that

make clear that their work is solely to support the Consumer Panel. Additionally, the LSB allocates a £32,000 budget to the Consumer Panel so that it can fund its own primary research.

95. Whilst some might expect to look for substantive points of difference between the LSB and the Consumer Panel as a way of demonstrating the Panel's independence, that would be simplistic. Whilst there have been differences in perspective between the Panel and LSB over the years, often these arise because the LSB is required to have regard to a much broader range of considerations than the Panel, who are at liberty to focus solely on consumer interests. Paragraph 100 below describes in more detail the benefits we see from an embedded consumer panel.

### Tailored review question 5b

#### **“Should the Act require the Consumer Panel to be wholly independent of the LSB?”**

96. As set out in answer to question 5a, we consider the Consumer Panel is already sufficiently independent of the LSB. This question seems directed at structure rather than function ie does the Panel need to be structurally independent of the LSB as well as independent in thought.

97. We consider that **the current arrangement has been shown to be effective over the years** and would not propose any change to the statutory arrangement at this stage. We would be surprised to learn that commentators thought it would be viable to make the Consumer Panel a fully independent standalone entity now given its small size<sup>11</sup> as this would significantly increase the cost of consumer representation, whilst at the same time losing the benefits of the embedded consumer panel model.

98. Should the MoJ undertake a review of the Legal Services Act, however, our vision document<sup>12</sup> did explore different options for consideration. If our vision were to be pursued, we concluded that, as a minimum, there should be a general duty on the new single regulator to consult and engage with consumers to help promote a consumer-focused regulatory culture. In addition, there should be an independent sector-specific consumer voice to ensure consumer representation through the regulatory framework. However, we did not specify the exact form this voice should take as we consider this should depend on the wider

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<sup>11</sup> The LSCP comprises a part-time chair and members and is supported by a dedicated secretariat of two members of LSB staff.

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[http://www.legalservicesboard.org.uk/news\\_publications/LSB\\_News/PDF/2016/20160909LSB\\_Vision\\_For\\_Legislative\\_Reform.pdf](http://www.legalservicesboard.org.uk/news_publications/LSB_News/PDF/2016/20160909LSB_Vision_For_Legislative_Reform.pdf)

institutional architecture and take account of the outcome of the Government's current consumer landscape review<sup>13</sup>.

99. One option under a future regulatory framework could be for the consumer representation function for legal services to be given to Citizens Advice (funded by an industry levy) as an alternative to replicating the existing embedded consumer panel arrangement. This could result in greater independence between the consumer representative body and the regulator, access to a cross-sector perspective and to its intelligence database from consumer contacts, and the scope to build on a well-recognised and trusted brand. However, there may be disadvantages, including a more remote relationship with the regulator, and dilution of focus on legal services regulation given the wide range of citizen and consumer issues that Citizens Advice works on. Citizens Advice is also a major provider of legal services and will likely raise issues of conflict of interests.
100. Our vision document suggested that the principal benefits of the embedded consumer panel model include the concentration of expertise on legal services regulation, ongoing input from the panel members who bring a range of perspectives, and access by the regulator to advice at the early stages of policy development. The location of the consumer body inside the regulator uniquely enables the sharing of documents and discussions during the policy formulation stage based on a relationship of trust supported by a regulatory framework with reciprocal duties and powers. It is also a relatively low-cost model, especially in the context of consumer spending on legal services. The document also acknowledged there may be disadvantages with this model, however, including the risk of restricted thinking which does not take into account wider developments in other sectors, due to the exclusive focus on legal services. Nonetheless, our experience is that the model has worked successfully and this risk has not materialised.

### **Tailored review questions 6a and b**

**“Should the statutory functions of the OLC be carried out by a public body and, if not, which delivery model might be better placed to carry out these functions and why?”**

101. The primary statutory function of the OLC is to administer an Ombudsman scheme to consider complaints from consumers about legal services and claims management companies. Parliament concluded that, at the time of passing the Act, the statutory right it gave to consumers to have access to an independent redress scheme, was best delivered by a statutory body accountable to Parliament and, in some areas, to the LSB. Poor complaint handling by some

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<sup>13</sup> <https://www.gov.uk/government/consultations/improving-the-consumer-landscape-and-quicker-switching-call-for-evidence>

legacy bodies played a central role in the Act's reform of legal services regulation.

