RESPONSE OF THE SOLICITOR SOLE PRACTITIONERS GROUP

TO THE LSB CONSULTATION ON THE DRAFT STRATEGIC PLAN 2015-2018

AND BUSINESS PLAN 2015/2016

We recognise that the Legal Services Board (LSB) has an enormous task to fulfil in meeting the 8 regulatory objectives set by Section 1 of the Legal Services Act 2007 (LSA), which are each in themselves hugely distinct and challenging tasks. We set these out below since we refer to them throughout the remainder of our response:

- protect and promote the public interest
- support the constitutional principle of the rule of law
- improve access to justice
- protect and promote the interests of consumers
- promote competition in the provision of legal services
- encourage an independent, strong, diverse and effective legal profession
- increase public understanding of the citizen's legal rights and duties
- promote and maintain adherence to the professional principles.

The latter, of course, is then further defined as:

- acting with independence and integrity
- maintaining proper standards of work
- acting in the best interests of clients
- complying with practitioners' duty to the Court to act with independence in the interests of justice and
- keeping clients' affairs confidential.

When one considers that the LSB is responsible for all of the above across eleven approved regulators (three of which are also licensing authorities), and which between them regulate directly approximately 166,800 lawyers and 398 alternative business structures operating throughout the jurisdiction, the regulatory minefield and sheer scale of the complexity of this task is staggering.

All members of the profession would agree that a vibrant and healthy legal profession, proper access to justice and a well-functioning justice system are indeed cornerstones of our civil society and must be preserved.

The LSB summarises its goal as "to reform and modernise the legal services marketplace across England and Wales, creating the conditions for competitive, innovative and accessible services that work better for all users and consumers of those services, while protecting broader consumer and public interests. "

We are, however, extremely concerned that the increasingly rapid pace of change in the legal marketplace, which seeks to open the gateway to new business models, growth and innovation in the way in which legal services are delivered, is creating regulatory challenges at such a fast pace and to such a large extent that the very regulatory objectives the LSA 2007 has set are in longer-term jeopardy.

Changes facing the legal sector which are described as a "springboard" to a better market for legal services may well be the very obstacle which causes it to trip and fall to its knees.

We rather fear that the implications of the Legal Services Act 2007 are far wider-reaching than those concerned may have originally thought, and the regulatory reforms needed to deal with the fall-out are becoming something of a runaway train.

'Access' to legal services is by no means access to good quality legal services and following the model of other sectors such as financial services is not necessarily a good thing, given the recent pitfalls evident in that sector.

There is a marked core difference between a 'consumer' and a 'client' and it is significant in terms of the changing legal landscape. The former suggests a somewhat cursory exchange of goods or services (even if this is repeated over many years – it is a discrete exchange) and the latter suggesting care, consideration and protectiveness (indeed a qualitative relationship) in which professional skills are offered (even if only on one occasion) that is missing from the former. It may seem a very subtle difference merely of terminology but this is deceptive. The emphasis of the draft strategic and business plans upon the 'consumer' is indicative of the slow but sure way in which the culture of consumerism (a sales-based culture) as opposed to client-care has been allowed to seep into a profession previously unique in its standards of integrity, quality and professionalism. This change in terminology of itself de-values the professional services that we provide.

Draft Strategic Plan 2015 – 2018

The LSA 2007 appears to us to have a complex overall regulatory position, in terms of the vast number of different regulators and the lack of a proper review of whether the list of reserved legal activities is the appropriate one. The difficult issue of regulation by title and activity has been ignored within this overall regulatory architecture when that is surely key to ensuring that consumers are properly protected? We would welcome the LSB's consideration of the reservation of additional legal activities, bringing them within the protection of the regulated environment.

It is also a huge concern that the changes to the legal marketplace opened up by the LSA 2007 have gone full steam-ahead despite the paucity of data and research in many key areas of the legal services sector. It is absolutely vital that the LSB develop a sound evidence base for better-informed future decision and policy-making, not only on its own but in collaboration with other organisations.

The strategy document states, in setting out the strategic themes for the next three years that " whilst we have identified some key work packages to support them, we recognise the need to be flexible and to be prepared to re-prioritise and re-scope, should we need to respond to changes in circumstances over the next three years ". By implication, this need for flexibility is indicative of the fact that absolutely nobody has any idea what the legal landscape might look like over the next three years and, to our minds, the LSB is effectively " holding a tiger by the tail ".

