

# **Response from the Legal Services Ombudsman and Legal Services Complaints Commissioner to the Legal Services Reform White Paper “The Future of Legal Services: Putting Consumers First”**

## **Introduction**

Radical reforms to the way in which legal services are delivered and regulated in England and Wales are proposed by the Government in its legal reforms White Paper “The Future of Legal Services: Putting the Consumer First”. As Legal Services Ombudsman and Legal Services Complaints Commissioner, I welcome the Government’s proposals and am delighted to see the recommendations made by Sir David Clementi being taken forward.

I have, for many years, been an advocate of reforming the regulation of the legal profession in the interest of the consumer. In outlining the challenges facing me as Legal Services Ombudsman in July 2003<sup>1</sup>, I commented: “... it is clear that we must now embark upon such a course of action [to deliver step change solutions] if we are to ensure that legal services better meet the needs of consumers and that the associated complaints-handling systems deliver a fair, transparent and impartial service, one that inspires confidence rather than apprehension and distrust among consumers”. It is therefore heartening to see that the Government’s proposals are intended to put the consumer first.

Since the Office of the Legal Services Ombudsman was established in 1990<sup>2</sup>, it has independently reviewed the handling of over 19,000 complaints by the legal professional bodies – I have personally reviewed over 4000 complaints to date. The role of Legal Services Ombudsman has provided me with insight into the consumer’s experience, the perspective of the providers of legal services and their regulators. As Legal Services Complaints Commissioner, I have worked closely as a regulator with the largest legal professional body to make improvements at a systemic level to the way in which complaints are handled.

This extensive experience has led to an understanding of the regulatory framework and the importance of having sufficient powers to achieve the necessary improvements.

As the proposals go through the process of translation into legislation, I would like to offer my full support to the Government in making its proposals come to fruition. This includes working with the Department for Constitutional Affairs, as the legislation is drafted and assisting with plans for implementation when appropriate.

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<sup>1</sup> “Taking up the challenge” The Office of the Legal Services Ombudsman Annual Report 2002/2003

<sup>2</sup> Established by the Courts and Legal Services Act 1990

As previously demonstrated, I very much support and welcome the Government's policy intent as expressed in the White Paper. This formal response inevitably raises some challenges and questions with regard to the detail of the proposals, but does so with the aim to be helpful to those involved in drafting the legislation. My experience as both Legal Services Ombudsman and Legal Services Complaints Commissioner leaves me uniquely placed to inform the development of this legislation, particularly concerning the creation of the new Legal Services Board (LSB) and the Office for Legal Complaints (OLC).

My response will address **six** key areas, which broadly follow the order in which the White Paper proposals are presented:

**Putting consumers first** – my response fully endorses the Government's stated aim and further explores what action will be necessary to ensure that all consumers are given the information and support to take full advantage of opportunities presented by the reformed legal services market and new system of regulation.

**Powers of the LSB and Powers of the OLC** – these sections are informed by my experience (as both Commissioner and Ombudsman), of working under statutory powers directly with the professional bodies (referred to in the White Paper and hereafter in this response as the Frontline Regulators (FLRs)).

**Structures and governance** – this section addresses the proposals in the White Paper with regard to the accountabilities of the new bodies, appointments of members and the new organisations' relationships with each other.

**Alternative business structures** – my response welcomes the potential for increased choice and flexibility for consumers in accessing legal services, and for professionals in allowing innovation in ownership and delivery. I also support the Government's aim of ensuring that there are sufficient safeguards in place to protect consumers.

**Funding and implementation** – in this section I address the assumptions underpinning the proposed costs of the new regulatory regime and urge the Government to consider the mechanisms that could be used to deliver a transition that is "best in class" in terms of implementation of Government reform.

On that note, the theme running through my response to the White Paper is that the Government has created a once in a lifetime opportunity to put things right for consumers and professionals who have laboured for too long under an archaic system of regulation which has lacked transparency or consumer focus. The Government has to be brave in grasping this opportunity and seeing the reforms through in spite of the challenges from those who will seek to preserve their own interests.

The principles and ambitions outlined in the White Paper must be delivered for the consumer without being compromised by self-interest or false economies in implementation and transition. Put bluntly, true reform needs to be properly funded. Aiming for excellence (not merely “effective and efficient”) carries a cost that should not be under-estimated at the outset.