102. But a statutory right for consumers to have access to redress, or for providers to be statutorily bound to take part in ADR, can be delivered in many other ways and there are examples across the economy.
103. These typically include an element of competition and need not be carried out by a public body. For example, in the communications and gambling sectors, the regulator acting as a competent authority under the Alternative Dispute Resolution (ADR) Regulations may approve multiple redress schemes operated by commercial ADR providers. This is an example of competition **in** the market. Elsewhere, such as for optical services and veterinary practices, a competition **for** the market model operates where a single scheme is selected by the regulator following a tender exercise. Introducing an element competition is potentially a more flexible approach that could create healthy incentives to encourage innovation and reduce costs, whilst offering more leverage to deal any performance issues which may arise. However, there are potential issues to consider, such as ensuring the independence of the ADR body or bodies from the regulator. In particular, the competition **in** the market model raises issues of consumer confusion, inconsistency of standards and barriers to information sharing.
104. That aside, there are some definite benefits in retaining the current model. These include a clear route to redress, ensuring consistency of standards, making information sharing with regulators relatively simple and it being easier to extract learning from complaints to help raise standards in the sector. The OLC's status as a public body operating a single statutory redress scheme also provides security for the scheme which allows investment in infrastructure and supports staff recruitment and retention. However, there may be some potential disadvantages compared to alternative models, including less flexibility, weaker incentives to improve performance and reduce cost, and limited options for the regulator or government to address any failures that might occur.
105. Should the MoJ undertake a review of the legislative framework, there may be merit in considering the consumer redress landscape alongside the regulatory institutional architecture. As illustrated above, based on redress arrangements currently operating across the economy there would appear to be a range of models which such a review could consider. We do not, at present, indicate a preference, as this would require more detailed analysis. In the meantime, our current focus remains on making the existing system work as well as it can.
106. In the long term, the more logical question to start with is whether providers should be required to participate in some form of ADR. If yes, then it becomes

easier to consider whether the ADR should be provided by a single statutory body or via an alternative model.

### Tailored review question 7

#### **“Does the Legal Ombudsman scheme provide a good service to both complainants and regulated service providers?”**

107. The LSB holds the OLC to account for its performance in administering the Legal Ombudsman scheme. In June 2015, the LSB used its powers under sections 120 and 121 to set targets for performance and triggers for reporting requirements from 1 June 2015 to 31 March 2016<sup>14</sup>. These addressed performance in relation to quality, timeliness and cost targets in administering the Legal Ombudsman scheme as regards its legal jurisdiction. If performance fell below the trigger target levels, the OLC were required to provide an explanation of why performance had not reached the target and the steps the OLC would take to remedy the situation. The targets mirrored those already established by the OLC itself except for timeliness, where the LSB target of 60% of cases to be resolved in 90 days was less stretching than the 70% target OLC had set for the LeO scheme. All of the reports received by OLC under this requirement can be found on the LSB’s website<sup>15</sup>.

108. The LSB also issued a section 120 requirement, requiring OLC to provide a report to the LSB setting out OLC’s proposals for a comprehensive framework for key performance indicators (KPIs) and performance measures to apply to the performance of the LeO scheme (in respect of its legal jurisdiction) from April 2016 onwards..

109. With regard to the reports of performance received during the reporting period, these can be summarised as:

- With regard to timeliness, at no point in the reporting period did the LeO scheme achieve the required target of 60% of cases being resolved within 90 days of first point of contact. In June 2015, 90 day performance was reported as 57% and by March 2016, performance at the 90 day target was at 40%. OLC provided reports explaining why performance had fallen below these levels in each month
- With regard to unit cost, the target was set at unit cost not exceeding £1,750 in any rolling quarter. This target was met in six of the ten months covered by

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[http://www.legalservicesboard.org.uk/news\\_publications/LSB\\_News/PDF/2015/20150619\\_LSB\\_OLC\\_Exchange\\_S120121.pdf](http://www.legalservicesboard.org.uk/news_publications/LSB_News/PDF/2015/20150619_LSB_OLC_Exchange_S120121.pdf)

<sup>15</sup> [http://www.legalservicesboard.org.uk/about\\_us/office\\_for\\_legal\\_complaints/olc\\_board/index.htm#3](http://www.legalservicesboard.org.uk/about_us/office_for_legal_complaints/olc_board/index.htm#3)

the requirement. OLC provided reports explaining why the target wasn't met on each occasion required

- With regard to quality, the target was defined as the average satisfaction of complainants and lawyers (regardless of outcome of case) must not fall below 40% in any quarter. This target was met throughout the reporting period.

