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Dear Robert,

We listened with interest to the Justice Committee hearing on legal services regulation on 28 June.

As you know, the Legal Services Board (LSB) is the independent body set up by Parliament under the Legal Services Act 2007 (LSA) to oversee the regulation of legal services in England and Wales. In carrying out our statutory duties we have seen the successes of, and areas for improvement in, the current legislative framework for the regulation of legal services. Given this, and the wide range of important issues that were covered in the 28 June hearing, we thought it might be helpful to set out the LSB's position on some of these issues and to point out relevant evidence from our regulatory and research work.

Is regulation working well?

One of the first questions asked by the Committee was whether regulation is working well.

In answering this question, we think it is important to start by looking at market outcomes. Our recent market evaluation report¹ shows there have been positive developments since the 2007 Act. For example, quality of services has improved by most measures even while there have been major changes in the market. However, our research and analysis shows that improved outcomes have been slow to emerge. Consumers are still not able to drive competition by being able to shop around with ease. Levels of unmet need remain stubbornly high, suggesting that, as discussed at the hearing, there is a problem with access to legal services. Perceptions of high cost remain a barrier for some and most small businesses do not view lawyers as cost effective.

We believe that the current framework for the regulation of legal services contributes directly to some of these problems. For example:

- The current framework is not properly risk-based. On one hand, there are blanket consumer protections in some areas that may unnecessarily increase costs for providers that are then passed on to consumers. On the other hand, some activities which could be considered high risk are not regulated activities and users of such services often do not

¹ <https://research.legalservicesboard.org.uk/wp-content/media/2015-2016-FINAL-Market-Evaluation-Main-report.pdf>

realise they do not have the protections (such as access to redress) that they might assume they have.

- The current framework recognises and enshrines the historic boundaries between professional groups. This contributes to the way the professions appear to be culturally 'locked in' to a certain way of providing legal services (as touched on in the hearing). This in turn means that innovation to reduce costs and improve service offerings is muted.
- The current framework does not secure full regulatory independence – see further below.

It is also interesting to note that the Competition and Markets Authority has said, in its recent interim report on its legal services market study², that it is open to the possibility that moving to an alternative regulatory model may generate longer term benefits to competition, and that it sees merit in a systematic review of which legal services or activities should be regulated and how.

We would therefore hope that the review of the legislative framework in the lifetime of this Parliament, as promised by the Lord Chancellor in evidence to the Justice Committee in July 2015, will proceed.

Regulatory independence

The hearing covered the question of regulatory independence. In our view the case for full regulatory independence is not just a matter of public perception. It is of course not at all helpful that each profession could, under the current regulatory framework, be seen to be 'policing its own'. There are, however, a number of other strong arguments in favour of full independence. These include:

- The need to simplify the complex governance relationships between the regulatory and representative functions of the approved regulators, where the approved regulators have responsibility for both functions (for example in the case of the Law Society and the Bar Council). These arrangements do not achieve full independence of regulation and distract senior management time on both sides.
- The scope under the current arrangements for some professional bodies to resist reforms that could otherwise benefit competition and consumers. Past examples include opposition to the Institute of Chartered Accountants in England and Wales' (ICAEW's) application to become a regulator for probate activities and resistance to the Legal Ombudsman establishing a voluntary scheme.
- The lack of transparency of the cost of regulation under the current arrangements due to (i) sharing of resources and cost between some regulators and their professional bodies; and (ii) some costs that should arguably be collected from practitioners as part of optional professional membership arrangements being included within a compulsory regulatory levy³.

² <https://assets.publishing.service.gov.uk/media/577f76daed915d622c0000ef/legal-services-market-study-interim-report.pdf>

³ These are the 'non-regulatory permitted purposes' under section 51 of the Act. In 2014, 30% (amounting to £31.9 million) of the Law Society practising certificate fee and 38% (amounting to £3.5 million) of the Bar Council practising certificate fee was spent on non-regulatory permitted purposes.

- The fact that market change is reducing the relevance of a regulatory structure in which regulation is tied to specific representative bodies⁴.

We do not agree with the assertion that training and education and professional standards should be matters for the representative body. To the extent that the right to offer the reserved activities depends on achieving certain required standards of education and professionalism, these clearly have the potential to act as a barrier to entry if not proportionate. There could, as pointed out at the hearing, be considerable scope for a conflict of interest to arise if these standards were the responsibility of the representative body. In short, there could be the risk of gold-plating of entry standards and less competition and choice for consumers, alongside the opportunity for rolling-back of liberalising reforms in the market.

