



The Law Society

**LSB publication 'Draft: Business Plan 2017/18'**  
The Law Society's response  
7 February 2017



## 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 170,000 solicitors. The Society represents the profession to Parliament, government and regulatory bodies and has a public interest in the reform of the law.
2. The Society has a number of comments relating to the Legal Services Board's (LSB) draft business plan. These observations cut across the whole of the proposed programme of work, so we have grouped them together by theme instead of responding to specific questions.

## Oversight

3. In its crucial oversight function the LSB has done a good job providing challenge and support to the Legal Ombudsman (LeO) in respect of its operations. LeO has undergone significant changes over the last two years: it has taken on a new jurisdiction, moved offices, adopted a new case management system and undergone a restructure. Despite a recent slip in its KPIs<sup>1</sup> LeO has worked proactively to address and meet these challenges, ensuring the vital role the Ombudsman plays is assured, and that consumers receive a high quality and timely complaints handling service. This has all been supported by the LSB through its performance, evaluation and oversight of LeO.
4. Alongside the oversight of LeO, the Society considers the LSB's role in scrutinising applications from the frontline regulators as one of the most important functions of the organisation. Never has this been more important as we face unprecedented change and uncertainty within the profession and wider economy. Ensuring vital decisions are robust and well-evidenced is an ever more crucial function.
5. To this end, in recent years the LSB has played an active role in this regard, holding frontline regulators to account. For example, the Society agreed with the decision taken by the LSB in 2014 to refuse to approve an application from the Solicitors Regulation Authority (SRA) to reduce the minimum level of Professional Indemnity Insurance (PII) cover required for solicitors firms<sup>2</sup>. The LSB questioned a lack of evidence on which the SRA was basing its proposed changes. It is just this sort of challenge and oversight from the LSB that is at the heart of the regulatory objectives enshrined in the Legal Services Act.
6. In addition, the SRA has recently consulted on amending the Handbook to allow solicitors to be employed in unregulated entities<sup>3</sup>. It is the Society's view that this is a dangerous step that sets the tone for a race to the bottom in regulatory standards<sup>4</sup>. If solicitors were to offer legal services from unregulated companies, as

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<sup>1</sup> [Legal Ombudsman Annual Report and Accounts 2015-16](#), 31 October 2016, Legal Ombudsman, pg. 6

<sup>2</sup> [LSB publishes its SRA PII application decision](#), 27 November 2014, Legal Services Board

<sup>3</sup> [Looking to the Future - flexibility and public protection](#), 22 September 2016, Solicitors Regulation Authority

<sup>4</sup> [SRA Looking to the Future consultations – Law Society response](#), 8 September 2016, The Law Society

is also suggested in the Competition and Markets Authority's (CMA) recent Report<sup>5</sup>, then their clients would no longer enjoy a raft of protections - from confidentiality to compensation - offered by every solicitor in an SRA regulated solicitors' firm. No quantitative assessment has been made by the SRA to demonstrate that these proposals will result in more people seeking and obtaining legal advice; it seems the SRA is prioritising competition objectives over its duty to ensure the public and consumer interests are served.

7. As we have already seen in the Claims Management Payment Protection Insurance sector some business practices, including pressure selling, have been to the detriment of some consumers. The creation of an environment in which unregulated entities could employ solicitors, who would in turn be subjected to commercial pressures but would be unfettered by regulatory checks and balances, would erode the fundamental consumer and professional protections Parliament legislated for in Part 5 of the Legal Services Act 2007. The LSB has a role in ensuring this does not happen. Our assessment is that these deregulatory changes would undermine consumer protections and would therefore be more likely to increase unmet legal need as consumers lose trust in the legal system and face an additional regulatory maze.
8. In our response to the Ministry of Justice's Tailored Review<sup>6</sup> we suggested that the frontline regulators should provide a sound rationale and evidence-base for any regulatory change and that the LSB should hold them to account for these changes through its oversight function. We also suggested that the LSB should require frontline regulators to produce an impact assessment which quantifies the costs and benefits (as well as the risks and opportunities) of any proposed regulatory change. Without any such impact assessment it is very challenging for the LSB and the public to determine (a) whether there is robust evidence for a regulatory change or (b) whether the change will reinforce or undermine the regulatory objectives. In addition, the LSB should require that changes are reviewed by frontline regulators after implementation to assess their effectiveness against the original objectives, providing transparency and scrutiny of their decisions.
9. The LSB, like all front line regulators, has a duty to ensure that appropriate and well evidenced regulatory interventions are undertaken. The Society would encourage the LSB to continue to take an active role, as it has done in the past, ensuring that all the regulatory objectives are considered. We would encourage the LSB to ensure that it robustly challenges the evidence-base proffered by frontline regulators when applying for regulatory changes, in line with its role envisaged by Parliament and the Act.