110. The OLC also responded to the section 120 requirement to provide proposals for a comprehensive future framework for performance measurement<sup>16</sup>. This described a balanced scorecard approach to performance, linking operational performance to the strategic priorities of the organisation. At the time the report was submitted, a number of the measures that would be used in the final version of the balanced scorecard were still to be quantified eg with regard to quality.

111. At the end of the period covered by the June 2015 section 120 and 121 requirements, the LSB reviewed the reports that had been received.

112. The LSB concluded that the time was not yet right to remove all formal reporting requirements from the OLC and agreed to place a revised reporting requirement on the OLC from 1 April 2016 to March 2017<sup>17</sup>. The section 121 performance targets were not renewed and a section 120 reporting requirement only was placed on the OLC. This required monthly reporting of LeO performance against timeliness, cost and quality targets (using prevailing OLC measures until new OLC measures were adopted) and quarterly narrative reports to include the OLC's assessment of scheme performance over the preceding quarter, any trends and analysis of those, and, importantly, clear, time-bound information on action to improve performance where it fell short of OLC expectations.

113. All reports received by OLC to date under this requirement can be found on the LSB's website<sup>18</sup>.

114. In judging the success of the Legal Ombudsman scheme, and the contribution it makes to the sector, however, the LSB believes that a broader set of outcomes should be considered alongside operational performance data. For example, evaluating whether the following outcomes are being delivered:

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[http://www.legalservicesboard.org.uk/about\\_us/office\\_for\\_legal\\_complaints/olc\\_board/pdf/2016/15\\_L\\_to\\_Mike\\_Pitt\\_re\\_KPI\\_Report\\_301015.pdf](http://www.legalservicesboard.org.uk/about_us/office_for_legal_complaints/olc_board/pdf/2016/15_L_to_Mike_Pitt_re_KPI_Report_301015.pdf) and  
[http://www.legalservicesboard.org.uk/about\\_us/office\\_for\\_legal\\_complaints/olc\\_board/pdf/2016/16\\_Performance\\_Measures\\_Report\\_to\\_LSB\\_final\\_November\\_2015.pdf](http://www.legalservicesboard.org.uk/about_us/office_for_legal_complaints/olc_board/pdf/2016/16_Performance_Measures_Report_to_LSB_final_November_2015.pdf)

<sup>17</sup>

[http://www.legalservicesboard.org.uk/news\\_publications/LSB\\_News/PDF/2016/20160415\\_LSB\\_OLC\\_Requirement\\_under\\_s120\\_of\\_LSA.pdf](http://www.legalservicesboard.org.uk/news_publications/LSB_News/PDF/2016/20160415_LSB_OLC_Requirement_under_s120_of_LSA.pdf)

<sup>18</sup> [http://www.legalservicesboard.org.uk/about\\_us/office\\_for\\_legal\\_complaints/olc\\_board/index.htm#3](http://www.legalservicesboard.org.uk/about_us/office_for_legal_complaints/olc_board/index.htm#3)



- the organisation performs its core complaints-handling functions well and operates in accordance with established standards for such bodies
- Intelligence from complaints is fully exploited to raise industry standards leading to providers dealing with complaints well so ADR is only needed as a last resort
- Consumer redress arrangements deliver **good value for money**
- Routes to redress are **clear and simple to navigate** for consumers and providers
- There are effective mechanisms to address poor performance by the organisation
- Structures enable good information sharing between the organisation and regulators

115. Whilst the OLC is making progress on improving its core services, in the face of complex challenges such as the stability of its case management system, the LSB remains concerned that the scheme's full potential is yet to be reached. The new senior leadership, steered by the OLC, are endeavouring to deliver improvements in this regard and the new service principles evidence those endeavours to improve quality of service. The LSB has been clear about the need to see the OLC delivering sustained scheme performance improvement and does recognise work that is being put into that at all levels. Looking ahead, the LSB acknowledges the OLC's commitment to improving its approach to exploiting intelligence from complaints and playing its important role in feeding back learning to consumers, the sector and regulators.

### **Tailored review question 8**

**“Do the statutory functions conducted by the Legal Ombudsman need to be carried out independently of Government?”**

116. The Act provides certain statutory functions be carried out by the Office for Legal Complaints: but we are used to the term ‘Legal Ombudsman’ simply being the name of the statutory scheme administered by the OLC.