The true test of the reforms will be that the consumer experiences the improvements to the legal system at the point of delivery and (though it is hoped that this is increasingly rare), fair and appropriate redress in the event that things go wrong. If this is to be achieved by merely tweaking what largely exists, but at the same time removing an independent tier of regulation, then there are simpler and more cost effective methods of achieving such modest change.

I hope the Government maintains the courage and resolve to ensure that the major changes proposed are made real and meaningful for the consumer within the new framework.

## **Response from the Legal Services Ombudsman and Legal Services Complaints Commissioner to the Legal Services Reform White Paper “The Future of Legal Services: Putting Consumers First”**

### **Summary of Key suggestions made in the Response:**

**Putting consumers first** – my response fully endorses the Government’s stated aim and further explores what action will be necessary to ensure that all consumers are given the information and support to take full advantage of opportunities presented by the reformed legal services market and new system of regulation.

### **Specific suggestions made in relation to consumers:**

- **The LSB should have a duty of consumer protection**
- **The LSB should have a duty to inform and educate consumers**
- **The LSB should be given the power to monitor and set guidelines for how the FLRs and firms conduct marketing activity**

**Powers of the LSB and Powers of the OLC** – these sections are informed by my experience (as both Commissioner and Ombudsman), of working under statutory powers directly with the FLRs.

### **Specific suggestions made include that the LSB is given additional powers:**

- **To set minimum standards of service that consumers should expect to receive from the FLRs and their members**
- **To set standards and ensure consistency of standards across all FLRs, such as setting minimum standards for education and training of providers of legal services.**
- **To investigate/audit FLRs (including the power of entry to the FLR).**

### **Specific suggestions made include that the OLC’s powers are strengthened:**

- **The OLC is given powers in legislation to define the boundaries of consumer complaints and misconduct**
- **The OLC, using these definitions, will make the assessment of what constitutes misconduct.**
- **The OLC has the power to decide when it concludes a case and when it deems it appropriate to make a referral to the FLR.**
- **Legislation should allow within the OLC, a mechanism that allows the parties to have a review of the final decision, which must then be binding.**

**Structures and governance** – this section addresses the proposals in the White Paper with regard to the accountabilities of the new bodies, appointments of members and the new organisations’ relationships with each other.

**Specific suggestions made include that:**

- **The criteria that the first Chair of the LSB is a non-lawyer is applied to all future Chairs of the LSB.**
- **The Chair of the OLC Board is to be a member of the LSB Board.**
- **Powers are vested respectively in the OLC Board and the Chief Ombudsman, as appropriate.**
- **The position of Chief Ombudsman is a quasi-judicial appointment.**
- **The Chief Ombudsman is an ex-officio member of the LSB Board.**

**Alternative business structures** – my response welcomes the potential for increased choice and flexibility for consumers in accessing legal services, and for professionals in allowing innovation in ownership and delivery. I also support the Government’s aim of ensuring that there are sufficient safeguards in place to protect consumers.

**A specific suggestion is made that:**

- **The powers of the LSB Board, OLC Board and Chief Ombudsman are made sufficiently flexible in legislation in order to adapt to the complexity the new ABS structures may bring.**

**Funding and implementation** – in this section I address the assumptions underpinning the proposed costs of the new regulatory regime and urge the Government to consider the mechanisms that could be used to deliver a transition that is “best in class” in terms of implementation of Government reform.

**Specific suggestions are made that:**

- **Government makes provision for the appointment of Shadow Chairs of the LSB Board, OLC Board and Chief Ombudsman.**
- **Issues such as access and flexibility should be at the forefront of considerations of the structures of the OLC and LSB and that a number of options should be considered and costed before final decisions are made.**
- **Flexibility is built in with regard to the start-up costs of the OLC.**

## 1. Putting Consumers First

In my view, the Government's commitment to "putting consumers at the heart of the changes" is unquestionably right. As the White Paper points out, consumer needs, not those of providers "should drive decisions about regulation".

Therefore, I would fully support the Government's proposals<sup>3</sup> to establish a new oversight regulator in the LSB and a new independent OLC. (I will comment further on the consumer involvement in the governance of the new organisations in section 4 of this response).

I would go further in setting out some additional principles by which the success of the new regulatory framework and ways of delivering legal services could be judged by consumers:

- **Adequate protection and safeguards**

The White Paper is strong on the safeguards for consumers in terms of a hierarchy of controls and sanctions from the LSB to the FLRs in the event of non-compliance or failure. Similarly, safeguards in relation to the ownership of the new ABS firms appear to be sensible and in the consumer's interest.

