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HOUSE OF COMMONS

ORAL EVIDENCE

TAKEN BEFORE THE

JUSTICE COMMITTEE

THE OPERATION OF THE LEGAL SERVICES BOARD

TUESDAY 19 MARCH 2013

DAVID EDMONDS CBE and CHRIS KENNY

Evidence heard in Public Questions 1 - 36

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Oral Evidence

Taken before the Justice Committee

on Tuesday 19 March 2013

Members present:

Sir Alan Beith (Chair)
Steve Brine
Jeremy Corbyn
Gareth Johnson
Elfyn Llwyd
Seema Malhotra
Andy McDonald
Graham Stringer

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Examination of Witnesses

Witnesses: **David Edmonds CBE**, Chair, and **Chris Kenny**, Chief Executive (Lay), Legal Services Board, gave evidence.

Chair: I welcome Mr Edmonds, Chair of the Legal Services Board, and Mr Kenny, the Chief Executive. We need to declare any interests we may have.

Gareth Johnson: I declare the fact that, as recorded in the Register of Members' Interests, I am a practising solicitor.

Andy McDonald: I also declare that I have a current practising certificate as a solicitor.

Mr Llwyd: I have practised as a solicitor for the last 15 years. I practised at the Bar up until last year.

Jeremy Corbyn: There are only three non-lawyers here.

Steve Brine: I am not a lawyer.

Gareth Johnson: Stop bragging.

Chair: That seems a good introduction for Mr Brine to ask the first question.

Q1 Steve Brine: Yes; Mr Brine, not a lawyer. The LSB was established six years ago. This is a two-part question, probably for Mr Kenny first, but I would be very interested for Mr Edmonds to chip in. How well understood do you think the role of the Legal Services Board is by, first of all, the legal profession, which might sound like a strange question, and, secondly, by the Government?

Chris Kenny: The role is a very complex one. I would suspect that anybody who, encountering us for the first time, believes they have understood the role has missed something. The role is not simply about being a regulator of regulators. There are one or two analogies for that in other sectors—but only one or two—maybe the Financial Reporting Council and the Professional Standards Authority for Health and Social Care.

It also has a very different role as a change agent, helping to make change in the market, transform conditions, make the market more competitive, and in that way improve access to justice. That is a very different role. It has taken the profession some time to adjust to it. The fact that the name is not dissimilar to the Legal Services Commission has probably

not helped, but I think people are beginning to understand our role. In a way, it almost does not matter if we don't have a great deal of name visibility because the average professional will relate much more, and quite rightly, to the body that regulates them directly. It is nice to know we are understood. We always accept invitations when we get them to go up and down the country to talk, and we occasionally hold road shows ourselves. The important point is that we achieve our objectives rather than get a lot of name checks.

Do the Government understand the role? I think they do, yes. I would say this is true both of the current Administration and its predecessor. Both Administrations have absolutely understood the importance of independent regulation in this area. At no stage have Ministers attempted to lean on us, one way or the other. We haven't had the inside track on their thinking; they have not sought to have an inside track on ours.

Q2 Steve Brine: Mr Edmonds, as we are opening up the discussion, do you want to chip in on this one?

David Edmonds: I double underline the key point that Chris made in the second half of the question. The independence of any regulator is absolutely fundamental, both to our ability to do our job with integrity and our ability to take decisions untrammelled by influence from Government Departments. On no occasion has a Minister ever said to me, "Do something," or, "Don't do something." That is very clear. The Government Department, if I take it to official level, understands that well. We have a working relationship with Ministry of Justice officials, but in no sense is it one that attempts to push our policy in any direction. The legal profession, again, as Chris says, understands us to a pretty good degree. I think the people with whom we work—the approved regulators—understand us totally.

Q3 Steve Brine: Let us look at the eight regulatory objectives. Do you have a favourite child among them? Do you think you give equal weight to each of them? If not, which one do you consider to be the most important?

Chris Kenny: Parliament deliberately did not set up a hierarchy. There were various discussions at the time of the Act within the process of debate. I suspect that was rather wise, because the priority you give to any objective will vary with the issue under debate. We have never consciously taken a view on a hierarchy. We have tended in our work to give rather more weight to the consumer and competition objectives, because, as I said before, we see those as absolutely integral to achieving access to justice. Access to justice seems to me to underpin the rule of law and the broader public interest. As you begin to pick away at any one objective, you find yourself beginning to invoke all of them. While we have looked closely, taking our cue from David Clementi back in 2004, at where we had perceived gaps in what regulators have been doing historically, we have always attempted to weigh all of the objectives in everything that we have done.

David Edmonds: Do I have a favourite objective? No. The objective of bringing the consumer to the heart of regulation is key for me. After all, the Act was passed by Parliament following a great deal of concern that the consumer did not have proper representation in the regulatory framework. Therefore, driving the consumer interest into all that we do has been fundamental to our work. Trying to create a competitive environment and introducing competition in a world where competition did not exist before has clearly been an important part of our role.

We have not ignored any of them. If we were to look for an area on which we have not done as much, it is increasing public understanding of the citizen's rights and duties. I have been involved in public legal education initiatives. It is a very difficult area to drive forward. If we were to be criticised, it is probably that we have not done as much work in that area as in many of the others.

Q4 Jeremy Corbyn: Good morning, and thanks for coming today. What do you think has been the main benefit for consumers of the introduction of the Legal Services Act and the creation of the Legal Services Board?

David Edmonds: If I could, I would almost go back to the answer I gave to the Chairman when I appeared before this Committee five years ago. We had three major objectives. One was to create, for the first time, genuinely independent regulation inside the legal regulatory framework. That has to be in the longer-term interest of the consumer and in the public interest. After four or five years, we do now see effective separation of representation from regulation in the main legal service regulators. That is a very major step forward.