117. We have assumed that the question is designed to refer to either the statutory functions provided to the OLC ie primarily establishing an Ombudsman scheme, or to the Chief Ombudsman ie the requirement for the production of an annual report on the discharge of ombudsman functions or the powers provided to an ombudsman in relation to determination of complaints. On the latter, the LSB notes that the Ombudsman Association's Criteria for the Recognition of



Ombudsman Offices<sup>19</sup> lay down clear and well-regarded principles for bodies seeking to be recognised as Ombudsmen and address key considerations in relation to independence.

118. With regard to the necessity of independence from Government of the OLC more generally, we find the MoJ's own conclusions from the 2012 Triennial Review of OLC remains persuasive namely that "*separation from Government and the regulators is important for a truly independent redress system. The first of the six principles of good governance in Ombudsmen schemes is independence: ensuring and demonstrating the freedom of the office holder from interference in decision making*". This argument is particularly persuasive when the position of lawyers representing clients in conflict with Government is taken into account. To avoid any perception of undue influence, independence of complaints-handling from Government is important.

### **Tailored review question 9a**

#### **"Do the three-way governance arrangements between the LSB, OLC and MoJ allow for effective oversight of financial and operational performance?"**

119. Constructive working between the three parties aims to mitigate the inherent risks that the unusual tripartite relationship between MoJ, OLC and LSB represents to effective oversight of financial and operational performance. However, the unusual (in public sector governance terms) nature of the relationship does give rise to tensions and can best be described as sub-optimal. The lack of a single, clear line of accountability either directly from MoJ to OLC or from MoJ, through LSB, to OLC also causes frustrations to each party and introduces a degree of tension into relationships that might otherwise not exist.

#### *The nature of the relationship*

120. The Act gives the LSB a variety of functions, powers and duties in relation to the OLC. The OLC has its own functions, powers and duties under the Act and, in parallel and as an independent public sector body, has its own responsibilities and accountabilities through its Accounting Officer under Managing Public Money and other public sector norms. These can best be summarised as:

- The OLC Board is responsible for the performance of its own statutory functions
- The OLC is accountable to LSB for its oversight of LeO's performance and funding

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<sup>19</sup> <http://www.ombudsmanassociation.org/docs/OA-Rules-Schedule-1.pdf>

- The OLC is accountable to MoJ for its obligations as a NDPB including any functions delegated to the CEO of LeO as Accounting Officer
- The LSB is accountable to MoJ for its obligations as a NDPB including any functions delegated to the CEO of LSB as Accounting Officer
- The LSB and OLC are accountable independently to Parliament, via the Lord Chancellor, for the performance of their statutory functions.

121. It is important to state that the LSB does not regulate the OLC. For example, the LSB has no powers which might be described as sanctions. Its powers to direct the OLC are very limited in scope, and where the LSB does have functions in relation to the OLC these are almost all phrased as obligations on the OLC. The LSB does however have a mixture of hard and soft levers to affect OLC's performance of its functions.

*Why are the arrangements sub-optimal?*

122. The LSB is of the view that the current tripartite arrangements between MoJ, LSB and OLC are sub-optimal for the following reasons:

- Confusion and the potential for disagreement over responsibilities and accountabilities between the three parties persist. Whilst the Act is prescriptive, and functions and duties are clearly stated, in practice, the drafting of the Act failed to take account of the interplay with prevailing public sector protocols and norms
- There are risks to LSB's reputation arising from external misperceptions of LSB's responsibilities for OLC. LSB has certain tools (which we have used) but the remedial steps we can take are limited in scope. These risks are real and exacerbated by the complex nature of the relationship which means that it is difficult to explain in simple terms why misperceptions are unjust
- Legislative gaps make it technically difficult for LSB to properly give effect to its functions. In contrast to the exercising of the LSB's functions as regards the approved regulators practising certificate fees or regulatory arrangements, the Act contains no clauses relating to how the Board should exercise its functions of approval of OLC budget or consent to OLC scheme rules
- While LSB can set performance targets the LSB has no powers to sanction OLC where targets are not met. The only hard level in this regard would be removal of the Board. This can only be done in limited circumstances and is a 'nuclear' option

- LSB's role in approving the OLC's budget is circumscribed due to public sector protocols around approving the levy for OLC, approving grant-in aid sums to fund the claims management jurisdiction (both via the Lord Chancellor) and granting authority to spend (the latter being provided by the Permanent Secretary of the MoJ). This broader public sector spending control regime is in reality a more powerful determinant of OLC budget than LSB consent
- Strict delivery of the 'post-boxing' function in relation to the OLC's Annual Report and Accounts could place the LSB's Accounting Officer in the invidious position of apparent responsibility for the content and regularity of OLC's accounts when he has no such responsibility for them
- Seen from the OLC's perspective, it is frustrating to have 'two masters.'