However, it is important that the new regulatory regime places as much emphasis on the proactive activity such as **setting standards for the FLRs** as on the provision of sanctions if things go wrong. I would also suggest that the legislation should give the LSB **a duty of consumer protection**.

- **Empowerment and Education**

It is essential that all consumers are clearly informed about the changes to the regulatory regime and the LSB should have **a duty to inform and educate consumers**. Those consumers who are confident and competent should be enabled within the new legal services market to undertake more self-help legal work where appropriate. Those who require expertise or support should be clearly sign-posted where to go for help.

Information about how the market works must come from the authority of the LSB, which needs to have the structure and resources to enable it to communicate effectively with consumers and the general public as well as members of the professional bodies.

Consumers will seek out information and the LSB needs to control the key messages. In the absence of consumer information from the LSB there is a danger that the private sector could fill this vacuum. **Legislation therefore needs to give the LSB the power to monitor and set guidelines for how**

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<sup>3</sup> "The Future of Legal Services: Putting Consumers First" section 3.1, page 19

**the FLRs and firms (including the new ABS firms) communicate and undertake marketing activity.** As a parallel, the Financial Services Authority (FSA) already sets guidelines monitors marketing literature on financial products.

## 2. Powers of the LSB

It is pleasing to note that the Government has set out a range of proposed powers for the LSB, which will enable effective oversight of the FLRs and the OLC. This is essential to restore consumer confidence.

My experience as Legal Services Complaints Commissioner has shown that it is necessary for a regulator to have a range of control powers backed up by a range of sanctions, which can build in severity proportionate to the degree of failure.

Based on this experience, and in considering the range of powers proposed for the LSB, I have identified some potential gaps, which the Government may wish to address in drafting the legislation. These are in relation to:

### **LSB powers to carry out regulation<sup>4</sup>:**

#### **Controls over FLRs**

I would suggest additional powers as follows:

- **To set minimum standards of service that consumers should expect to receive from the FLRs and their members**

The Consumer Panel would be well placed to advise the LSB on this matter. This would be an important step in achieving consistency of service for consumers.

- **To set and ensure consistency of standards across all FLRs, such as setting minimum standards for education and training of providers of legal services.**

Individual FLRs may wish to set standards higher than those set by the LSB, although the LSB needs to be satisfied that these standards do not become unreasonably restrictive or a barrier to entry.

I would also recommend that as with the medical profession, there should be a requirement for all legal professionals to be regularly re-accredited, perhaps every five years and particularly in client care.

- **To investigate/audit FLRs (including the power of entry to the FLR).**

This is particularly important, as the LSB will need (as an effective and fair oversight regulator) to gather evidence of failure to comply or weakness in regulation in order to work with the FLR to improve, or in the case of

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<sup>4</sup> “The Future of Legal Services: Putting Consumers First” Section 5.6 page 32 ff

continued failure, in order to use sanctions and/or remove authorisation to regulate.

The LSB may also wish to satisfy itself (through investigation and audits of the FLRs) that the governance arrangements it accepts as initial evidence of the representation/regulation split continue to work in practice and are carried through in the day-to-day operations of the FLRs.

I would also suggest an enhancement to the following control power over FLRs as expressed in the White Paper:

- **To require FLRs to provide the LSB with information (subject to privacy/confidence) to carry out its duties.**

My suggestion is that **the legislation is drafted so that the LSB has the power to insist on the information being provided**, rather than reliance on enforcement via a civil injunction. This would need to be supported by an appropriate sanction.

### **Sanctions over FLRs**

The general point that I would raise with regard to the sanctions set out in section 5.6 of the White Paper, is that for each control power, there should be one or more sanctions which it is clear would be specifically employed in the event of failure to comply by a FLR. The sanctions and controls should be drafted in order to more obviously complement each other.

In addition, the proposed sanction **“to set regulatory targets for FLRs and to monitor compliance”**<sup>5</sup> might be expressed more positively and appropriately in the legislation as a control power rather than a sanction.

I would suggest two additional sanctions:

- **To enforce an individual FLR's compliance with LSB or OLC recommendations.**
- **To apply a sanction directly on a firm in the event of its non-compliance with LSB or OLC recommendations** (this point is illustrated in relation to complaints handling in section 3).

The legislation needs to be clear that when the LSB decides the FLR has failed to take the appropriate action on a firm, it can then deal with the firm directly. This would most likely be at a point before it becomes necessary for “Stop Now”<sup>6</sup> powers to be used.