Secondly—I know not all members of the Committee will agree with me on this—the introduction of the alternative business structure world is bringing into the legal services sector new players offering a range of, hopefully affordable, services that did not exist before. It is a massive step forward. As the market moves over the next two, three or four years, we will see even more providers coming in and offering the public legal services that they were not able to access before.

Thirdly, a major reform that we have brought in because of the Act is the creation of the ombudsman service—the legal complaints service—which is now dealing much more effectively and efficiently with complaints against providers of legal services. That did not happen before.

In the three major areas that I told Sir Alan four or five years ago we wanted to focus on, we have secured a very great deal. For the public, for public interest and public policy, those are significant steps forward. There are others, but if I may, I will offer those three big ones.

Q5 Jeremy Corbyn: Why are businesses not included in the baseline survey?

David Edmonds: Businesses providing?

Jeremy Corbyn: The analysis of outcome 2 in the baseline report, relating to the quality of legal services in 2009, did not include information on business consumers. Why was that?

Chris Kenny: We have started looking at it separately. We produced a template, first of all, looking at the broad measure of what small businesses need. We have researched at a very advanced stage now a survey of, from memory, 9,000 small firms, looking at how they perceive the market.

First of all, we wanted to separate small businesses out because we think they are a very important group. I have said publicly that, in a way, access to legal advice for small businesses as they begin to hire staff, or maybe merge with a business in another town, or have a property dispute or have an intellectual property they want to register, is almost as important as access to bank capital. We wanted to make sure they weren't a footnote.

The challenge the survey report has highlighted is a single very telling statistic that only 12.6% of small businesses believe that law firms provide an effective means of getting legal advice to resolve problems at the time they face them. We want to pick away at that finding.

If I can go back to what the Chairman said about alternative business structures, one of the interesting developments triggered by ABS is more firms moving into subscription services for small businesses, which might be a way of ensuring that there isn't the deterrent effect of, "Dare I pick up the phone because the hourly rate clock will start spinning too quickly?" We are acutely aware of the importance of legal services to small business. It is something that we will be giving more weight to in the course of the coming year.

Q6 Jeremy Corbyn: Do you look at the number of times small businesses change their solicitors or legal advisory facilities?

Chris Kenny: The survey does touch on that—you will have to forgive me, I cannot remember the exact details. A lot depends on what stage a small business is at. Sometimes it will look around for a very specialist service, particularly if it has a canny owner who feels able to punch his or her weight with professionals. At other times, it may be rather more dependent and have a rather more straightforward thing, and they will want a trusted adviser. That is the kind of service that many smaller firms have given and continue to give quite effectively. The important point is that as the world gets more complex and you can do more things online, those needs will start to evolve, and they may be rather more urgent and rapid than they have been in the past. It is important that the advisory services move at the pace of the businesses that they are trying to serve themselves.

Q7 Mr Llwyd: Under section 4 of the Legal Services Act, one of the duties that was imposed upon your board was assisting in the maintenance and development of standards in relation to the regulation by approved regulators of persons authorised by them to carry on activities that are reserved legal activities, and, secondly, the education and training of persons so authorised. How do you define the assisting role?

David Edmonds: It is not quite, "I am from head office and I am here to help you," but it is very much a broad definition of the word "assist". My board has the regulatory objectives, and we believe that in pushing forward the securing of those regulatory objectives, we have the ability, the right and the duty to make suggestions and proposals that we believe are good and in the interests of securing those objectives. To be honest, we define "assist" quite broadly. We don't need to be called upon to assist in the view of the board. We have a right to offer to assist and to assist in ways that we think are productive.

Q8 Mr Llwyd: Is it proactive or reactive in effect, or a mixture of both?

David Edmonds: We are a mixture of both. We are a proactive regulator, in the sense that we have driven into the marketplace alternative business structures, on which I know you have views. That was very strong proactivity. I think we are being very proactive at the moment in that we are looking at the regulatory performance of the approved regulators. We ask them to self-assess, and we have then gone back with a view—a judgment—on the assessments that they have produced of their own performance. We are making suggestions where we think there are weaknesses in their performance. That is a degree of proactivity.

We are reactive in the sense that we have a statutory duty to approve rule changes by the regulators. The regulators produce those rule change proposals. We talk to them before they come to us. We have a close working relationship with the primary regulators, but you could say that was, to use your words, a reactive and proactive relationship.

Q9 Mr Llwyd: Could you give us some examples of what the board has recently achieved in practice?

David Edmonds: The main points are those that I have just touched on. The embedding—I can't underline how important it is—of internal governance rules for the primary regulators means that they are now obliged to regulate, taking account of the objectives set out in the Act, irrespective of the special interest of their profession. Having independent regulation fundamentally embedded, in particular in the SRA and the Bar Standards Board—very significant change was needed in both those organisations—has made a very significant change. That is a marked step forward and a huge achievement.

The fact that you are seeing coming into the marketplace organisations that, for the first time, are offering consumers access to legal services in a way they would not have conceived of being offered those services before is another very significant achievement.

The third achievement is that you have an ombudsman who is dealing with 80,000 queries and 30,000 cases. He is dealing with 8,000 ombudsman investigations a year, with very little criticism of that machinery now, which is very different from seven or eight years ago. There was a lot of criticism the general public was effectively able to make by way of complaints about their legal services provider.

Those are the three big achievements that my board takes some pride in. There are other initiatives we have taken in the area of diversity. There was an initiative we took in terms of legal education and training. We have dealt with a variety of side issues, but we have developed a very public interest, community interest and consumer interest organisation, consistent with what Parliament asked us to do in the 2007 Act.

Q10 Mr Llwyd: I understand what you say about the public interest and so on. I think most lawyers understand your relationship with the regulators; I don't think that Joe Public does. To be fair, you did touch upon it in an earlier answer. How would you set about ensuring that the population at large is more, or better, apprised of the relationship between your board and the other regulators?

