



The Law Society

**Legal Services Board draft 2016/17 business plan**  
The Law Society's response  
February 2016



## Introduction

1. The Law Society of England and Wales ('the Society') is the professional body for the solicitors' profession in England and Wales, representing over 160,000 registered legal practitioners. The Society represents the profession to parliament, government and regulatory bodies and has a public interest in the reform of the law. It is the Approved Regulator under the Legal Services Act 2007.
2. The Legal Services Board (LSB) has asked for comments on its draft Business Plan for 2016/17. The LSB is part funded by the Society's members, who therefore have a real interest in the Business Plan each year and will be concerned to see that value for money is achieved.
3. The Law Society notes the LSB's commitment to deregulation in line with the government's agenda and agrees that there is a need to remove unnecessary regulatory requirements so that solicitors can innovate, expand their businesses and compete within the domestic and international legal markets. Properly focused and proportionate regulation is in the public interest and dilution of requirements must be carefully considered against the potential for increased risk. It is essential that the LSB and the front-line regulators have as full an understanding of the impact of potential regulatory changes as possible (including the potential for consumer risk and detriment) before making such decisions. Regulation should be fair, proportionate and targeted to be effective and in the public interest; without that, consumers may simply be open to greater risk without the ability to make informed choices.
4. As well as removing any requirements and rules that are identified as unnecessary, it is important that the administrative burden of complying with regulators' information requirements is reduced to a minimum. This is not achieved purely by just removing regulations but by ensuring that when solicitors do interact with the regulator, the procedure for doing so is straight forward and efficient. It is the application of process around regulation as well as the regulatory safeguards themselves that offer the opportunity to save cost.
5. The Society notes the LSB's intention to cut its operating costs by £450k (15% in total) over the course of the current parliament. A reduction in the cost to the profession is welcome but these savings should not be achieved by diverting money away from the core of LSB statutory work. The LSB should consider whether all of the work it proposes to undertake over the next year in relation to the regulated legal sector is necessary in order to fulfil its statutory role. Its main purpose is overseeing the work of the front line regulators and the Office for Legal Complaints (OLC), and it should limit work that goes beyond this. The SRA is expected to begin a review of its Handbook in 2016 and, notwithstanding that the rule approval process may be changing, it is important that resource exists to ensure that proper scrutiny is given to applications for rule changes.
6. The Society recognises that there are concerns around the unregulated sector but does not think that it is appropriate that the regulated community fund the LSB's work undertaken in connection with the unregulated sector

7. The LSB has divided its strategy into three work streams: breaking down regulatory barriers, tackling unmet legal need, and performance, evaluation and oversight. The Society briefly comments on each within this response, grouped against the consultation questions posed at page 28 of the draft Business Plan.

### **Question 1: Do you have any comments on our proposed work plan?**

#### **Breaking down regulatory barriers**

8. The Society is aware that although the decision to include legal services within the government's Business Impact Target (BIT) has been deferred, there is a possibility that at some point legal services will be included. As already mentioned, the Law Society supports efforts to cut unnecessary red tape and regulation and is keen that this should be done with a realistic appreciation of how regulatory changes, both individually and as a whole, affect practitioners, clients, the legal system and the public interest. As part of this assessment, there is value in measuring the costs imposed on business by regulators' activities (as would be a requirement if the government's BIT applied to the legal sector).
9. Removing unnecessary process around regulation should genuinely make compliance easier for firms and be beneficial to the market and clients. Proposals relating to deregulation should be well evidenced by the applicant, thoroughly scrutinised by the LSB and there should be sufficient opportunity for those who are affected by the changes to have their say.
10. The SRA is engaged in a programme of work around reducing regulatory burden<sup>1</sup>. The Society has raised concerns in relation to the limited evidence provided for some of the proposed changes, where decisions often appear to have been made before a consultation is launched. For example:
  - PII: reduction of the minimum level of requisite cover: The SRA did not provide evidence to support the need for this change. The LSB recognised this and rejected the SRA's rule change application for a lower level of PII cover.
  - Changes to Consumer Credit Regulation: the SRA's proposed changes were not properly impact assessed and the approach could have led to dual regulation (FCA and SRA) for firms. There was a strong likelihood of negative consequences for consumers given that the indications were that duplication of regulation would lead firms to exit the market, reducing consumer choice etc. Ultimately, the SRA saw the force of the Society's arguments but the SRA should have undertaken the necessary research, evidence gathering and testing of proposals at the initial stage.
  - Regulation of Insolvency Practitioners: the Society did not agree with the SRA decision that it should cease regulating solicitors undertaking insolvency work on the basis that it would in all likelihood lead to a reduction in the number of solicitor insolvency practitioners and the