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<sup>5</sup> “The Future of Legal Services: Putting Consumers First” Section 5.6 page 33

<sup>6</sup> Powers under the Enterprise Act 2002

### 3. Powers of the OLC

As both Legal Services Ombudsman and Legal Services Complaints Commissioner, I welcome the Government's proposals in relation to creating an independent Office for Legal Complaints (OLC) as "the single complaints – handling authority". The White Paper accurately portrays the difficulties and erosion of consumer confidence that have characterised the handling of complaints by the professions, particularly those against solicitors. It is for this reason that the Government is to be supported in its view that the FLRs must not be allowed to retain the ability to handle complaints about their members' service under the new arrangements.

The powers and sanctions described for the new OLC are largely those that I would expect to see in an independent complaints-handling service. However, there are some aspects of the OLC's powers described in the White Paper that the Government may consider making stronger or clarifying in the legislation.

My specific comments are as follows:

- **It is fundamental that the OLC is given powers in legislation to define the boundaries of consumer complaints and misconduct**

This is essential for consumer understanding and for the FLRs to act consistently, particularly as the boundaries (between minor conduct issues and misconduct) are not neatly drawn or indeed obvious to the consumer. I have consistently raised this point, including in my response as LSO to the Clementi consultation paper.<sup>7</sup>

- **It should be clear in the legislation that the OLC, using these definitions will make the assessment of what constitutes misconduct.**

The White Paper states that misconduct issues will continue to be handled by the FLRs and I am in agreement with this principle, but consider it to be in cases of serious misconduct only. The legislation needs to make it clear that accountability rests with the OLC, all complaints go there and any redress awarded by the OLC can take into account any conduct issues found.

- **Legislation should give the OLC the power to decide when it concludes a case and when it deems it appropriate to make a referral to the FLR.**

Any breach of conduct rules would be referred to the FLR at an appropriate point in its investigation of the case, if the OLC deems it necessary.

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<sup>7</sup> Response of the Legal Services Ombudsman to the Consultation paper on the Review of the Regulatory Framework for Legal Services in England and Wales – June 2004

- **Section 8.7 of the White Paper makes the case for quick and fair redress for the consumer.**

I endorse this view and agree with the principle of not having a separate, external appeals process. There should be increased confidence in the OLC's decisions as it will be independent of the professions about which the consumer is complaining. Consumers will need to be told clearly at the outset that the OLC's decision is final.

However, I do think there is a danger in the Government's proposals to remove the external appeal body and allow for Judicial Review (JR), without considering whether there might be practical and financial benefits to the provision of an effective internal review mechanism.

- **Legislation should allow within the OLC, a mechanism that allows the parties to have a review of the final decision, which must then be binding.**

This may well offer scope for speedier resolution than recourse to JR alone. In addition, the costs of JR could be very significant for the OLC, if as with the present legislation covering the Legal Services Ombudsman, all non-recoverable costs of the JR would have to be absorbed by the OLC.

The legislation needs to be clear which party will carry the cost of JR, and if it were the OLC, the new body would need to be funded accordingly.

- **Sharing information with consumers about the complaints records of providers.**

The White Paper is clear that the OLC will decide how best to do this. I believe that availability of information on the complaints records of providers will be an important factor in creating true consumer choice. It would assist the OLC in moving forward on this matter soon after its creation, if there could be clarity over whether there are Human Rights Act and Data Protection Act implications of publishing this information.

- **Legislation will provide for an upper limit of £20,000 for awards by the OLC<sup>8</sup>.**

I welcome the proposed increase in the compensation limit, but I am not clear from the White Paper on what basis the figure of £20,000 was reached. Considering that the variety of types of Alternative Business Structures (ABS) are not yet known, but anticipating that they could relate to legal matters involving property and/or investments, this upper limit may not be sufficient and could drive more consumers towards the courts in order to seek redress. As the Estates Agency Ombudsman is already able to award £25,000 and the Financial Ombudsman Service (FOS) limit is £100,000, research may show

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<sup>8</sup> "The Future of Legal Services: Putting Consumers First" Section 8.11, page 66

that a limit somewhere between the two may be more appropriate. The LSB should also be provided with the power to undertake periodic review of the maximum level and recommend increases where appropriate.