David Edmonds: I agree with your premise. I don't think Joe Public does understand what the Legal Services Board is there for, because, on the whole, Joe Public does not use us. The members of the public who get into a conflict with their lawyer and want to seek redress from their lawyer will now see that there is machinery whereby they can get that redress. The principal regulators with whom we work know precisely what the relationship is.

We do not have a public relations adviser; we do not have a PR budget. Chris, I and the rest of the board make a lot of speeches to a lot of groups. We put out a lot of publications. It is a very interesting question whether we need to do more in terms of public understanding and knowledge of what we are. I would have to say that, at the moment, it is not a priority for us.

Q11 Mr Llwyd: As you know, the approved regulators cover a broad range of legal skills and qualifications, as well as a range of sizes of entities, and also areas of practice. Does the board take into account the differences between the different approved regulators and also between the different types of legal practice for which individual approved regulators are responsible?

Chris Kenny: This is one of those terrible, "Yes, but" answers. Yes, we do. We clearly have to. The range of bodies we oversee is enormous. The smallest are very small indeed. We would be failing in our duties under the Act in terms of acting proportionately to put on the most plain vanilla of treatment, expecting the Costs Lawyer Standards Board, for example, to react in exactly the same way as the Solicitors Regulation Authority.

The "but" comes in from the fact that, nevertheless, the Act does impose exactly the same duties and disciplines on all the bodies. While we can be proportionate in what we ask of them, there is a limit to how far we can say, "Actually, you don't need to give us your rules for approval," because they do. We can't say, "Just focus purely on professional interests rather than consumers, even though your consumers may be a very distinct group."

What we always try to do—and why we looked very hard at doing both the regulatory effectiveness work and also some preceding research that Nick Smedley led for us—is to understand the specifics of each of the smaller bodies to make sure that we keep the burdens manageable and act in a way that allows them to develop. You can see some real progress in the Council for Licensed Conveyancers, for example, and in the Intellectual Property

Regulation Board in the last few years, where bodies that in the past, to be very unfair to them, had been almost professional registration bodies are really beginning to develop some regulatory expertise.

Q12 Gareth Johnson: I want to ask you about the triennial review to which you were recently subject. There was some criticism levied at you from some of the regulatory bodies. The criticisms aimed in your direction were that the monitoring that you carried out was more you imposing your view on the regulatory authorities than a general overseeing of what was actually taking place. There was also criticism that there was some duplication between the work that you were carrying out and the work that some of the approved regulators were carrying out. There were also allegations of attempts at micro-managing.

Would you say those criticisms were unfair or were they well founded? Were these teething issues, you having just been put in place in 2007? What is your view of those criticisms?

David Edmonds: My view is that many of the criticisms were unfounded. I say that bluntly and clearly. When I appeared before your Committee four or five years ago, I said that I was absolutely sure that tensions would arise between us and the primary regulators. Some of those tensions have arisen. My own view is that we, as a board, have sought to build a relationship with the approved regulators that has been absolutely consistent with the statutory objectives that we have been set and with our powers under the Act. If you were to go back and question those who made those observations about the detail that underpinned them, you would find it very hard to find a substantive example of where we had interfered in an area where we should not have, or where we had interfered in an area that had done any kind of damage.

You can count on the fingers of one hand the number of actual statutory interventions that we have made over the five years of our existence. All of those interventions have been to ask for information. We have never used any enforcement power. We have never used a direction. We have never used any power under the Act apart from asking for information. Micro-management is an allegation I would totally and absolutely refute. Tension, teething troubles, and all those kinds of words, I accept; yes, they are there, and I think it is natural that there is a tension between a supra-regulator, which is what we are, and the primary authorised regulators, which is what they are.

Picking up what Chris said earlier, you are looking at an organisation that does see itself as a change agent, and I say that unashamedly as well. In an organisation that is determined to drive the consumer interest into regulation where perhaps it did not exist before there are bound to be some tensions.

Q13 Gareth Johnson: Do you think there are any lessons you can learn from those criticisms?

David Edmonds: There are lessons that I have learned in terms of discussion. As it happens, I meet the chairs of the major regulators—indeed, all the regulators—at regular intervals. We have official-level meetings monthly with the regulators. Discussing some of the issues at board-to-board level, which is a suggestion that has been made to me by the Bar Standards Board—we have had one go at it and we are having another go in April—is another way forward. Yes, although I reject the allegation, I accept the point that we have to listen. If people are anxious about what we are doing, of course we have to listen and there are ways of working better.

Q14 Gareth Johnson: One issue that strikes me—it is no criticism of you at all—is that we have, depending on how you calculate it, between eight and 10 approved regulators.

There is the Office for Legal Complaints as well. There is the Legal Ombudsman. There are yourselves. It is not unfair to say that it is all getting a big crowded, and therefore tension between various regulators and overseeing umbrella groups like yours is bound to happen. Is that fair comment?

David Edmonds: Tension is bound to happen, particularly, I have to say, if you have a board committed to proactivity, and I make no apology for this. That was the interesting thing in Parliament's mind about setting up this particular board. The appointments that were then made to the board did bring a group of people who were committed to a different way of regulation. That is bound to lead to tensions with those who are on the ground at the moment.

On three separate occasions I have had a lawyer say to me, "But, Mr Edmonds, why are you doing this? We have behaved like this for 800 years," to which my response is, "Well, maybe it's time we had a look at doing things a little bit differently." Quite often we do see a mindset that finds change difficult, when you have a change-focused organisation working with them. Yes.