Both Theme A (breaking down regulatory barriers to competition, growth and innovation) and Theme B (enabling need for legal services to be met more effectively) deal extensively with the affordability and 'access gap' between the need for legal services and what is currently supplied. Research has shown that over a three year period, half of all UK citizens experienced at least one legal problem, but one in three did not get the help that they needed. This is said to be an opportunity for innovative firms and professionals. Is it therefore being suggested that the innovations and growth in new business models made possible by the LSA 2007 may somehow plug the immense access gap left by the extensive reforms to legal aid?

It is absolutely certain that even the most innovative of legal providers will not provide legal services free of charge. It is acknowledged within the strategy document that " Some providers that are reliant on a declining flow of legal aid work may find it challenging to find alternative income streams ". This is, of course, true but the strategic plan then fails to address the most glaring 'access gap' of all.

We feel that it is absolutely incumbent upon the LSB, as part of its remit under the Act to protect and promote the public interest, support the constitutional principle of the rule of law, improve access to justice and protect and promote the interests of consumers, to impress upon the Government in the strongest of terms that all other efforts to achieve these objectives are incomplete without an effective system of legal aid that ensures these 'objectives' are not merely rhetoric but reality for the more vulnerable in society. We are of the view that the LSB is wrong in considering this falls outside of its remit. The LSB stands in a unique position. It has the ear of the Government, it is entirely neutral in as much as it is not a representative body, it does not stand in the corner of the profession but rather the consumer and it has the evidential research to back this up.

In the meantime, family law is the one of the most significant areas of law which should be a priority for the LSB in enabling demand for legal services to be met.

Theme B refers to enabling need for legal services to be met more effectively. We question what is meant by 'more effectively'? Does this mean more quickly? More cheaply? More accurately? With a better standard of

client care? A more positive 'experience' or 'journey' through the legal process? An effective legal service can meet a multitude of different things to different people and to say that the traditional models of legal service provision are less effective than the new, innovative business models is unhelpful without further expansion of what is meant by this.

There is a real risk of consumer confusion and perception about what is and isn't subject to legal service regulation and issues of protection, quality and price. It is crucial for consumers to know the distinction between regulated work and unregulated work and not be misled into thinking that they have the protection of an authorised practising lawyer (and the consequent regulatory protection of indemnity insurance, the compensation fund, the Ombudsman, legal professional privilege, qualification, training and staff skills that this brings) when they don't. This is a real risk where professional services are split into separate entities, where businesses may seek to be authorised by one of the regulators, in order to gain the cachet of a professional title whereas in reality, little or none of its activities will be regulated. Clients must be clearly aware of what services they are buying and who regulates them. We agree that one of the LSB's priorities should indeed be ensuring that there is clear information available to the public to enable them to make informed choices when sourcing legal services.

There is no doubt, in our mind, that unreserved legal work undertaken outside of the regulatory framework is likely to ultimately damage consumers, putting it outside the reach of indemnity insurance and Ombudsman protection.

There must also be significant clarity as to redress and other remedies available to consumers.

We are keen to see a level playing field between the regulated and unregulated sector so that the regulated firms can compete fairly. Of course, the SRA's current consideration of reforms to the Separate Business Rule are intended to have such an effect. However, the fact is that smaller firms and sole practitioners (SPs) are less likely to benefit from the changing legal landscape than the larger firms and ABSs. Those who stand to gain the most are the larger firms, ABSs and the unregulated service providers. Working as they do on a larger scale than the small firms and SPs, they can not only reduce costs, but also have the resources and flexibility to diversify, invest in separate businesses and technology and work across regulatory boundaries, to develop innovative, but untested, new models of legal service delivery, which perhaps incorporate a number of related services.

The increased competition that this change is also intended to create will also be of some threat to small firms and SPs who are not positioned financially to take advantage of these new opportunities, but who will find themselves having to compete with those who do. The increased level of services that ABSs and larger unregulated providers may well begin to provide is likely to lead to them capturing a larger market-share for both regulated and unregulated work as consumers are encouraged to bring all of their needs "under one roof". Small firms and SPs are likely to suffer as a result. That will not contribute to encouraging an 'independent, strong and diverse legal profession ' – indeed, quite the opposite. It is also rather ironic, given the desire of the LSB to see the growth of small businesses – though perhaps not small legal businesses.