### **Budget and regulatory duplication**

10. The Society supports the LSB's commitment to a downward trend in the costs of regulation and particularly the £150K decrease in the LSB's budget this coming financial year. The profession has been under unprecedented pressure due to cuts in Legal Aid funding and the wider economic situation and the LSB's commitment to proportionate regulation is to be applauded.

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<sup>5</sup> [Legal Services Market Study: Final Report](#), 15 December 2016, Competition & Markets Authority

<sup>6</sup> [Law Society response to the Review of the Legal Services Board and the Office for Legal Complaints](#), November 2016, The Law Society

11. However, last year, in our response to the LSB's three-year Strategy and Business Plan<sup>7</sup>, we raised concerns around duplication of work and therefore costs. We believe that the oversight regulator should not seek to undertake work which is within the scope of the individual front line regulators. Where it is looking cross-sector, it should seek to time its work so as to maximise research already being undertaken by regulators.
12. For example, in relation to duplication, the SRA is undertaking research work related to the transparency of legal costs, which appears similar to the proposed LSB research piece in this business plan. Much of this work has also already been undertaken by the CMA in its recent Legal Services Market Study on pricing in individual consumer legal activity<sup>8</sup>. It would appear more prudent that rather than repeat existing work the LSB should seek to engage with all the regulators, and the regulated, to share information, insights and data more transparently. This would drive greater efficiency and encourage collaboration.
13. In addition to concerns around duplication, it also appears that the LSB may be undertaking work which should, ideally, be undertaken after the front line regulators have completed their work in these areas. This is the case regarding the LSB's proposed review of its education and training guidance. While we support the LSB's proactive approach to reviewing its guidance we wonder whether this is best paused until frontline regulators have completed their work.

### **Regulatory objectives**

14. During the passage of the Legal Services Bill through Parliament there were long debates about the regulatory objectives and the relative position of one over the other<sup>9</sup>. At the time the then Government was very clear that the regulatory objectives were not ranked and that while they may sometimes be in conflict, they should be considered as a whole by the LSB. This is explicitly stated in the Explanatory Notes to the Act<sup>10</sup> where the Notes state the LSB should have regard to the balancing of those objectives.
15. The Society has concerns that the LSB is applying undue weight to the objective to promote competition in the provision of services. It is important not to assume that all change which increases competition will benefit consumers. Competition may result in lower prices, but this must be balanced against any risks that result from competitive pressures (e.g. reduction in consumer protection or trust in the legal system), which may bring competition into conflict with the public interest: the two not always having the same outcomes and remedies.
16. While we entirely support competition within the legal services market we are concerned that the LSB is not sufficiently balancing this with the welfare of consumers, the public interest, rule of law and access to justice. Competition in of

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<sup>7</sup> [Legal Services Board draft 2016/17 business plan: The Law Society's response](#), 27 February 2016, The Law Society

<sup>8</sup> [Legal Services Market Study](#), 15 December 2016, Competition & Markets Authority

<sup>9</sup> [Legal Services Bill](#), Lords Hansard debates, Column 129, Baroness Ashton of Upholland, 9 January 2007, House of Lords

<sup>10</sup> [Legal Services Act 2007](#), Explanatory Notes, Section 1: The Regulatory Objectives

itself is not always the best way of ensuring that optimum services are delivered to consumers whilst safeguarding the public interest. As stated above, competition may result in lower prices, but this needs to be balanced against aspects such as consumer protection, and the LSB's duty to encourage an independent, strong, diverse and effective legal profession.