The point you make about the large number of organisations sitting there is fundamental. Parliament decided on the framework of supra-regulation in the eight other regulators following the Clementi review and following analysis of what was then happening in 2007. The Clementi report was in 2001 or 2002, so we are some 10 or 12 years on from the initial analysis. I have some serious doubts in my own mind whether we have a framework that holds good for the next five years. What we have is something we are trying to make work. We have made it work perhaps as well as anyone could have expected, but whether you would want this in five years' time is a question, with respect, for Parliament and not for me.

Q15 Gareth Johnson: Finally, my colleague, the Member for Winchester, earlier bragged that he was not a lawyer. I think you can boast the same qualification.

David Edmonds: I can.

Chris Kenny: As can I.

Gareth Johnson: Absolutely. There are obviously advantages and disadvantages of looking at the regulatory bodies from a lay perspective or from a lawyer's perspective. One of the criticisms levelled at yourselves was that you did not understand the legal profession. Again, was that a fair criticism? Are you taking any steps to get a better understanding of how the legal profession works? Is there a downside to the fact that you are not lawyers and you are regulating lawyers, or do you think that is an advantage to you?

David Edmonds: It is really important as far as my board is concerned. Three members of my board are lawyers: a general counsel, an ex-president of the Law Society, and a QC. Three members of my staff have legal qualifications. I think we understand lawyers and the law extraordinarily well.

If I may personalise it, for 20 years I was a civil servant. I drafted regulation. For seven years I was head of the legal department of a great bank. For five years I regulated telecommunications where the law was at the heart of all that I did. I think I and my board understand the legal services sector very fully indeed. We spend most of our life talking to lawyers or their representatives. It is quite wrong to say that we don't understand the way in which lawyers operate. I think we do. The policies that we try to drive forward come from an understanding of the profession with whom we are dealing. I do not think we are at all ignorant of the sensitivities or the great difficulties. At the moment, many lawyers are facing very real difficulties. As a board—as an organisation—we do understand that, so I don't accept that as an allegation, no.

Chair: I am going to bring Mr Stringer in at this point because we are moving into the territory that he was going to ask about.

Q16 Graham Stringer: Listening to you, I have come to agree with a member of the public who wrote to us and said that the system you are describing is labyrinthine. The Office of Fair Trading has said it is confusing. What can you do to improve the system so that the public understand it? You said in answer to Mr Llwyd that you found it difficult to communicate what you are doing to the public. How can you make the system more transparent so that the public can understand it?

David Edmonds: The key ingredient is that a member of the public who is dealing with a lawyer or any of the groups that we supra-regulate, and is concerned about their services, understands what his or her redress is if something goes wrong. What we have very specifically done is to insist that lawyers make available to the members of the public, the clients, the customers and consumers what their rights are in terms of the complaints machinery and the ombudsman. I think we have successfully done that.

We have a pretty good handle on the major issue for members of the public, which is, "How do I get this put right?" Ensuring that the primary regulators make clear to the lawyers whom they regulate through the rule book amendments, and all the rest of it, the responsibilities that they have is a secondary part. I am not at all sure that us going out and proselytising about the Legal Services Board would bring the benefits. The benefit is to focus on the consumer of legal services.

The other bit, which is very important, is the new providers coming into the marketplace. As Sir Alan will recall, this used to be called "Tesco law". It is actually not "Tesco law"; it has become "Co-op law". The Co-op has created an entirely new legal service and an entirely new way of providing legal services to the community as a whole. For those lawyers, and for existing lawyers, making known to the public what is there, what is available, and doing their own proselytisation in a complex marketplace is another part of the answer that you are searching for.

Chris Kenny: The Legal Ombudsman has started to draw lessons from the work that it is seeing and has produced two extremely good guides for consumers about things to look for if you are, sadly, heading into a divorce, but also a guide for both lawyers and consumers about how to communicate what the costs of a legal service are. That is the subject of many of the complaints he sees, where better communication first time would remove a lot of misunderstanding. I am sure that as that part of the framework beds in even more, we are going to see the kind of communication that will absolutely help the consumer when he or she is first beginning to think, "Maybe I have a legal problem but I am not quite sure how to pursue it."

Q17 Graham Stringer: If the Legal Ombudsman is so good, why is it necessary to have an Office for Legal Complaints as well?

Chris Kenny: They are one and the same organisation effectively. The Office for Legal Complaints is the statutory name. The Legal Ombudsman is effectively a slightly more user-friendly brand name. The Office for Legal Complaints is the Board for the Legal Ombudsman. There isn't a division.

Q18 Graham Stringer: So it is exactly the same, just with a different board in front.

Chris Kenny: Yes, and "Legal Ombudsman" is the term that they attempt to use, I think, because the word "ombudsman" is so well known in the consumer space. "Office for Legal Complaints" is what is buried away in the bowels of the Act.

Q19 Graham Stringer: I understand that. It is very complicated and you are describing a system of red tape upon red tape in one sense. How would the consumers' experience be worse if we went back to the pre-2007 situation and you were disappeared?

David Edmonds: You will recall that, pre-2007, the regulation and representative arms were very closely linked. Parliament perceived that regulation too often happened in the interest of the producer rather than the interest of the consumer. That principally underpinned the 2007 Act. I do not think anyone would want to go back to that. I therefore think the situation would be seriously worse.

The progress that we have made—I give great credit to the ombudsman and his board, the OLC—in producing a system that responds to consumer complaints much more quickly and effectively to secure redress means that we are looking at a quantum leap in quality from before the Act. If you were not to see the opening up of the marketplace and the knocking down of barriers to entry that we have produced through the whole framework structure for alternative business structures and these new players coming into the marketplace, the consumer, again, would be disadvantaged.