This threat should not be ignored by the LSB and discounted blandly as a natural consequence of innovation, termed in the strategy document as " the exit of those who cannot adapt " and the " inevitable product of an increasingly competitive market place. " The LSB states that it will continue to take into account the geographic diversity of legal needs across England and Wales and that it seeks to create " diverse and ethical legal service providers…..that collectively support wider public interest objectives including the rule of law and access to justice for all. " It cannot be ignored that SPs play a huge role in diverse legal service delivery in the high streets of towns and villages all over the UK, serving local communities and the vulnerable who may otherwise struggle to access legal advice from larger firms in bigger cities or online. It also cannot be ignored that a high proportion of BME solicitors are represented within the SP sector of the profession, which in turn means that there is a real threat to the ethnic diversity of legal service delivery in BME communities.

It is said that this will ultimately benefit consumers by providing greater competition in the provision of legal services, greater opportunities to access holistic services and potential reductions in cost. It is noticeable that the word "quality" rarely features.

If these changes lead to a watering down of the brand and reputation of the traditional solicitor qualification, let alone a possible decline in the number of small regulated, highly qualified and expert service providers, the consumer may ultimately suffer from both reduced choice, reduced quality of legal services and reduced assurance that having work undertaken by a qualified person provides. Far from creating more sustainable regulated services, the very opposite could be true for smaller firms and SPs as prices are driven down further by increased competition from the de-regulated sector.

Whether the playing field is, indeed, levelled is open to question.

It is unfair that all work carried out within a recognised body or an RSP is SRA regulated, whereas the MDP policy now allows non-reserved legal activity to be excluded from SRA regulated activity for an MDP. This is far from a level playing field and puts MDPs at a significant commercial advantage compared to solicitors" firms. However, the alternative, of dual or even multiple regulation is by no means attractive and fraught with difficulties and again, the potential for confusion amongst clients, who will expect their work to be regulated to the same high standard of the profession, regardless of the individual within the firm who undertakes it,

There are other regulatory aspects of consideration for traditional law firms, not least of which is the issue of PII. For SPs, the PII premium can be the deciding factor in the financial viability of a firm. With Accountants able to offer legal services regulated by the ICAEW and their minimum level of PII cover at £500,000, we are still far from a level playing field. We have made our views with respect to the minimum level of PII cover very clear in our consultation responses on those issues and we do not seek or support a reduction in minimum levels for solicitors, to achieve a more level playing field. The risks of reducing minimum levels of cover are prohibitive to this. Nevertheless, it is unrealistic to suggest that the LSA 2007 creates a level playing field, when there are other significant dynamics within the traditional law firm that hinder this.

What is the view of the PI insurers with respect to unbundling, mingled with self-help provisions? Similarly, the banks? Those are the institutions who ultimately decide whether a firm can operate or not. We would be interested to know whether any research has been undertaken of this nature in informing the LSB's draft strategic plan and business plan?

Further, many of the regulatory changes for the traditional law firm are being addressed after the race has been running for some time, and the SRA have been behind the curve. This has set the sector back, particularly small firms and SPs, considerably. SPs, are often, by their very nature entrepreneurial and innovative and many of these, who provide very niche and specialist services will compete without difficulty in the changed legal market. However, there are many SPs who, for the reasons set out above, simply won't.

The need for the regulators to consider its regulatory function in line with the objectives of the LSA 2007 is creating complexity and confusion. We attach our responses to the recent SRA consultations dealing with the Separate Business Rule, Consumer Credit Regulation and Insolvency Practice by way of example. These deal with the detailed implications of proposed de-regulation, for example the complexity surrounding referrals, if the proposed reforms to the SBR go ahead and the risk of cases moving back and forth between regulated and unregulated services, through unbundled services, and different providers dealing with different parts of the same case, in a way that prejudices the client. It is difficult to see how a less sophisticated consumer (the average man or woman on the street, whom the LSA is intended to benefit) will understand what may be complicated divisions of work between a separate business and an authorised person. The lines are further blurred when we introduced the concept of 'self-service' via online technology to the already-complex equation.

