

**Legal Services Board**

**Draft Business Plan 2009/10**



**A response by the Association of Personal Injury Lawyers**

**March 2009**

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation whose members help injured people to gain the access to justice they deserve. Membership comprises solicitors, barristers, legal executives and academics, who are all committed to serving the needs of people injured through the negligence of others.

The aims of the Association of Personal Injury Lawyers (APIL) are:

- To promote full and just compensation for all types of personal injury;
- To promote and develop expertise in the practice of personal injury law;
- To promote wider redress for personal injury in the legal system;
- To campaign for improvements in personal injury law;
- To promote safety and alert the public to hazards wherever they arise;
- To provide a communication network for members.

APIL's executive committee would like to acknowledge the assistance of the following members in preparing this response:

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## **Executive Summary**

We note the LSB's aims and vision as set out in the draft business plan, particularly the intention to put the consumer at the heart of the legal services market and to enable the consumer to exercise effective choice.

We believe that the LSB has to be particularly alert to the risks of regulating businesses which may have non-lawyer owners where those owners are subject to different standards of regulation. There must be a 'level playing field' between regulated business structures and all regulated businesses must have to abide by the same rules. It would be unfair, in our view, if one type of business structure had a commercial advantage over another type purely because a different regulatory regime applied.

We are concerned that the LSB's plan is to move to a system of regulation that is 'principles' based rather than 'rules' based. It is vital for the protection of the public, as well as the protection of the regulated person or business, that regulation is clear and transparent, with a detailed framework behind it. We believe there is a risk that a 'principles' based regime will not provide enough clarity and transparency and the LSB must guard against this.

We are pleased to see that the public interest will guide the LSB in its work and that they will actively seek the views of all with an interest in the regulation of legal services. We are extremely keen to be actively involved with the LSB and to assist in any way we can to help it achieve its aims and vision.

We agree that the right regulatory framework is needed to protect consumers and to manage risks such as conflict of interests. All regulated business structures must have to abide by the same rules.

We agree that consumers should be able to expect service providers to deal with their complaints in a courteous, fair and professional manner but we equally agree that those who are subject to complaint are entitled to be treated courteously, fairly and professionally and that endeavours by them to resolve complaints are acknowledged.

## **Introduction**

APIL welcomes the opportunity to provide our views and comments on the Legal Services Board (LSB) draft Business Plan for 2009/10. Our comments in this response are of a more general nature, rather than in relation to specific sections of the plan.

We agree that any regulatory regime must put the interests of consumers first.<sup>1</sup> APIL represents the interests of people injured through no fault of their own and our primary concern is for their protection. Issues of independence of solicitors and the need for solicitors to act in the client's best interests are of particular significance in respect of alternative business structures given that non-lawyers will be able to have a minority stake in legal firms.

## **General comments**

We agree with the LSB's aims and vision as set out in the draft business plan, particularly the intention to put the consumer at the heart of the legal services market and to enable the consumer to exercise effective choice.<sup>2</sup> The latter, particularly, is of profound significance in a legal services market that will offer new ways of delivering services to consumers. It is vital, in our view, that there is transparency and clarity in regulation and that detailed consideration is given to resolving the tension between professional ethical standards on the one hand and commercial enterprise on the other.

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<sup>1</sup> Legal Services Board Draft Business Plan 2009/10, paragraph 20

<sup>2</sup> Ibid, Foreword

The movement towards non-lawyer ownership of legal firms presents a threat to the independence of solicitors and their ability to act in the client's best interests particularly if there is part ownership of a firm by a liability insurer.

The LSB will no doubt be aware of the current practice of 'third party capture' (TPC). TPC is the process by which an insurer approaches a person knowing that they have been involved in an accident with their insured and in the knowledge that they could be injured and may want to make a claim for personal injury. The insurer then offers a sum of money to settle the claim immediately or offers to refer the claim to their panel firm of solicitors. The insurer 'captures' the claim to deal with it, generally before independent legal representation can be obtained.

The Financial Services Authority (FSA) is responsible for regulating this type of activity and we provided a dossier of case evidence to them over a year ago to demonstrate why there should be much more robust regulation of the practice. Nothing has yet been decided and it is high time for this issue to be addressed before more vulnerable victims fall prey to this scam. The FSA has, so far, been ineffective in addressing the issue. It is important that the LSB seizes this opportunity to improve matters for those working at the interface of regulatory activities so that they are not tarnished by the FSA's poor regulatory mechanisms.