We have done what Parliament intended us to do. It is a very interesting question for Parliament whether, going forward, you need a Legal Services Board, a Bar Standards Board, a Law Society and the six other regulators sitting underneath it. My own view, for what it is worth, is that we have driven in processes that make life much better in terms of independent regulation. We are also, though, sitting on top of a framework that you would not start here with, if I am being very honest. That is not necessarily the view of my board, but I have one year to go so I am beginning to think about how the system that Parliament created might be improved in the future. I think we have something that could be simplified quite easily. I do not see why, in two or three years' time, it would not be possible to create a regulator that applied itself across the whole landscape. It would be clearer for consumers and for lawyers, but there would be enormous resistance if you attempted to wind the existing primary regulators into a single organisation. That is where I would be headed were I left to my own devices, but fortunately I am not being left to my own devices. That is for all of you to decide upon.

Q20 Andy McDonald: I want to home in on a specific issue and refer to your annual report and accounts. Some £89,000 was spent on recruitment in 2011-12, which was a 287% increase against the previous year's costs of only £3,000. Staff costs and numbers have remained more or less constant across those years. Could you account for that significant increase?

Chris Kenny: Mr McDonald, I had better instantly caveat that by saying that I will send you a note if what I am about to say is wrong because I do not have the data in my head. My guess would be that it would almost certainly be taken up by the costs of headhunting firms looking at members of the board for the Office for Legal Complaints and our consumer panel, and also probably replacements for the first non-executive board members who turned over. I am afraid I would need to dig into the bowels of the accounting system to remember precisely what they were.

It is also fair to say that we were staffing up quite slowly in the course of 2010-11, and there would still have been some initial recruitment costs that did not play out until the following year. But, if I may, I will give the Committee a note on that in rather more detail.

Chair: We look forward to hearing from you.

Q21 Andy McDonald: On a related point, how will the LSB manage to meet its projected costs if the 2013-14 levy review results in a reduced levy rate?

Chris Kenny: We will cut our cloth to meet the resources available, as we have done until now. When we set up the organisation, we were very clear that it would be a failure on our part if we grew massively. It would be a failure, because it would mean that we had not made the changes in the system at the front-line regulators' level, which meant we were somehow having to substitute our judgment for theirs because there were huge gaps in what they were doing. We set off with 34 staff; we are now down to 31. I would expect movement downwards in our budget. The cost of the LSB's operation per lawyer has gone down from £33 to just under £28 on the current budget.

The levy review will be as much about how we apportion that. When we were established, quite a few people said, "You've got a difficult trade-off." You could either have simplicity, and we have gone for simplicity—we have said that we will apportion our costs purely by the number of people each front-line regulator regulates—or you could go for something that might be a little bit fairer if you could define a risk-based system. If the Council for Licensed Conveyancers generates more activity, they should pay a proportionately larger share. I don't know whether it will be possible to do that. It may be that we would get into questions of spurious scientific accuracy, and simplicity will win out. We said we would revisit that question after we have been around for three or four years, just to see if the landscape had changed. That is something we plan to do in the coming year.

Q22 Mr Llwyd: I note that you did suggest that will writing should be subject to regulation. That, of course, is obviously important because a badly drawn will can create havoc. What I don't understand is why estate administration was not similarly regulated. When I used to be in practice as a solicitor, very often one of the complaints levied was that banks were muscling in and ripping people off, if I can put it crudely. They were putting down a flat fee of thousands on a small estate, which happened time after time with complete impunity. I would have thought that the administration is an area that should be looked at. I am not saying that solicitors are exempt from criticism either. There is often a debate about how long an estate should take to be administered and so on. I can't quite see why you did not apply regulation to that area of practice.

Chris Kenny: I think you are right to say that it is a very difficult decision. We looked at the area of will writing and estate administration for well over two years. For the first time we did very comprehensive evidence-gathering, informed by a couple of consumer surveys, advice from our consumer panel and also a fascinating mystery shopping exercise. From that, we believe the case for regulating will writing is absolutely unequivocal. We found a lot of poor practice in the unregulated sector, where we think getting a regulatory handle on it is the only way forward. We were heartened by the fact that the main trade bodies in that sector, including one that already has a code of conduct approved by the OFT, agreed with us. We also thought that there was room for improvement in the way that solicitors write wills. That is something we are pursuing separately with the Solicitors Regulation Authority.

On estate administration, we found the evidence a lot less clear-cut. We did not find as many examples of flagrant bad practice. We were also very mindful that a lot of the non-legally regulated bodies offering estate administration are already regulated, whether by the Financial Services Authority or the accountancy regulator. Whereas the totally unregulated will-writing market was 15% to 20% of the total, the totally unregulated estate administration market, we think, is only 3% to 4%.

We also thought that, of that 3% to 4%, a lot are unregulated will writers. Catching them at the will-writing stage when the sale is made for estate administration cuts off any potential for mischief there. The amount of danger becomes smaller and smaller. On balance, therefore, we decided that rather than have regulatory creep in an area where the evidence was

far less clear-cut, we would not make a recommendation now but signal that our door was open to further evidence as it emerged.

Generally, we are very mindful that as the market gets more diverse, we could just say, "If it is vaguely legal, let's throw a blanket of regulation over it and it will all be better." That is not the way regulators behave in most sectors. We are wary about doing it here, if only because we think there is scope for innovation. We do think the market pressures will be able to work to raise standards in many cases—not all; you will occasionally need a statutory underpinning. We thought estate administration did not quite fall into that category, but I won't pretend it was anything other than a 55:45 decision. We remain vigilant and will return to the issue if in two or three years' time it looks as if we have called it wrongly.

Q23 Mr Llwyd: What was your objection to the cab rank rule?

David Edmonds: I don't have an objection to the principle of the cab rank rule, nor does my board. I won't go into the detail, but as a board we were asked to look at a proposal in terms of the commercial agreements between solicitors and barristers. Doing that work, questions were raised with us about whether the cab rank rule should exist and whether it did any good. Therefore, as a board, we commissioned some research, which is what we do all the time when we have doubts about something. The researchers produced a very interesting and what has become a rather controversial report, saying that whatever the fundamentals of the cab rank rule, in practice there were many occasions on which it did not obtain.