- **The OLC will have the option to include in its guidelines on enforcement, the power “to order a payment for poor service, loss or distress. Such an award will be enforceable as a debt<sup>9</sup>”.**

I endorse the option of the OLC having the power as expressed above. However, the legislation also needs to ensure that in the event of the provider failing to comply with the OLC’s order, the system of regulation works effectively to enforce further appropriate sanction at the level of the firm.

As currently described, it would seem that the OLC could make a report to the LSB if the firm fails to pay. However, it would be more appropriate for the LSB to have clearly defined powers in relation to the firm itself, rather than only relying on its sanctions and powers in relation to the FLR.

### **Performance of the OLC**

I support the proposal in the White Paper that the OLC will be required “**to monitor and prepare reports on trends in complaints handling and outcomes**”. This will help to ensure that information on complaints can be used to improve the whole system of legal services delivery for consumers. It is also appropriate for the OLC to report on its own performance in an Annual Report.

It is my view that the Government’s proposals for the LSB’s powers in relation to the OLC seem appropriate to support the organisation in its objectives. The LSB’s power “**to set and monitor targets for the OLC**” is welcomed. A brand new OLC should be assumed to be an organisation that will aspire to and achieve excellence. However, if the new organisation fails to deliver an efficient and effective service, there should be appropriate and graded sanctions available to the LSB.

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<sup>9</sup> The Future of Legal Services: Putting Consumers First. Section 8.4, page 61

#### 4. Structures and Governance

The White Paper states that the legislation will provide for a number of arrangements with regard to the structures and key appointments to the Legal Services Board and Office for Legal Complaints.

It is pleasing to note the mechanisms to ensure independence of the new organisations from the professions they seek to regulate and the serious involvement of consumers in the governance and decision-making (particularly of the LSB).

I have previously advocated that the Legal Services Board should be a Non Departmental Public Body (NDPB) at arms-length from Government and it is pleasing to see that the White Paper proposes this.

A close examination of the arrangements as described in the White Paper does, however, raise some queries and suggestions concerning the proposed governance details.

- Arrangements for the potential removal of the LSB and OLC Chairs and Boards are described. The legislation would need to highlight clearly definitions of the types of **misconduct and non-performance** that would give rise to such action being taken.

In addition, general scrutiny of the LSB will be required and I consider that the Constitutional Affairs Select Committee could appropriately provide this.

- **“Legislation will provide for the Secretary of State to appoint the Chair of the LSB. The first chair of the Board of the LSB will be a non-lawyer”<sup>10</sup>.**

I am supportive of an independent non-lawyer Chair of the LSB, but unclear as to why the decision to make a non-lawyer appointment should be restricted only to the first Chair of the LSB. I would advocate that **this criteria applies to all future Chairs of the LSB**. In addition, the role of Chief Executive of the LSB should in my view, also be filled by a non-lawyer in order to preserve independence from the profession.

- **“The Chief Executive of the LSB will act as the accounting officer for the LSB...(and) will be responsible to the Permanent Head of the Department for Constitutional Affairs”<sup>11</sup>.**

As funding of the LSB is from the professions (i.e. the LSB is not dependent on public funding) there is a need to ensure value for money, however there

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<sup>10</sup> “The Future of Legal Services: Putting Consumers First”. Section 5.4, page 32

<sup>11</sup> “The Future of Legal Services: Putting Consumers First”. Section 5.8, page 36

appears to be a very direct reporting line to Government, which does not fund the LSB.

It also seems unclear why this accountability is necessary as expressed, when the LSB will set its own levels of required funding and where it is the level of the fee ultimately charged to the FLRs that is the issue for control. Consideration could therefore be given to accountability to the Treasury as an alternative vehicle for control.

The legislation also needs to be clear on **the position with regard to any annual surplus that the LSB may make** and its ability to use this.

- **“Legislation will require the LSB to consult formally with its Consumer Panel, the Secretary of State for Constitutional Affairs, the Office of Fair Trading (OFT) and the higher judiciary when it is considering taking...action”<sup>12</sup>.**

The actions listed are serious and would warrant consultation as described. I welcome, in particular, the balance that consultation with the Consumer Panel and the OFT is likely to bring. The White Paper is, however less clear on the role of the higher judiciary. The higher judiciary would undoubtedly bring much influence and gravitas to bear on such decisions, but **clarity on the purpose of their input** would need to be spelled out in the legislation.