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<sup>1</sup> Red Tape Initiative (February 2013), Regulatory Reform programme (May 2014) and Looking to the future: Flexibility and public protection - a phased review of our regulatory approach (November 2015)

unique perspective that they offer to clients, thereby limiting consumer access and choice. This arrangement has pre-Legal Services Act history and (a) it did not appear that sufficient research had been undertaken to assess the impact of the change and (b) it was not clear the extent to which the SRA acted upon the limited evidence produced.

- SRA Regulatory Reform Programme: in April 2015, as part of its Regulatory Reform Programme, the SRA launched the consultation, 'Improving Regulation; proportionate and targeted measures', which contained various proposals which were viewed as non-contentious by the SRA. The Society raised concerns in relation to the limited evidence provided for some of the proposed changes<sup>2</sup>. The Society is pleased that the decision around one of the proposals, separate client accounts, has been deferred so that it can be thoroughly considered as part of the SRA's review of the Accounts Rules (expected in Spring 2016). However, there were other proposals within the consultation which led to changes being made to the Handbook that were not properly evidenced and explained. For example, with regards to ABS firms, the Society was concerned that the SRA was attempting to speed its process by removing steps in its authorisation process without fully appreciating the repercussions for businesses and clients.

11. The Society is also concerned about the cumulative impact of [marginal] changes that the SRA is making to regulatory requirements; taken individually, they may seem insignificant but as a whole they could contribute to the erosion of standards. The Society raised objections to the approach taken to reducing regulatory requirements. For example, commenting on the SRA's recently published consultation, Training for Tomorrow: Assessing Competence, the Law Society has expressed concern that the SRA is making piecemeal announcements to the profession on its proposals<sup>3</sup>. This is unhelpful and more detail would be welcome so that the proposals can be robustly scrutinised in the round and their full implications considered, ensuring the stated aims are met.

#### Identifying ways in which legislation needs to change to keep pace with the development of a modern, vibrant, diverse, high quality legal services sector

12. In relation to LSB work on the future legislative framework, the Society is engaged in related thinking and would welcome the opportunity to engage with the LSB on this issue.

#### Making sure that regulation does not unnecessarily deter entry, innovation and investment

13. The planned work on investor behaviour (investor community views and barriers to investment) will be interesting in the context of the Consumer and Markets Authority (CMA) market study. We are engaging fully with the CMA

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<sup>2</sup> The Law Society's response to the SRA's consultation on its Regulatory Reform Programme can be found here - [file:///I:/mydocs/Downloads/sra-response-regulatory-reform-programme-consultation-law-society-response-june-2015%20\(12\).pdf](file:///I:/mydocs/Downloads/sra-response-regulatory-reform-programme-consultation-law-society-response-june-2015%20(12).pdf)

<sup>3</sup> The Law Society's response to the SRA's consultation, 'Training for Tomorrow: Assessing Competence', can be found here - <http://www.lawsociety.org.uk/policy-campaigns/consultation-responses/sra-training-for-tomorrow-assessing-competence-law-society-response/>

Market Study and will be interested to see the impacts of the planned research in this context.

#### Reviewing transitional protections for special bodies

14. The Society notes that the LSB proposes to review transitional protections for special bodies such as not for profit organisations, community interest companies and independent trade unions. These bodies are currently able to provide reserved legal activities without being authorised. The LSB consulted on this topic in 2012 and decided that it was not, at the time, appropriate to end the transitional protection given that, in the LSB's view, 'the risks of continuing the status quo [were] relatively low when weighed against the risks of a disproportionate licensing regime'.
15. The Law Society responded to this consultation highlighting the important role that such bodies play in providing access to justice for vulnerable people who may not be able to afford access to legal services. However, the Society also highlighted the distortion that these services could have on the legal services market. The Society argued that the provision of services to those who cannot afford them should be encouraged; however, where these services directly compete with the commercial market, it becomes less clear-cut and it is more difficult to see why there should be significant differences in approach. The Society also acknowledged that the current regulatory position creates unsatisfactory protection for clients and concluded that the protection should not end immediately but should be delayed, given funding cuts and the difficult financial environment at the time.
16. Since 2012, the regulatory environment has changed somewhat and some of the rules that existed which would have made regulation difficult for special bodies – for example, the separate business rule and the ban on solicitors charging for advice – have been weakened or removed. The Society looks forward to seeing the LSB's proposals in relation to the removal of the transitional protection for Special Bodies.