There is a risk of a conflict of interest between the solicitor and client in a referral situation if the solicitor is dependent on the insurer for business or if the insurer has an interest in the solicitor's firm. Solicitors are bound by conduct rules to avoid conflicts of interest but poor or ineffective regulation of alternative business structures may allow less reputable firms or organisations to take advantage of this situation.

We believe that the LSB has to be particularly alert to the risks of regulating businesses which may have non-lawyer owners where those owners are subject to different standards of regulation. There must be a 'level playing field' between regulated

business structures and all regulated businesses must have to abide by the same rules. To apply different standards to different business structures could potentially give one regulated business a commercial advantage over another.

## **Vision (section 2)**

We note the LSB's vision of reforming and modernising 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.<sup>1</sup> The LSB envisages '... greater competition in service delivery and the development of new and innovative ways of meeting consumer demand ...'.<sup>2</sup> We support these aims provided the competition is fair between all regulated businesses. It would be unfair, in our view, if one type of business structure had a commercial advantage over another type purely because a different regulatory regime applied.

## **The LSB role (section 4)**

We note the LSB's passion to improve the quality and accessibility of legal services for all citizens<sup>3</sup> but we are concerned that the plan is to move to a system of regulation that is 'principles' based rather than 'rules' based.<sup>4</sup> The FSA's regulatory regime for insurers is 'principles' based and, in our view, is too vague to robustly regulate the practice of third party capture (see above). For example, solicitors and claims management companies are both regulated by specific rules to avoid conflicts of interest.<sup>5</sup> Regrettably, the FSA's 'Principles for Businesses' do not go anywhere near as far in relation to insurers. Principle 8 says that a firm 'must manage conflicts of interest fairly, both between itself and its customers and between a customer and another

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<sup>1</sup> Ibid, section 2, paragraph 1

<sup>2</sup> Ibid, section 2, paragraph 6

<sup>3</sup> Ibid, section 4, paragraph 25

<sup>4</sup> Ibid, section 4, paragraph 30

<sup>5</sup> Solicitors' Code of Conduct 2007, rule 3; Conduct of Authorised Persons Rules 2007, rule 1(d)

client'. This is an extremely vague and unhelpful principle depending on an interpretation in every case on what is 'fair'.

In our view, it is vital for the protection of the public, as well as the protection of the regulated person, that regulation is clear and transparent, with a detailed framework behind it. There is a risk that a 'principles' based regime will not provide enough clarity and transparency and the LSB must guard against this.

## **Policy focus (section 5)**

We are pleased to see that the public interest will guide the LSB in its work<sup>1</sup> and that they will actively seek the views of all with an interest in the regulation of legal services.<sup>2</sup> We are extremely keen to be actively involved with the LSB and to assist in any way we can to help it achieve its aims and vision.

We support the LSB's aims as set out in section 5A and would reiterate that we are keen to engage with the LSB to help develop their policy and practice.<sup>3</sup>

We agree that the right regulatory framework is needed to protect consumers and to manage risks such as conflict of interests.<sup>4</sup> We have already referred to this earlier (see section 4, above) and we maintain that all regulated business structures must have to abide by the same rules.

We agree that consumers should be able to expect service providers to deal with their complaints in a courteous, fair and professional manner<sup>5</sup> but we equally agree that

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<sup>1</sup> Legal Services Board Draft Business Plan 2009/10, paragraph 39

<sup>2</sup> Ibid, paragraph 40

<sup>3</sup> Ibid, paragraph 44

<sup>4</sup> Ibid, paragraph 65

<sup>5</sup> Ibid, paragraph 73

those who are subject to complaint are entitled to be treated courteously, fairly and professionally and that endeavours by them to resolve complaints are acknowledged.<sup>1</sup>

We share the aim of the LSB, as indicated in section 5D, that legal services regulators should be seen as 'world leaders'.<sup>2</sup> We are particularly pleased to see that the LSB will engage with all stakeholders to develop and test ideas<sup>3</sup> and we are keen to be actively involved and to assist in any way we can.

- Ends -

## **Association of Personal Injury Lawyers**

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<sup>1</sup> Ibid, paragraph 74

<sup>2</sup> Ibid, paragraph 85

<sup>3</sup> Ibid, paragraph 92