Legislation will also need to make clear how accountable the LSB is to acting on what could be differing views from consultation. By consulting as set out in the White Paper, the LSB is acting under its powers in relation to advice, but **the ultimate decision must rest with the LSB.**

In addition, the LSB should not be hindered in its ability to take urgent action by an overly protracted consultation process. **Firm timescales** would be required and could be set out in the legislation.

Governance arrangements should be drawn up to **allow both executive and non-executive membership of the LSB’s Boards** and the LSB Chair could determine the make up of both Boards.

### **Structure of the OLC**

The White Paper describes the OLC as an entity, the range of powers vested in it and the responsibilities of the Chair of the OLC and OLC Board members.

However, the full range of the Legal Services Ombudsman’s powers will transfer to the OLC and it is not clear from the White Paper how these powers will be enacted through the structure described. It would be difficult to vest those powers directly in the OLC’s Chair or Board, given the suggested appointment system and the oversight powers of the LSB. Yet it is evident that an individual or entity would need to have the powers vested in it. The

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<sup>12</sup> “The Future of Legal Services: Putting Consumers First”. Section 5.7, page 35

British and Irish Ombudsman Association (BIOA) has clear criteria for the role of ombudsman in order to ensure independence and impartiality.

The term “ombudsman” is one which is well recognised and trusted by the public and it is important that as the powers of the Legal Services Ombudsman are transferred to the OLC, that the title should be retained.

My suggestion is that the powers are vested in an independent Chief Ombudsman / Chief Executive (as in the Financial Ombudsman Service). The Chief Ombudsman / Chief Executive would be the final OLC reviewer and their decisions would be binding. The role and accountabilities could be based on those of the Chief Ombudsman in FOS.

In order to maintain impartiality and independence, the appointment would be a quasi-judicial appointment made by the Secretary of State. The respective powers of the OLC Chair and Chief Ombudsman / Chief Executive would need to be clearly defined in the legislation.

With regard to the operational relationship between the LSB and OLC, I would suggest that legislation **provides for the Chair of the OLC to be a member of the LSB Board**. I consider this link to the LSB Board to be important in ensuring that the OLC understands and can act in accordance with the LSB’s strategy and does not become isolated.

There is also a need for the Chief Ombudsman/Chief Executive to have links with the LSB Board, but given the need to ensure impartiality, I would suggest that **the Chief Ombudsman/Chief Executive is an ex-officio member of the LSB Board**.

### **Relationships with other statutory regulators**

It is important that the reforms are used as a mechanism to reduce fragmentation in the regulation of legal services. Arrangements falling outside of the structure of the FLRs as described in the White Paper (for example the regulation of immigration advisers who are not members of designated professional bodies) should be kept under review.

I would suggest that the **legislation allows for a review of the proposed Memorandum of Understanding between the Office of the Immigration Services Commissioner (OISC) and the LSB** with relation to quality standards and complaints handling<sup>13</sup>.

With regards to the objectives of the new regulatory framework<sup>14</sup>, I note that the Government proposes one of these is “to improve access to justice”. This objective is also spelled out clearly in the Access to Justice Act 1999 which created the Legal Services Commission (LSC).

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<sup>13</sup> The Future of Legal Services: Putting Consumers First. Section 5.9, page 37

<sup>14</sup> “The Future of Legal Services: Putting Consumers First” Section 3.1, page 20

With responsibility for funding and contracting with providers of publicly funded legal services and for quality standards, the LSC has a great deal of influence over how services are delivered to some of the most vulnerable clients. Therefore, the “access to justice” objective will be shared by both the LSB and LSC. It is my view that the **legislation should provide a clear remit for LSB oversight in this vital area and accountabilities between the LSB and LSC should be clearly defined**. As a minimum, a Memorandum of Understanding similar to that proposed with regard to the OISC could be considered in relation to the LSC.

### **Defining the LSB’s remit**

The definition of the LSB’s remit<sup>15</sup> and the working definition of legal services provided at Annex C of the White Paper, would seem to me to be an adequate starting point upon which the LSB can build.

I am pleased to note that claims management services will be added to scope subject to Parliamentary approval of the Compensation Bill.

I note that new activities can be brought within the regulatory framework by the LSB and that this will be by secondary legislation. In order to support the LSB’s role, **the ability to enact that secondary legislation quickly when needed to bring an activity into regulatory scope** is important. The legal reforms legislation could therefore usefully set out **indicative timescales** for the secondary legislation to be enacted from first request to the Secretary of State – a period of six months, for example, could be considered, depending on circumstances.