We are aware that both the LSB and the regulators are powerless to impose rules upon the unregulated providers who undertake one of the six reserved activities and are powerless to take protective interventionist and deterrent action in respect of them (unless they are also authorised persons). When one considers that in 2013, the unregulated sector accounted for a turnover of between £5.84 billion - £8.76 billion, this is a huge concern. All those consumers who created this turnover will have had no recourse to the Legal Ombudsman and the exposure of consumers in the area of will-writers to unfair sale tactics is well documented. Despite that being a clear lesson from which we should learn, we are widening the gateway even further.

This concern is heightened by the fact that the expansion of the unregulated sector is predicted to match, if not exceed, the expansion of the regulated sector, given that there are no barriers to entry and a non-existent regulatory cost base. One such example is the provision of on-line services. The unregulated sector have been able to offer this service for years. The regulated sector have not. Again, hardly a level playing field.

One consequence of the decline in legal aid is the continued rise in the number of litigants in person, vulnerable to rookie McKenzie Friends, who are neither qualified, regulated, nor insured and in respect of whom the consumer has no redress whatsoever, despite the fact that many McKenzie Friends are illegally charging for their services. Far more needs to be done in respect of this issue if the public is to be properly protected in accordance with the Section 1 objectives.

We note that the strategic plan will involve consideration of how section 163 of the Act (voluntary arrangements) might be used to ensure necessary safeguards are in place for consumers, for example, accrediting codes of practice/kitemarking for unregulated providers etc. in a similar manner to healthcare practitioners (eg. physiotherapists) The difficulty is that the poor providers are those would not invest in such voluntary arrangements and sign up to the codes of practice in any event. A further concern is the cost – in our view, such arrangements and codes of practice would have to be funded by the unregulated sector itself.

We are also concerned by the suggestion that the LSB may, in due course, encourage and facilitate the extension of quality assurance schemes and the development of new schemes for both regulated and

unregulated providers. This is likely to be deeply unpopular with the regulated sector, given the number of such schemes to which they are already subject and the likely increased cost of these schemes. We accept these are likely to be necessary for the unregulated sector and should be modelled on those already in existence in the regulated sector. These should be funded by the unregulated sector.

Whilst we agree that it is necessary for the LSB, as part of its work over the next three years, to take into account both regulated and unregulated providers and to conduct research, engagement and intelligence gathering covering both regulated and unregulated services, we are frustrated and concerned that it will be only the regulated sector who foot the bill for this work, whilst the unregulated sector continue to earn their £8.76 billion. Again, this is a wider consequence of the LSA 2007 that is of much concern not merely to SPs but to the solicitor's profession as a whole.

The extension of the jurisdiction of the Legal Ombudsman to all legal services, including unregulated legal services, will require primary legislation and proper resourcing, all of which could take years and the changes in the legal marketplace are not being held back until this in place, leaving clients vulnerable in the meantime. This demonstrates the haphazard and 'patchwork quilt' approach to the de-regulation of legal services taken by this Government which flies in the face of the regulatory objectives set out at Section 1. How will such an expansion be funded? Would it not be simpler to expand the scope of regulation by simply adding to the list of reserved activities, placing such work only in the hands of the regulated sector.

We are curious to know the Legal Ombudsman's view of what constitutes a legal service? This may differ significantly to the views of regulators, licensing authorities and the Legal Services Board.

The cost of any extension of the role of the Legal Ombudsman is a further cause for concern.

A further concern is the likely increased focus on the international context, including foreign providers and investors increasing their activities in the UK, other jurisdictions developing their own liberalisation agendas, informed by the precedent set by the Act, more providers operating across jurisdictions or providing different services from different jurisdictions and continuing flows of students and lawyers, especially in the early years of their careers, into the UK. The risks, including funding of terrorist activities, maintaining consistent standards of competency and regulatory complexities of these trends must surely be obvious. How can the Government possibly think that the LSB, staffed by 30 people, will be capable of ensuring that the eleven regulatory and licensing bodies can consistently and properly regulate, intervene and protect consumers, whilst avoiding duplication within such a vast legal landscape and complex regulatory architecture?