What my board is now doing is looking at that report. It is looking at the various comments that have been made since the report was published and is going to reach a view, which we will have to reach when the Bar Standards Board produces its revised code of conduct, as to whether or not we think that what it is proposing in that revised code is appropriate for the circumstances.

I think the cab rank rule is a fundamental principle of British justice. If you are accused of a crime, you surely have the right to have effective representation to defend you in the court. Whether or not the cab rank rule applies in practice in the way that principle is set out is a very interesting question.

Q24 Mr Llwyd: Your literature review concluded, first, that the rule serves no clear purpose; secondly, it was a principle masquerading as a rule; thirdly, it was unenforceable and had not been the subject of enforcement proceedings; and, fourthly, it applies to a small select group of lawyers. Altogether, it sounds a little bit like an objection to me.

David Edmonds: That was the view of the researchers, which we reported, and that is the view that we are now contemplating. I don't know whether you have seen the cab rank rule lately.

Mr Llwyd: I am fully aware of the cab rank rule.

David Edmonds: It is four pages long and it is full of conditions whereby barristers don't have to accept the instruction that they are given. There is a wonderful one: "A barrister has some other substantial reason for so doing."

I was taught as a young civil servant that you should not make laws that could not be applied. That seems to me to be one of the principles that we need to look at as a regulatory board when we are approving other people's rules coming into us. The SRA has 500 pages of rule book; the BSB has apparently 300 pages. Four pages of detail, mainly exceptions in terms of the application of the cab rank rule, seem to me to be something we have a duty to look at. It seems to me to be an absolutely fundamental principle that a person has a right not to be refused representation on grounds of colour, creed, the nature of the offence, or any of those factors. But where you have a rule that says you don't have to accept the instruction if the person is on legal aid or you don't have to accept the instruction for a variety of other

circumstances set out in the four pages, it seems to me fundamental that it is at least worth a conversation, and that is what we are having. It is not an objection by my board to the cab rank rule or to the principles of the cab rank rule; it is what we hope would be a dispassionate discussion around a set of rules. As the quotes you have just given me demonstrate, perhaps there is one example, but only rarely, where it has been suggested that someone has not followed the rule. Do you want law that is either not enforced—unenforceable—or is broadly ignored, however fundamental the principle? That is my simple question.

Q25 Mr Llwyd: I agree with you there, but, in terms of having a dispassionate discussion, using the words "masquerading", "unenforceable" and "a small select group" does not help.

David Edmonds: Somebody asked me earlier whether I had learned any lessons from something. Perhaps one of the lessons I learned from this particular project was that, yes, the words of the researchers and the research team, and our comments, could have been better chosen, but the debate has been absolutely fascinating and brings right to the heart of our work the public interest principle. We are there to defend the rule of law. We are there to enhance access to justice. You start from a very simple statement that you have a right to be properly defended and a barrister has an obligation to accept your case. I could write—I hope—a rule in five or six sentences, yet we have four pages of tightly knit typescript. That is the only point I am making.

Q26 Seema Malhotra: The Legal Services Act 2007 allowed for the creation of alternative business structures, which meant that you could have the inclusion of lawyers and non-lawyers in ownership, investment and provision of services. Do you agree with the conclusion of the Office of Fair Trading that ABS has removed a key barrier to market entry, and how have you seen this benefiting consumers?

Chris Kenny: Yes, we do. The OFT had long been campaigning for that kind of change and is right to see its campaign justified. It is still comparatively early days to see real consumer benefits. There are 120 or so ABSs in place, around the same number of serious applicants in the pipeline, and one or two more queuing up behind. Most of those have only had their doors open since the first quarter of last year, and many of them have only gone through the process this year.

The most interesting thing has been the level of innovation that has happened in the market, not simply by the new entrants themselves but by existing firms, who say, "We are really quite happy with our current partnership model, but we can see the market changing around us. We need to get our skates on and think about how we can do things differently."

Q27 Seema Malhotra: What would be an example of innovation that you have seen?

Chris Kenny: You can see much more cheaply available services around the work the Co-op, for example, is doing on family law. I was talking with Mr Corbyn earlier about small businesses. There is a very interesting example of a firm—not an ABS—called Riverview Law based up in the Wirral. That has a mixture of both solicitors and barristers working together, offering primarily subscription services for small businesses.

We will also see a number of larger consumer brands entering the market. This will give people the opportunity to have legal needs alerted to them as they have a different purchasing relationship, which might well help with the really rather large number of consumers—round about a third—who tend not to access legal services when they have a legal problem, mainly, we think, because they have a perception of unaffordability or unapproachability. Getting much more awareness of what the law and legal services can do for you when you have a major life problem seems quite important.

We have talked a little bit today about profile-raising. I am not sure people are going to do that because Government or an NDPB go round spending the profession's money, which we have to do very mindfully at all times. It is going to happen much more because people encounter solicitors and, increasingly, barristers offering public access much more routinely, as they would encounter other businesses, rather than it being something where you take your life in your hands to approach somebody you are in awe of, or who may not be from anything remotely like your background. We are seeing legal services, dare I say it, becoming a bit less legal and a bit more of a service.

Q28 Seema Malhotra: Are you happy that the process of getting a licence through the SRA, for example, is as open to access for small businesses as well? I have some statistics of applications versus licences. In January this year, 454 firms started the process; 117 completed it. The number has slightly gone up since January, but it is probably in the region of about 100 that have been granted. Many are large firms. Do you feel you have enough small businesses coming through to create diversity in the marketplace?