123. The LSB believes, however, that these arrangements can be made to work optimally within the current framework.

### **Tailored review question 9b**

#### **“How might the governance arrangements be improved?”**

124. With regard to the current tripartite relationship, the LSB believes that clear success criteria for the tripartite relationship should be established. All bodies involved should be focused on making the existing system work better, despite its imperfections. Alongside the current development of an effective and practical operating protocol, agreed success criteria might include:

- Recognition that each body has an important role to play in helping the others deliver their functions in a way that maximises potential for each to make a valuable contribution to consumer and market confidence, the quality of legal services and regulatory standards
- Respective responsibilities are clear to provide certainty for the parties and stakeholders, and so parties do not misdirect themselves by assuming they have responsibilities that they do not
- The independence of the OLC's dispute resolution function is not questioned
- MoJ and LSB co-ordinate the discharge of their respective functions in relation to OLC and manage OLC risks for which they are each responsible by accessing an appropriate combination of hard and soft levers
- All parties agree the performance indicators which will incentivise the right actions within LeO and understand remedial action, including, where appropriate, action by the LSB, will need to be taken where performance

failures occur

- There is compliance with good governance and public sector accounting protocols without imposing unduly onerous administrative burdens on any of the parties.

#### *Change options*

125. Were there to be appetite for more radical reform of the governance relationship, alongside or as an alternative to more radical reform of the regulation and redress architecture, there are a range of alternative models to look to when thinking about the relationship between the regulator and the redress body. These include adjustments to the current arrangements, for example:

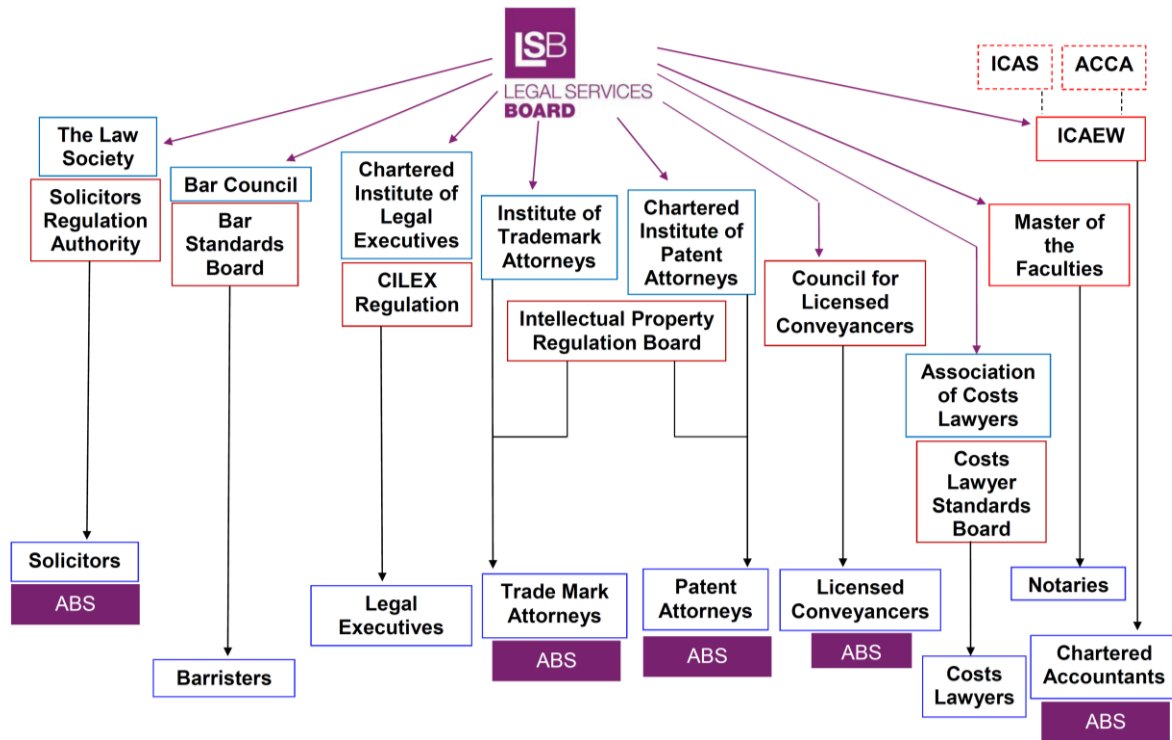
- A looser relationship – removal of LSB’s responsibilities in relation to the OLC except in matters relating to redress policy (it would not be appropriate for MoJ to exercise policy functions as these should be exercised independently of government) and transfer these to MoJ. For example, LSB might retain section 120 reporting powers to help investigate policy issues arising from complaints, but lose responsibilities in relation to appointments, performance and budget approval.
- A tighter relationship – with greater direct accountability on all matters, including financial, from OLC to LSB to MoJ and a greater range of powers available to LSB. For example, development of a performance review process similar to that used for the approved regulators backed by a range of sanctions. Governance options could range on a spectrum of securing LSB board members *ex officio* positions on the OLC board, considering whether there are changes that could be made to the Accounting Officer relationships, or considering a single board for both bodies. Care would need to be taken to investigate all of these options thoroughly to avoid introducing different risks and complexities into the governance relationship and to ensure that the independence of the Ombudsman’s decision making was not undermined.