The activities of the LSB

Comments were made at the hearing to the effect that the LSB in some ways seeks to act outside its remit. This is absolutely not the case. All our funds are spent in accordance with our statutory remit and in line with the Managing Public Money framework.

One of the areas mooted in this regard was our ground-breaking research into the unregulated legal services sector. We stand firmly by our investigation of this area. We would not be able to pay due attention to the LSA's regulatory objectives if we did not take into account both regulated and unregulated service providers in our work. This is not least the case when we have a specific power to recommend to the Lord Chancellor that such activities be added to the list of reserved legal activities – as we did with will-writing in February 2013, a recommendation supported at the time by The Law Society.

The same is true of our work to promote equality and diversity, which arises directly from the regulatory objective in the LSA of “encouraging an independent, strong, diverse and effective legal profession”. This is an area to which we are very committed. There continues to be a pressing need to look further into equality issues within the professions, not least in relation to diversity monitoring. The approved regulators must use the results of that diversity monitoring to inform their own plans to address equality and diversity challenges.

Alternative business structures (ABS)

We agree with the comments made at the hearing that there is no evidence of less ethical behaviours in ABS nor of any adverse effects of ABS on the reputation of the England and Wales jurisdiction. On the contrary, research evidence shows that ABS are more innovative⁵ and more productive⁶ than traditional law firms, and that they may be better at handling complaints⁷.

There are now around 700 ABS, with a very wide variety of business models. There is also a strong appetite amongst the legal services regulators to license ABS, with the Solicitors Regulation Authority (SRA), the Council for Licensed Conveyancers (CLC), the Intellectual Property Regulation Board (IPReg) and the ICAEW being licensing authorities, and now the Bar Standards

⁴ For example, the advent of legal disciplinary practices (combinations of different types of lawyers) and multi-disciplinary practices (combinations of lawyers and non-lawyers) in the market is breaking down barriers between professional groups and thereby undermining regulation structured primarily by reference to those groups.

⁵ <https://research.legalservicesboard.org.uk/wp-content/media/Innovation-Report.pdf>

⁶ Paragraph A.1.32 <https://research.legalservicesboard.org.uk/wp-content/media/2015-2016-FINAL-Market-Evaluation-Main-report.pdf>

⁷ Paragraph C.2.18 <https://research.legalservicesboard.org.uk/wp-content/media/2015-2016-FINAL-Market-Evaluation-Main-report.pdf>

Board (BSB) applying to become a licensing authority too. But it is still early days in the licensing of ABS, and not enough time has passed to come to a definitive view on the long-term impact of ABS on the market.

McKenzie Friends

The hearing covered McKenzie Friends and the recent Judicial Executive Board (JEB) consultation on reforming the courts' approach to McKenzie Friends. As you may know, the LSB responded to the JEB's consultation⁸. We thought it might be worth briefly drawing to your attention the key elements of the LSB's response, given the discussion of these matters at the hearing. These are:

1. the need to understand why the Judiciary consider that they are unable to deal adequately with any problems created by McKenzie Friends using the Judiciary's existing powers. The LSA provides scope for the provision of legal services outside the regulatory framework and it explicitly acknowledges the discretion of courts to grant a right of audience or permission to conduct litigation to non-authorized persons;
2. the lack of evidence presented in the consultation of consumer detriment specifically associated with the charging of a fee or recovery of expenses by McKenzie Friends; and
3. the need for careful consideration to be given to the potential impact of the proposed prohibition, against a backdrop of evidence of high levels of unmet legal need⁹.

We hope this letter is a constructive contribution to the Committee's deliberations on legal services regulation. We would of course be happy to respond to any questions the Committee might have in relation to these issues if that would be helpful.

Yours sincerely,



Sir Michael Pitt
Chairman

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http://www.legalservicesboard.org.uk/what-we-do/responses-to-consultations/pdf/2016/20160526_LSB_Response_To_McKenzie_Friends_Consultation.pdf

⁹ Research demonstrates that a high proportion of consumers with a legal problem do not seek legal advice. For example, a large scale consumer survey jointly commissioned by the LSB and the Law Society in 2015 identified that 64% of consumers with a legal problem do not seek independent assistance in dealing with it – see <https://research.legalservicesboard.org.uk/wp-content/media/Online-survey-of-individuals-legal-issues-REPORT.pdf>.