Chris Kenny: When we looked at the SRA's performance altogether, the headline we used on a press release was, "Much done, much to do." That is a judgment we would still stick by. Inevitably, in the first year of a process, there was a degree of caution in the way they approached some of the issues. They have had challenges around IT systems and with process design. They were possibly taken by surprise by the number of firms, both large and small, who were interested in this area. We have had a lot of discussions with them over the past few months. As you pointed out, the pace of approval notably quickened immediately before Christmas and in the first couple of months of this year. They are looking at their authorisation design in total to see not only if they can approve ABS firms more quickly but also authorise changes to existing partnerships more quickly. This is an area where they do have more to do, but I think the need is well understood by the board of the SRA and its top team, and we are confident of seeing progress.

To answer the question directly, I want to see all kinds of new entrants being authorised, both large and small. Quite often, innovation does not come merely from the big players in the market. It is the two or three-person firm that spots a need and finds a way of meeting it more innovatively than before. Clementi talked about one-stop shops where you might get accountants, surveyors and solicitors gathering together to offer an integrated business service. It is important that those models proceed just as quickly as the Co-ops and BTs of this world.

David Edmonds: Less tactfully than Chris, can I say that I think there is singular scope for improvement in the process that is currently in place? The SRA understands that. I have talked to the chairman of the SRA about that and about improvements. My board has made some general observations about that. Equally, I give them great credit for where we have got to, but we are at a point where we need to look at the process and they need to look at the process. We need to find ways of simplifying and expediting it without removing that critical challenge. We don't want practices coming into the provision of legal services that are owned by people with criminal records. We don't want practices introduced by people with a background that you would not want to provide services to our fellow members of the community. There is a very interesting check and balance, but I agree with the premise of your question—if I may take it as a premise—that more could be done and it could be done more quickly; it could, and I think the SRA is very conscious of that.

Q29 Seema Malhotra: I have one final question relating to the point about trying to get enough of competition in the streamlined process to enable a diversity of suppliers to come through and be more accessible and connected in the community as well. Do you look

out for diversity data on both sides of enterprise and maybe also whether those enterprises are women-led businesses?

Chris Kenny: On ABS, narrowly, one of the issues we have been in debate with the SRA about is the quality of their management information. At the moment it is not sufficiently granular to enable us to look at that, and that is a pity. Our sense, impressionistically, is that we are seeing a lot of diversity of ABS approval. It would be nice to have a rather stronger analytic base for our judgment than we have.

In terms of diversity generally, we have pushed very hard for improvements in data. We have challenged the approved regulators to make sure that they don't simply have data at the pan-professional level, but that individual firms and chambers also conduct diversity surveys and publish that information. The profession's record on diversity is very curious. In many ways it has deserved bragging rights about what it has achieved at entry level, both in terms of gender and ethnicity, but there is a strong sense that glass ceilings remain and may kick in both rather earlier and rather harder than they do in some professions. The trickle-up effect, if I can call it that, which you might expect from the way entry to the law has changed over the last 25 years or so, hasn't happened at quite the pace you might expect.

We think that should be made visible so that buyers of the service or potential entrants can look at a firm or a set of chambers and say, "If I came here, I would be the only woman, whereas somewhere down the road, in the next conurbation, it looks rather more friendly." That is helpful to the individual. Frankly, it is also helpful for the firm or chambers that has the poor record. They can say, "What is it that we are doing that is inadvertently putting people off? What is it that they are doing that might mean they are getting rather stronger female and minority ethnic candidates than we are?"

David Edmonds: I think that is the answer. Following our statutory objective, we are looking more at diversity. We are equally looking at—or indeed looking more at, in a way—existing organisations rather than the new ones coming in. It is interesting that at the Bar, 53% of pupils are male, of those practising at the Bar 63% are male, and of QCs 88% are male. Forty-seven per cent of pupils are women, 37% of those practising at the Bar are women and 12% of QCs are women. In the big law firms at entry level it is something like 40% to 60% entry. At partner level, it is one in four or one in five.

Going back to the priority that we give our objectives, the emphasis that we have put in our work on diversity has for the first time been creating proper databases and transparency. That is a focus it will continue to have over the next few years.

Q30 Chair: In 2011, you said that the case for a general ban on referral fees was not made out and that there was not enough evidence of consumer detriment.

David Edmonds: Yes.

Q31 Chair: Next month there will be a ban on referral fees in personal injury cases, but that leaves referral fees in operation in a number of other areas. As far as this Committee is concerned, we called for a ban, so did the Bar Council and the Law Society. The referral fees system seems to be one of the key drivers of the public nuisance of repeated telephone calls offering people the opportunity to pursue injury claims for injuries they may or may not have had. In some cases, of course, it is based on data protection abuse, which has led to the knowledge of these things. Haven't you been rather complacent about this problem?

David Edmonds: I think "complacency" is not a word I would use. When my board was set up, we instituted a consumer panel that did a significant tranche of research into this area and produced a report that said they could not see consumer detriment arising from the administration of referral fees in the legal services sector. The Secretary of State and

Parliament took a different view in terms of personal injury, and that part of the referral process has now been banned.

It is for the Solicitors Regulatory Authority, if it wishes to propose a ban on referral fees, to make that case to us if it wishes to change its rules. The Bar already has a ban on referral fees. They have asked me on occasions whether we will introduce a ban of our own. Why should we? There is one at the moment. If a barrister breaks the Bar's own rules, the barrister is, I assume, liable to the Bar's own sanctions. My understanding is that on only one occasion has that rule ever been breached. I constantly ask for evidence to show why my board should go along the lines of introducing a ban.