126. The LSB understands that it would take legislation to alter the governance arrangements between the LSB, OLC and MoJ. The LSB is absolutely determined and indeed is enthusiastic to make the current governance structure work. The LSB’s view is that if, however, government were minded to initiate legislation then it should not confine itself to legislation that solely sought to alter those arrangements in one of the ways described in the previous paragraph. The LSB believes it would be preferable for the government to undertake a wider review as suggested by our answers to the earlier questions and seek to determine the best delivery model for a redress system in the legal sector. As set out above, this may or may not need a public body. It could, for example, include a tender process, organised by LSB, or the regulators, for a private sector body

to deliver this function. In such circumstances, the current complex governance arrangements would be avoided.

## Annex A – approved regulators

The diagram below shows the complexity of the regulatory structure in operation. The LSB sits at the apex, overseeing the approved regulators, some of whom have both regulatory and representative arms.



Approved regulator	Regulatory body	Reserved Activities	Licensing Authority	No. of authorised practitioners***
Law Society	Solicitors Regulation Authority	The exercise of a right of audience The conduct of litigation Reserved instrument activities Probate activities The administration of oaths	YES	145,059
General Council of the Bar	Bar Standards Board	The exercise of a right of audience The conduct of litigation Reserved instrument activities Probate activities The administration of oaths	YES (pending the laying of the order)	15,288
Chartered Institute of Legal Executives	CILEx Regulation	The exercise of a right of audience The conduct of litigation Reserved instrument activities Probate activities The administration of oaths	NO	6,832
Chartered Institute of Patent Attorneys	Intellectual Property Regulation Board	The exercise of a right of audience The conduct of litigation Reserved instrument activities The administration of oaths	YES	2,056 (includes 284 dual registered)
Institute of Trademark Attorneys			YES	869 (includes 284 dual registered)
Council for Licensed Conveyancers		Reserved instrument activities Probate activities The administration of oaths	YES	1,283
Faculty Office		Reserved instrument activities Probate activities The administration of oaths Notarial activities	NO	784
Association of Costs Lawyers	Costs Lawyer Standards Board	The exercise of a right of audience The conduct of litigation The administration of oaths	NO	632
Institute of Chartered Accountants in England and Wales (ICAEW)**		Probate activities	YES	265
Institute of Chartered Accountants of Scotland (ICAS)*		Probate activities	NO	N/A
Association of Chartered Certified Accountants (ACCA)*		Probate activities	NO	N/A

\*The Institute of Chartered Accountants in Scotland and the Association of Chartered Certified Accountants are approved regulators for reserved probate activities only, but do not currently have any regulatory arrangements and so do not regulate reserved legal services.

\*\* The Institute of Chartered Accountants in England and Wales intends to apply to become an approved regulatory and licensing authority for reserved legal activities relating to taxation matters in 2016.

\*\*\* Figures show number of persons authorised by each regulator to undertake one or more legal activity as at 1 April 2015.

## **Annex B – history of reforms**

### **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**

128. 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.
129. 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**

130. 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:
  - 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
  - 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.
131. In December 2004, Sir David published his '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**

132. 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.
133. 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.
134. 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.