17. It is noteworthy that two of three of the pieces of work proposed by the LSB, and all of the research programme this year, relate in some way to competition. While this might be important, given the societal context in which we find ourselves (discussed in more detail below) it seems inappropriate for the LSB to be dedicating so much of its focus to only one of the regulatory objectives. The Society would like to see the LSB focussing more of its time on holding the regulators to account for their performance and budget and ensuring that the high standards of the whole legal profession are maintained, fostering trust and promoting the consumer and public interest.

### **Regulatory landscape**

18. Following the CMA's final report the Society welcomed the CMA's decision not to conduct a market investigation into the legal sector. To quote the CMA: "*We decided not to make a MIR in relation to the supply of legal services in England and Wales.... through the use of our other powers, we were well placed to identify effective remedies to address the issues that we had identified*"<sup>11</sup>. However, despite this, we have concerns about the momentum that is building to reform the regulatory landscape and particularly the LSB's focus in this business plan on supporting legislative change. At present that does not reflect a sound evidential base or the public interest.
19. For example, much of the analysis seems to be based upon assumptions around unmet legal need. As we have highlighted before, the scale of unmet legal need is unclear and difficult to measure and define. One significant measure of unmet need is the number of individuals who want to access legal services but cannot afford to do so, regardless of cost. For example in family law, the level of unmet legal need appears to have increased. This is not a market failure, but a matter of public policy with public welfare consequences resulting from cuts in legal aid funding. This is particularly acute when you consider access to employment tribunals and higher court fees, which has resulted in a large drop in claims and access to justice for many.
20. In 2004 Sir David Clementi did not find evidence of widespread regulatory failure, in fact he noted that: "*The current system has produced a strong and independently minded profession, operating in most cases to high standards, able to compete successfully internationally*"<sup>12</sup>. However, what he did note was an unduly restrictive system for both the profession and consumers that was complex to navigate and a lack of trust in complaints handling. At the time, and during the passage of subsequent legislation, the Society supported the main aims of the Act, indeed being the first to split our regulatory and representative functions, welcoming Alternative Business Structures and the creation of an independent ombudsman for complaints.

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<sup>11</sup> [Legal Services Market study](#), 15 December 2016, Competition and Markets Authority, pg. 22

<sup>12</sup> [Report of the Review of the Regulatory Framework for Legal Services in England and Wales](#), 15 December 2004, Department for Constitutional Affairs

21. At the time of the Clementi review the provision of legal services had not been substantively reformed for over 20 years. However, it is only just coming up to 10 years since the passage of the Legal Services Act and we now find ourselves in unprecedented social and economic circumstances with much uncertainty about the future.
22. As Sir David and successive Governments have noted, the legal profession in England and Wales is a substantial contributor to the GDP of the UK<sup>13</sup>. Given we face the biggest constitutional challenges in living memory, uncertainty for business should be reduced, not increased. For this reason we believe it would be unwise to review regulation of the legal sector at this time, nor is there demand from consumers or the profession for such reforms. Now is not the time to be undertaking a wholesale review of the regulatory landscape and jeopardise international trade opportunities and the legal profession's ability to compete. Instead we would encourage the LSB to use its resources to promote our jurisdiction internationally, which has continued to be at the forefront of innovative legal service provision worldwide.
23. We believe in a well functioning regulatory framework the LSB has a vital role to play in ensuring the regulatory objectives are met and that access to quality and independent legal advice is available to those that need it. The Society is committed to playing a constructive role as we meet the challenges ahead and we urge the LSB and Government to be mindful of the role legal services play in the economy and the importance of protecting the public interest, and balancing the competition objective appropriately.

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<sup>13</sup> [The Future of Legal Services: Putting Consumers First](#), White Paper, October 2005, Department for Constitutional Affairs