I am both defensive and protective of our stance on referral fees. As a regulator with an interest in economic regulation, I like to see markets operating in a way in which markets can operate, which is that referrals are made, satisfactory solutions are found and you don't intervene where there is no evidence that you should intervene. I guess there is a degree not of complacency but of agnosticism on the part of my board, fuelled by the report of my own consumer panel. If anyone was going to complain about, or find evidence of, consumer detriment, it would be in the research that they commissioned in this area, and they didn't find any. That is why, after a lengthy debate, my board took the decision that we did take. As you have seen, the Minister took a different view over personal injury.

Again, it is back to the issue of whether you can actually make something stick. It is incredibly difficult in the area of referrals to make something stick, because of unintended consequences of rules that people at the moment find useful in terms of driving business on both sides of the equation. I worry that we would end up in a situation that is worse than the one that we have at the moment.

Q32 Chair: In what way would it be worse than the situation we have at the moment?

David Edmonds: I don't know, because I don't know what the unintended consequences are. What we said is that where there are referral fees, it should be transparent: the consumer should know what referral fee is being paid, how much it is, by whom and when. If you moved to a process whereby those referral fees were not transparent, the consumer did not know what the people referring him or her were getting and they devised another way of paying the fee or a quid pro quo, I worry—and I think my board would worry—that we would get into a more complex situation than we do in a world where there is transparency. I totally take your point about the consumer detriment that comes from the constant harassment. I find that as irritating as everyone does. I will not say any more; that is where we are.

Q33 Chair: Will you be analysing the experience that we have with the ban in personal injury cases to see whether any of the rather vaguely imagined effects that you have described will arise and whether there are any practical problems about operating such a ban?

David Edmonds: The answer to that is yes, of course we will. I am sorry; it did sound vague but that is because unintended consequences quite often are. You will probably see the creation of a different type of organisation, which will wrap it all inside the single organisation so you will not have to refer from A to B; you will put A and B in the same organisation. That is one possible outcome, but the point you make is a good one; yes, of course.

Chris Kenny: The thing we are most mindful of, Sir Alan, is whether we see any adverse impact on access to justice. The finding that surprised us most in the work the consumer panel did, and the economic analysis undertaken at the same time, was that we did not find any evidence at all that cases generated by referral fees proved either less

meritorious—that courts were more likely to find against the defendant—or that the level of compensation awarded was less than those who had perhaps come up a mainstream route. We did think there was some access to justice benefit being achieved.

It will be interesting to see whether that falls away. It may well be that some of those claims were fraudulent anyway and maybe insurance companies should have been brave enough to challenge them. That will be the key test. In other areas like conveyancing, again we found that where referral fees were paid, counter-intuitively fees for consumers were lower. We will be looking to see if there is evidence of creep.

David was right to highlight that a bizarre combination of the ban on referral fees but also ABS will be greater business professionalism in how lawyers set about finding clients in the first place. I think you can have different views about the ethics of referral fees, but whatever you think of the ethics, it is still a rather odd way to do business—to let somebody else get your clients for you, particularly if the person getting them is a bit of a fly-by-night claims management company that might be here today and gone tomorrow. A much more targeted marketing approach explaining the value of the law to people is a lot better than getting a text message at 2 o'clock in the morning.

Q34 Chair: If businesses did adjust to cope with a ban on referral fees, particularly with alternative business structures, what you will actually have will be solicitors regulated by the SRA, and ultimately subject to your system of regulation, having to advertise or promote their wares but within a regulatory climate very different from that of claims management companies.

Chris Kenny: Yes, and I think there may well be some benefit in that. The combination of the ban in the personal injuries case and what is happening in freeing up the market might well go with the grain and hasten that. It seems to me that that is rather welcome.

Q35 Chair: Finally, I turn to costs issues. There are, incidentally, costs issues that arose from the referral case. One of the driving issues for the personal injury ban was the discovery that it was possible to pay £500 or £600 for a case and still make a profit when conducting the case.

Chris Kenny: Indeed.

Q36 Chair: The Bar Council and Baroness Deech have been very critical of the cost of the LSB itself and suggested that this cost falls on clients. Of course it is combined with the cost of the primary regulatory system as well. What work have you undertaken to ensure that the costs of legal regulation are proportionate?

David Edmonds: The definition of "proportionate" is interesting. The work my board has done has been to drive down the cost of our own board year on year. We have done that; we have fewer staff than we had at the outset. Our costs are lower than they were at the outset. We created the Legal Services Board and the ombudsman service at figures significantly under those estimated by the consultants prior to the creation of all of those bodies. I think, this year, our costs are going to be £400,000 or £500,000 less than our costs last year. I also know that the costs of the ombudsman service are significantly less in real terms than the costs of the old and often maligned predecessor. We are very conscious of costs indeed. The background of both Chris and I, as accounting officers, means that we have an understanding—and, clearly, in the current economic climate a very clear understanding—of our own costs and the costs that we impose.

We are probably quite good value for 50p or 60p a week for a barrister or a solicitor. Given what we have driven into the process, I would claim we are okay. The big issue that

Baroness Deech and others have made is that we are sitting on top of a regulatory regime where we are demanding higher standards, higher quality and better delivery at the primary regulatory level, where we are insisting that the regulatory objectives set out are delivered by those primary regulators.

Personally I think that is leading to an upskilling—I hate the word—which has led to the development of better equipped and better skilled primary regulators. At the end of the day, that is in the interests of the legal services profession. That may be a tortuous argument to follow through if you are sitting at the end of the series of consultation documents that you get from my organisation. However, I would very stoutly defend the cost restraint that we have. I defend very stoutly the fact that we only seek to work with the primary regulators to deliver the objectives set out in the Act. From time to time there will be disagreement over that priority, but I do not believe that we have imposed costs on the profession that are disproportionate to the benefits that we are providing. I profoundly believe that that is what we have spent five years seeking to do since this Board was set up, and I think we have delivered it.

Chair: Mr Edmonds and Mr Kenny, thank you very much.