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<sup>15</sup> The Future of Legal Services: Putting Consumers First. Section 7.7, page 56

## 5. Alternative Business Structures

The White Paper sets out proposals to allow new Alternative Business Structures (ABS), which offer the opportunity for the legal services market to be opened up to new forms of providers. I welcome the potential for increased competition, flexibility and efficiency in the consumer's interest.

The White Paper also sets out a range of safeguards to protect the public in relation to the new structures. I endorse these safeguards and feel that they are particularly important as the Government's proposals for ABS go beyond Sir David Clementi's recommendations that would have extended innovation in structures as far as "Legal Disciplinary Practices", bringing together lawyers from different professional bodies.

The proposed ABS model is an attractive one from the point of view of increasing the consumer's choice of provider, allowing legal services to be accessed alongside other goods and services and giving the potential for "one-stop services".

Any concerns I would have about the introduction of ABS would be largely theoretical with regard to the potential for providers to move into the legal services market and unbalance it by "cherry-picking" those types of work which are favourable to their business model, while leaving less attractive work to be picked up by traditional providers. This could have the effect of actually reducing consumer choice and access and has the potential to put a strain on providers (for example those in the not-for-profit sector) who act as a safety net for consumers.

My other concern would be that the true burden on the entire system of regulating ABS is unlikely to be known at this stage, but **it is important that the powers of the LSB and OLC are made sufficiently flexible in legislation** in order to adapt to the complexity the new ABS structures may bring.

On paper, the potential benefits to consumers and professionals alike would seem to be considerable and the safeguards in the White Paper, if reflected carefully and flexibly in the legislation, should allow for appropriate regulation of ABS.

## 6. Funding and Implementation

When approving the OLC's budget, it is important that the LSB has some degree of certainty with regards to funding which could be achieved through a mix of funding streams for which the split between a general levy and 'polluter pays' needs to be explored. The proportion of funding to be raised from each stream would need to be carefully thought through. Consideration would need to be given to a number of areas:

- The size of each professional body and number of members;
- transitional and ongoing operational costs; and
- current cost of regulation to the members of the professional body.
- Flexibility around funding should delegated powers need to be called-in from a FLR. The LSB would need to be funded to take on this role until the powers could be re-delegated.
- Underwriting the OLC should there be a sudden increase in complaints received which were not anticipated.

It is important to note that the FOS model of "polluter pays" is based on a flat-rate fee for each complaint and does not rely on payment some time in the future if the case is successful. I suggest that a similar model to FOS needs to be in the legislation for the OLC, along with the ability for the LSB to set the fee at a level that encourages providers to deal with the complaint first rather than see the OLC as a more cost-effective option. Separately, the OLC can determine the fee level for upheld complaints.

### Implementation of LSB and OLC

I remain concerned about the timing of when the LSB and OLC Boards could be effectively introduced and suggest that Government makes provision for the **appointment of Shadow Chairs of the LSB and OLC Boards and the Chief Ombudsman/OLC Chief Executive** during the passage of the Bill. Such appointments could be made in the knowledge that they would cease if the Bill did not receive Royal Assent.

Appointments to the positions of LSB and OLC Chair should be made in line with Nolan principles and the process should commence as soon as possible. It is considered good practice to involve the Chairs of new organisations in the planning phase. Costs to Government of early Shadow Chair appointments would not be substantial, but could reap greater benefits for the consumer by enabling a smoother transition and implementation.

Also, the options for securing funds for implementation through the Spending Review should be explored. We must learn from the experience of organisations such as the Independent Police Complaints Commission and the impact funding issues had on timescales for implementation.

## Location and new ways of working

It is unclear from the White Paper whether the money allocated for these changes envisages the launch of two completely new organisations or whether the location of these organisations has been considered. The Government needs to be bold in its decisions and I believe that the establishment of new organisations is the only way in which consumer faith in the system can be restored. Re-badging should not be an option. In announcing the launch of the Independent Police Complaints Commission, (which replaced the Police Complaints Authority) Ministers said the change would increase public confidence in the "*accountability and integrity*" of police – and the same messages are important in the legal services reform context.

Both the OLC and the LSB need to be located where the labour market can support the volumes of staff and relevant skills required. Clearly, the Lyons Review<sup>16</sup> provides an important steer for Government in terms of location. The Government's response to Lyons confirmed that there would be a strongly enforced presumption against London and South East locations for new Government bodies and the rationale is as relevant in this context as in decisions relating to central Government Departments. Organisations who have moved out of London and the South East report savings on salaries and accommodation, with no reduction in the quality of potential recruits. These benefits would offset the increased costs associated with setting up a new office.