The strategy document refers to the development of processes that make "doing it yourself" easier, along with unbundling and digital service delivery which, it is said, will " help many consumers resolve legal issues cheaply and conveniently. " Whether they do so correctly, obtaining the correct outcome, does not appear to be a consideration and we fail to see how the "success" of these new models can be properly researched and measured by the LSB or any organisation. We agree with the Legal Services Consumer Panel in as much as these developments have the potential for creating dangers for consumers such as web monopolies, 'behavioural pricing' (ie online prices that vary depending on data about which other websites have been visited and when) and greater scope for misuse of personal data. Again, these developments have been permitted by the Act without any data or research into the potential impact upon consumers. Many vulnerable consumers cannot access the internet and lack the capability to complete legal and administrative processes without significant levels of support, ironically those same consumers who can no longer access legal aid – hence the need for the LSB to feed such messages back to the Government.

We agree that the LSB should undertake some initial work in the first year of this strategic plan period to build on its existing knowledge and evidence base and to fill the gaps in understanding of how legal needs are met in the legal services market, and how consumers navigate through the market. It is important for the profession to gain an understanding of how consumers solve their legal problems, the choices and information available to them, recent trends in pricing and affordability and what the key barriers to meeting legal needs are. However, although it is relatively easy to gather statistics on 'who went where' for legal advice, it is far harder to measure the success of that legal advice in terms of the longer term outcome for the client, whether that outcome would have been better or worse if the legal work had been undertaken by a different provider, the client's experience of that legal provider (in the absence of having a comparative).

The strategic plan focuses on exploring ways in which legal services can be delivered more efficiently, at lower price while retaining appropriate quality safeguards. This is a potentially dangerous approach. Legal aid fixed fees and subsequent cuts have surely shown that it is impossible to safeguard quality through lowering the price

of a service – the consumer inevitably suffers as demonstrated by the numerous miscarriages of justice already prevalent throughout the criminal justice system as a result of ridiculously low fixed fees and the consequent two-tier system of publicly-funded – v – private funding defence that has developed.

Further, there is a huge risk that the LSA is encouraging a legal market of such competitiveness that providers are pricing under cost. This is a dangerous long-term strategy for producing a stable and sustainable legal marketplace. The impact of a large ABS provider suddenly going bust could have a hugely detrimental effect upon its clients and could leave huge gaps in supply that cannot be filled because smaller firms and SPs have been forced out of the market place by unrealistic price competition.

We agree that the strategic plan should explore better availability of information for consumers (ranging from guidance for consumers to the transparency of specific parameters such as price and quality to inform particular purchasing decisions) so that consumers can more easily navigate and make decisions about legal services, as well as carrying out broader work on public legal education. The LSB must ensure that the information provided to the public is accurate (we have particular concerns about comparison websites).

We would question whether there has been any research conducted amongst consumers themselves as to what they understand to be an adequate standard of protection? There is also a significant difference between an 'adequate' standard, which suggests a bare minimum/just good enough, as opposed to an 'appropriate' standard.

It should also be remembered that the risk to the consumer will vary dependent upon the nature of the consumer eg. a large organisation as opposed to a vulnerable old lady, and the type of legal work being undertaken.

We agree that the LSB's performance, evaluation and oversight activities will continue to be vital in help it to understand the real-world challenges faced by the regulators and market realities. In particular, we would strongly urge the LSB to listen to the regulated sector as much as it seems to listen and be driven by the unregulated sector.

Business Plan 2015/2016

We would welcome the proposed review of barriers to firms moving between legal regulators, in particular focusing upon the PII position and compensation requirements that exist between different regulators. Attention should also be given to run-off cover requirements and successor practice rules across different regulators. Information about the benefits and risks of firms moving between legal regulators would be helpful to the profession.

We would also welcome a review of regulatory restrictions on choice of insurer for different entities and the potential positive or negative cost of such restrictions and the impact of removing them.

Research should be undertaken into the different legal needs of different types of consumers including vulnerable consumers, how they choose to deal with their problems and the reasons why. This should be carried out in conjunction with stakeholders to carry out surveys of individual consumers and small businesses to ascertain how they respond to legal problems including whether or not they choose to seek advice and their choice of provider.

Research should also be undertaken into the impact of unbundled services on consumers, with an analysis of the findings.

We remain concerned that the LSB's cross-cutting research (and we note the proposed on-line independent legal services research hub with independent editorial control) currently being explored with the SRA, the costs of which we again will fall to the regulated sector.