



HOUSE OF LORDS

Baroness Deech's Question for a Short Debate on 3 December 2012

*To ask Her Majesty's Government
what assessment they have made of the efficacy of the regulation of the legal profession*

BAR COUNCIL BRIEFING NOTE FOR PEERS

Importance of regulation

1 The Bar Council wants a strong and independent legal profession. To ensure that, it is vital that the public and consumers are confident that proper regulation exists to protect their interests and the interests of justice. We supported the recommendations of the report of Sir David Clementi in 2004, and the Legal Services Act which was enacted by Parliament in November 2007. Our approach to reform was, and remains, based on a simple premise which underpins the administration of justice, namely that the justice system is here to serve the public. The Bar wants to play its part in giving the public the justice system it deserves. Proper regulation of the legal services sector, in the public interest, is absolutely vital to the achievement of that aim. That is why, in 2006, the Bar Council delegated responsibility for the regulation of the Bar of England and Wales to the Bar Standards Board, an independent, ring-fenced regulator of the profession of barrister.

Time for review

2 Since the new regulatory architecture was put in place by Parliament in 2007, the maze of regulation governing legal services providers has been streamlined and simplified. Many of the original intentions of Parliament have been fulfilled, including the establishment of the Legal Services Board (LSB) to oversee eight "Approved Regulators" (of which the Bar Council is one) and the creation of the Office for Legal Complaints (OLC), to provide a unified system for the handling of complaints against legal service providers. The LSB has gone a long way towards fulfilling its original mandate of liberalising the arrangements for the provision of legal services, including the delivery of such services through Alternative Business Structures (ABSs). Five years on from the enactment of the Legal Services Act, it is timely, therefore, to assess the efficacy of the regulation of the legal profession.

Why a review is necessary: The Bar Council's concerns

3 The Bar Council is concerned that while some of the original intentions of Parliament have been fulfilled, others have not. Our concerns are summarised below:

- Although the Bar Council believes that the OLC has worked well, the **LSB has suffered from mission creep**. We believe it is becoming an organisation in search of a role for itself. Parliament never intended that the LSB should operate other than as an oversight regulator, exercising appropriate supervision of the activities of front-line regulators. In practice, however, the LSB has interpreted its mandate much more broadly. It has come to operate more as a market and a professional regulator than an oversight regulator. The LSB's ambition to extend its role is demonstrated by the following "goal" in its draft Strategic Plan for 2012-2015: "to reform and modernise the legal services marketplace in the interests of consumers, enhancing quality, ensuring value for money and improving access to justice across England and Wales."
- Despite assurances to the contrary when the Legal Services Bill was being considered, the **LSB has become involved in micro-management** of the activities of the regulators it was meant to oversee. The LSB has a statutory duty to "assist in the maintenance and development" of regulatory standards, but it has sought to involve itself in the management of the activities of the independent regulator of the Bar, the Bar Standards Board (BSB) in areas in which the BSB is already achieving the regulatory objectives specified by the 2007 Act, requiring no further 'assistance'.
- For example, changes in the regulation of arrangements to allow greater public access to the services of barristers (without the need for a referral from a solicitor) demonstrated the LSB's micro-management. In July 2011, the Bar's regulator, the BSB, published a short consultation paper on proposals to relax the rules governing public access to barristers' services to allow consumers to instruct a barrister directly, even if they are eligible for legal aid. Such changes are in the public interest, and the Bar Council supports them. Before the end of the consultation period, the LSB wrote to the BSB to raise 14 points which set out its expectations for the BSB's submission, should it decide to proceed with an application for approval of a rule change. A number of these points extended well beyond what was reasonable and proportionate for an oversight regulator to raise with little, if any, apparent benefit to the public interest or the profession's interests.
- As a result there has been **duplication and overlap of regulatory activity**, for example in the collection of data about equality and diversity in the profession. Chambers are already under a statutory duty to collect such data, but the LSB has overlain this requirement with their own requirements. The LSB has an ambitious programme to undertake research (paid for by the practising profession), the cost of which, it has said, it wants to double when the front line regulators are not only better placed to undertake such research themselves, being closer to their

respective markets and the consumers of their services, but also because they are in some cases already engaged in such research. Furthermore, the research which the LSB has commissioned has not always generated outcomes which are unarguably in the public interest (such as the LSB's review of referral fees and their conclusion that a ban could not be justified on such payments, which the Bar Council has consistently argued are tantamount to bribes, and against the public interest).

- Duplication and overlap result in **unnecessary costs**. These have to be borne by the legal profession. Not only does it have to fund its own regulatory costs (in the case of the Bar, those of the BSB, raised by the annual Practising Certificate Fee) but also the costs of the LSB and the OLC which are funded by levies imposed on the profession as a whole. When the Legal Services Bill was introduced to Parliament in November 2006, the Government's Regulatory Impact Assessment calculated the annual running costs of the Legal Services Board (LSB) at £3.6m. In the event, the LSB's costs have never come close to that figure (2009/10 - £5.049m; 2010/11 - £4.734m; 2011/12 - £4.578m).
- The growth in costs of the LSB, and the steady growth in its regulatory ambition, have had a direct effect on the costs of front-line regulators. Between 2006 and 2012, overall expenditure of the Bar Council has increased by some 70% (from £7.6m to £12.9m).
- **Regulators cannot ignore the affordability of regulation.** The costs of regulation have been increasing, while the remuneration of many at the Bar who depend on public funding has been significantly reduced and the market for their services has been contracting. Between 2010-12, barristers who undertake Crown Court cases where the trial lasts between 1 and 40 days have had their fees reduced by 13.5%. In longer cases, fees have been cut by as much as 40%. From April 2013, the scope of publicly-funded work will contract significantly as the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act comes into force. The combined effect of cuts in legal aid and the reductions in scope of legal aid, coming at a time of economic austerity, are causing many practitioners at the Bar to be very concerned about the remorseless increase in the cost of legal services regulation.

Conclusion

4 Earlier this year the Bar Council set out its concerns about the operation of the LSB in its response¹ to the **MoJ's Triennial Review of the LSB**. The Bar Council was very disappointed by the Government's response to the review.

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http://www.barcouncil.org.uk/media/132078/bar_council_triennial_review_final_response_paper_30032012.pdf

5 We urge Peers to support a post-legislative scrutiny review of the effectiveness of the Legal Services Act. Such a review should inquire into whether, having regard to the achievement of many of the original intentions of the Act, the time has come for the scope of the LSB's activity to be limited to the proper oversight of legal services undertaken by the frontline regulators themselves. In this way, we believe that the costs and burdens of regulation can be managed better and that the principles underpinning regulatory activity, whether oversight or front-line, are transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed.

30 November 2012