In considering different ways of providing an effective service to consumers, particularly in relation to the OLC, **issues such as access and flexibility should be at the forefront**. New ways of working may necessitate a different structure to that which currently exists and **a number of options should be considered and costed before final decisions are made**. The appointment of Shadow Chairs would enable appropriate planning to take place.

## Transition Issues

An independent Office for Legal Complaints (OLC) is key to managing consumers expectations and delivering against the Government's objectives. However, **careful consideration will need to be given to how existing cases from all the professional bodies are migrated to the new OLC**.

There may need to be some **flexibility built in with regard to the start-up costs of the OLC**. Projected volumes of complaints will need to anticipate not only taking on legacy work from the current professional bodies at start-up, but the potential for an initial high number of new complaints due to publicity about the reforms and high expectations of the new independent service.

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<sup>16</sup> "Well Placed to Deliver? – Shaping the Pattern of Government Service", Sir Michael Lyons, March 2004

The Government is clear that in future a complaint by a consumer “against a lawyer will be looked at independently and not by other lawyers.”<sup>17</sup> It will therefore be necessary to move away from the practice of outsourcing of complaints to legal firms, which has been used by the Law Society to assist with reducing backlogs. I have regarded such measures as an expedient short-term solution and would suggest that the OLC starts out by identifying alternative ways of dealing with future variations in case intakes.

### **Net savings from moving to LSB and OLC structures**

Sir David Clementi assumed a net saving of £1.5 million<sup>18</sup> on the operating cost of regulation. I believe that any estimated savings should be regarded with caution and not be a strong basis for advocating the regulatory reforms. Indeed the projected savings may not be realised. This is particularly so when there is a level of uncertainty and complexity that ABS firms could bring to the regulatory framework.

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<sup>17</sup> Lord Falconer of Thoroton, Secretary of State for Constitutional Affairs at the launch of “The Future of Legal Services: Putting Consumers First”, 17 October 2005

<sup>18</sup> “The Future of Legal Services: Putting Consumers First” Section 9.2, page 68

## **Summary**

As Legal Services Ombudsman and Legal Services Complaints Commissioner, I warmly welcome the Government's White Paper. While there are some elements of detail that remain to be worked out in the drafting of the legislation, I can wholeheartedly support the Government's direction as set out in the White Paper.

My own interpretation of this direction is that of fundamental change to the way in which legal services in England and Wales are provided and regulated. This change will truly put the consumer at the heart of the reforms and will challenge all of us who form part of the current system to alter our ways of working to be more focused than ever before on the consumer's needs.

I congratulate those working in the Department for Constitutional Affairs on the White Paper and look forward to working closely with colleagues over the coming months as the Government takes forward planning for the transition and implementation of the new framework.

A handwritten signature in black ink that reads "Zahida P. Manzoor." The signature is written in a cursive style with a prominent flourish at the end of the name.

**Zahida Manzoor CBE**  
**Legal Services Ombudsman for England and Wales and**  
**Legal Services Complaints Commissioner**

**November 2005**

## **Glossary of terms and abbreviations**

ABS	Alternative Business Structure
DCA	Department for Constitutional Affairs
FLR	Frontline Regulators
FOS	Financial Ombudsman Service
FSA	Financial Services Authority
JR	Judicial Review is a constitutional doctrine that gives to a court system the power to annul legislative or executive acts which the judges declare to be unconstitutional.
LSB	Legal Services Board
LSC	Legal Services Commission
LSCC	Legal Services Complaints Commissioner is an independent, government-appointed regulator. The Complaints Commissioner works with consumers and solicitors to improve how the Law Society handles complaints about solicitors in England and Wales.
LSO	Legal Services Ombudsman, appointed by the Lord Chancellor to oversee complaints about solicitors, barristers, legal executives, licensed conveyancers and patent agents, by the six professional bodies responsible for setting and maintaining standards of conduct and services within the legal profession. The Ombudsman cannot be a qualified lawyer and is completely independent of the legal profession.
NDPB	Non-departmental public body
OFT	Office of Fair Trading
OISC	Office of the Immigration Services Commissioner
OLC	Office for Legal Complaints
White Paper	An authoritative report on a major issue, which can be either, a government report outlining policy; or a report by a team of experts.