#### **Enabling the need for legal services to be met more effectively - tackling unmet legal need**

17. The Society sounds a note of caution in relation to work around tackling this issue. We do have some concerns about how 'unmet legal need' is defined by the LSB and others. In the past, the LSB has taken a very broad definition of the term but the reasons why people do not pursue legal problems, are varied and complex: there is a range of reasons, many of which do not suggest vulnerability or damage (e.g. the person thought the issue was easy enough to handle themselves, did not want to cause trouble with the other party etc). Given that the picture is not a simple one, the possible solutions to it, including those identified by the LSB, need to be seen in that context. There are however advice deserts where those who most need help or would benefit from it are unable to afford to pay and costs.

#### Encouraging market entry by comparison websites by unlocking regulatory data and helping consumers choose and use legal services

18. The LSB would like regulatory data to be more readily available so that consumers are better able to choose between legal services. The Law Society supports the suggestion that consumers need reliable information to help them compare legal services before they can decide what to buy. In particular, recent research by the Law Society has indicated very low levels of understanding of the legal services market and the different protections available to consumers who decide to use a regulated, rather than an unregulated provider. Providing greater access to regulatory data may go some way towards improving the situation, but only in conjunction with appropriate consumer education measures.
19. Regulatory data alone is however insufficient to provide a reliable indicator of quality in order to inform low frequency purchasing decisions. The Society uses data from the SRA to support the Law Society's 'Find a Solicitor' (FAS) website and augments it with additional non-regulated information to assist consumers in judging the relative merits of providers. The additional information includes details of accreditations awarded by the Law Society, and validated information from practitioners such as areas of practice and languages spoken. Members of the public can filter their searches to reflect their specific requirements e.g. by location or specialism.
20. The Society has reservations about the usefulness of price comparison websites in a hugely complex market. While such sites allow instant comparisons based on cost, it is incredibly difficult to provide the facility for equivalent comparison around the quality of work (based on an objective and informed assessment about quality of provision) and such sites are unlikely to include information on the extremely important consumer protections that exist when a client uses a regulated practitioner. In relation to quality, consumers find it especially difficult to compare the quality and price of legal services due to factors which include asymmetry of information and infrequent purchase. It is concerning therefore that quality assessments via price comparison websites are largely based on consumer feedback/online reviews. These naturally tend to focus on service experience rather than core competencies. Given this, comparison websites could be argued to reinforce information asymmetries rather than provide a genuinely objective view.
21. As commercial comparison websites depend on income either from advertising or from service providers, it is also important to consider the viability and implications of these business models. The subject of market intermediaries raises the vexed question of referral fees (where intermediaries may be paid a fee by a lawyer to be referred work). The payment of referral fees within the legal market has caused controversy and although such payments are now banned in the personal injury (PI) market, in the conveyancing market payments to estate agents for referrals are not uncommon. Despite a requirement on solicitors to inform clients of such fees, there are concerns about the degree of consumer transparency, as well as concerns about referral fees raising costs. These fees also work in an uncompetitive way as the capture of the client by the intermediary or agent who sells the legal service is used to further commercial advantages for that party rather than the client's best interests. Any measures to encourage market penetration by intermediaries must take account of these concerns.

#### Identifying the reach, benefits and risks of unregulated services

22. The LSB also proposes to conduct work investigating the reach, benefits and risks of unregulated services. The Society believes that there are problems associated with unregulated persons being able to provide many of the same services as regulated professionals but without the same level of assurances for consumers that come with a regulated provider (such as consumer protection, qualifications and training and regulatory obligations). The LSB proposes exploring the possibility of creating a voluntary jurisdiction for the Legal Ombudsman that would cover complaints arising in the unregulated market.
23. The Society would be wary of attempts to bring unregulated sectors under the purview of the Legal Ombudsman (LeO) via a voluntary scheme. Similar extensions have been suggested previously - for example, in relation to complaints relating to OISC regulated immigration advisers. There are several strong arguments against this course of action:
- It could lead to increased consumer confusion - LeO has significant powers to order redress for clients of the regulated legal community. It would have no such power to order redress for the clients of unregulated providers and, further to this, would not be able to enforce decisions against unregulated persons.
  - Lacking statutory powers to enforce decisions made in a voluntary jurisdiction would undermine the standing of the Legal Ombudsman in the sector as a whole.
  - It is unclear how a voluntary scheme would be funded. It should not be subsidised by regulated practitioners.
  - Unregulated providers, courtesy of the Consumer ADR Regulations, already have access to alternative dispute resolution services and may offer recourse to these options if they so wish.
24. The better solution (in terms of mitigating potential detriment to consumers) might be to consider bringing some unregulated activities of unregulated providers within the regulatory ambit i.e. if there is real risk for consumers, there should be some level of regulation. This recognises that it is preferable for consumers to be protected in areas of higher risk, rather than introduce a redress mechanism that can only deal with scenarios when they have already gone wrong.
25. The Society would again emphasise that it does not consider it appropriate that the LSB (or LeO), both funded by the regulated profession, use money from the levy to fund work on the unregulated sector (unless the purpose of this work is to decide whether or not to create new reserved activities).

#### Understanding how vulnerable consumers access legal services

26. The LSB proposes commissioning research into the experiences of clients in vulnerable circumstances. The Society would welcome this research and would be keen to reflect any findings in our practice note on meeting the needs of vulnerable clients.

#### **Performance, evaluation and oversight**

#### Holding the regulators to account for their performance and Undertaking our statutory responsibilities in relation to the OLC

27. The LSB's role overseeing the work of the front-line regulators and LeO should be regarded as its key function. It is important to the effective functioning of the legal services market that regulators are held to account and that changes to regulatory arrangements are properly evidenced and impact assessed.
28. The Society welcomes the work that the LSB is undertaking monitoring LeO's performance as it goes through significant structural and staff changes.

Making sure regulation is undertaken independently from representative interests

29. The LSB states in paragraph 41 that it needs 'to remain vigilant about the regulators' independence from the professions they regulate...' The Society agrees that regulation should be independent of representative functions but perhaps even more importantly, the legal profession should be independent of the government. Our chief executive, Catherine Dixon, stated in a recent interview that, 'Freedom from government intervention is an essential cornerstone of our justice system and underpins the rule of law.' It is regrettable that this is not prioritised in the LSB's plan.

Identifying the benefits and risks associated with regulatory choice and the changing shape of legal services regulation

30. The Society is also interested in the work the LSB intends to do in relation to regulator shopping. The Society understands that there can be client protection problems when firms change regulator, particularly if the firm closes down and reopens as a 'successor practice' under the new regulator. The Society is particularly concerned that this area of competition does not result in a race to the bottom in terms of standards.

**Question 2: Do you have any comments on the research we have proposed?**

31. The Society welcomes the LSB's continuing commitment to joint working in this area and values the input that it is able to provide via the LSB's Research Strategy Group. We are keen to ensure that any developments within the regulators' Research Forum relating to detailed research plans are also shared with Approved Regulators. This will ensure that their outputs are truly collaborative and duplication is avoided.

**Question 3. Do you have any comments on the commission we propose for the Legal Services Consumer Panel?**

32. The Society notes the LSB's intention to request advice from the Legal Services Consumer Panel on 'information remedies'. The Society would be interested in understanding the impact of these remedies on client behaviour and knowledge. As the SRA removes more of its prescriptive regulatory requirements, and requires firms to, instead, provide explanatory information in client care letters, etc, there is a real risk that clients may make purchasing decisions without a full appreciation of the repercussions of choosing that practitioner over others. For example, regulated persons who have taken advantage of the changes made to the separate business rule are required to provide information to clients but members of the public cannot generally be expected to understand the ramifications of choosing an unregulated firm owned or managed by a solicitor over choosing a regulated firm. The Society



suspects that this will be confusing to clients and is interested in seeing how this research develops.

**Question 4: Do you have any comments on the LSB's budget?**

33. Our response to the LSB's draft Strategic Plan 2015-18 and Business Plan 2015-16 urged the Board to consider how far all of the work proposed was essential and whether some of it could be stopped or delayed to reduce costs still further. The LSB will go some way to realising this through immediate budget savings in 2016/17 and further planned savings during the lifetime of this parliament (after only freezing its budget in 2015/16). The Society would urge the LSB to continue to carefully scrutinise its costs, ensuring that no work duplicates that of the front line regulators and that funds are concentrated on the Board's core oversight role.

**Conclusion**

34. We hope that the comments and observations in this response are helpful. We are always happy to meet with the LSB to help with our understanding of the LSB's priorities and to identify areas where the Law Society can assist the Board to improve the regulatory environment so that it supports the delivery of legal services, whilst protecting the public.