

**The Law Society of England and Wales’  
response to the consultation on  
the LSB’s proposed business plan for 2019/20**

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## Introduction

1. The Law Society welcomes the opportunity to respond to the Legal Services Board (LSB) consultation on the draft business plan 2019/20. The LSB's role in holding frontline regulators to account is critical in ensuring that high standards of regulation, education and training are maintained across the legal professions.
2. When the LSB set out its strategic objectives last year, we were broadly supportive of the proposed aims, but expressed a concern that they needed to reflect more closely all of the regulatory objectives prescribed in the Legal Services Act (LSA). We thought that the strategic aims did not apportion sufficient weight to promoting the welfare of consumers, the public interest, the rule of law, access to justice, or a strong independent diverse legal profession. We suggested that a broader and more balanced consideration of the regulatory objectives should lead to a greater focus on quality of legal services in the strategy. We continue to hold these views.
3. We suggest that the LSB should concentrate more on instilling greater stability and confidence in the legal sector during a time of change and uncertainty. The strategy acknowledged that the legal sector was going through a period of unprecedented change, driven by market and technological developments, changes in consumer expectations and behaviour, Brexit, and other regulatory reforms such as changes to Anti-Money Laundering rules, requirements for price transparency, and the General Data Protection Regulations. We remain apprehensive that this uncertainty is being compounded by significant changes driven by frontline regulators themselves, a problem that might be compounded yet further by the LSB's commitment to act "as an agent of change in the sector".
4. We remain uneasy about the cumulative impact of these changes on the profession and clients, and in particular the disproportionate impact on small firms and sole practitioners. There is a risk that constant regulatory change has an economic impact, as firms and solicitors adjust to and implement the requirements. This can have knock-on effects on clients who are likely to bear the cost of regulatory compliance.
5. Given the pace of change, and the uncertainty in the legal sector and wider economy, it is crucial that the LSB focuses on its core oversight functions of holding the frontline regulators to account, while providing challenge and support to the Legal Ombudsman.

## Q1 – Have we identified the most relevant developments in our external operating environment?

6. The business plan identifies most of the significant developments likely to affect the legal sector from a market, political, and more general perspective, and we agree that these matters should be factored into the LSB's considerations of how to approach their work over the coming year.

7. The number and sheer variety of developments show the scope of challenges confronting the sector and make evident the need for the LSB to exert a stabilising influence.
8. Last year we asserted that one of the most significant sources of uncertainty and risk for the profession, and the one over which the LSB can assert greatest control, is frontline regulators' ongoing push for regulatory reforms. We said that it was important for the LSB to take account of the regulatory uncertainty driven by these changes, setting out the particular confluence of circumstances that saw solicitors facing the prospect of a revised Handbook, new qualification requirements, new price publication requirements, and potentially changing vital client protections such as the indemnity insurance rules and the Compensation Fund; many of which the LSB has now approved.
9. Although the business plan mentions "ongoing programmes of significant regulatory reforms by the legal services regulators", including the Solicitors Qualifying Examination (SQE) and other changes coming out of the SRA's 'Looking to the Future' programme, we are not confident that the LSB fully appreciates the extent to which the reforms that they have already approved will affect the largest legal profession or the consumers of legal services.
10. Further reforms that have been consulted upon by frontline regulators, but not yet put to the LSB for approval, pose further risk of disruption and uncertainty (notably the SRA's proposed reforms to the Compensation Fund and solicitors' Professional Indemnity Insurance). Such reforms carry with them a very real potential for harm, but as yet they are without adequate empirical basis to justify the risk. Given that the LSB is best placed to control these developments, they should be given greater prominence in the business plan, discussed in greater detail, and when the time comes, subjected to far greater scrutiny.
11. We are still uncomfortable with the emphasis that the strategic objectives place the LSB working "as an agent of change", rather than reflecting on the current needs of the profession, consumers and wider society for stability, certainty and confidence in the rule of law – 'change for change's sake' is not in itself a positive value.
12. The strategic objectives are striving for even more change which risks exacerbating uncertainty for the entire legal sector. The Law Society believes that now is not the time to advocate further reforms of the system. Stability of the legal framework is key to ensuring public confidence in the rule of law, to providing certainty for the profession, and to maintaining the international competitiveness of the legal sector. It is not unduly alarmist to suggest that in a worst-case scenario where Britain crashes out of the European Union without a transition deal, a stable legal system will be an indispensable bulwark against social and political chaos.
13. Even in less extreme circumstances the problem would persist, because although the LSB rightly identifies factors likely to increase uncertainty in the market for legal services, its strategic objectives do not account for how the LSB intends to mitigate that uncertainty, or what indicators of success it will be looking for when evaluating frontline regulators' effectiveness in dealing with change and managing imminent risks.

## **Q2 – What are your views on our proposed five-year policy objectives?**

14. We would refer the LSB back to the answer we gave to this question in our response to last year's consultation on their five-year plan. There we suggested that the LSB should broaden

the focus of the strategy to adequately reflect all of the regulatory objectives set out in the LSA.

15. We remain concerned that the strategy does not sufficiently promote regulatory objectives such as access to justice, the public interest, the rule of law, a strong, independent and diverse legal profession, or – most concerning in light of recent LSB decisions – the protection of consumers.
16. We previously argued that in strategic objective 1 – “Promoting the public interest through ensuring independent, effective and proportionate regulation” – the LSB’s proposal to carry out work to “ensure that regulation remains proportionate and does not impose unnecessary burdens (for example when considering rule change applications)” fails to mention the public interest, or appropriate levels of consumer protection.
17. The LSB needs to send a clear message to frontline regulators that consumer welfare is central to its regulatory oversight work. and this should always be assessed when considering any rule change applications.
18. The need for such a strategic realignment is made evident by the LSB’s uncritical acceptance of the SRA’s Handbook reforms, which we believe are likely to weaken consumer protections and lead to client confusion. Under the new rules, solicitors will be allowed to practice outside of regulated firms or to operate on a freelance basis without vital redress protections for clients. For example, solicitors working outside regulated firms will not be required to hold mandatory professional indemnity insurance (PII) and provide clients with access to the Compensation Fund. While freelance solicitors will only need to maintain “adequate and appropriate” insurance. These changes place an unrealistic burden on clients to understand differences between regulatory protections arising from solicitors operating various models of practice.
19. Consumer research commissioned by the Law Society found that clients do not have a sophisticated understanding or awareness of the nuances of regulation. Many participants assumed all legal service providers were regulated in the same way, and when informed this was not the case the most common reactions were “shock, upset, outrage, concern and dissatisfaction”.<sup>1</sup> As a consequence of the changes that the LSB has approved consumers must now contend with the further complexity of different consumer protections and levels of regulatory control within a single legal profession.
20. Our research also demonstrated that educating clients about the differences in protection between different types of providers would pose a substantial challenge,<sup>2</sup> and the LSB must take adequate steps to ensure that any regulatory changes proposed by frontline regulators are in the public interest and satisfy the consumer protection objective.
21. The Legal Services Consumer Panel echoed these concerns, with reference to their own research into “information remedies”, when they commented on the SRA’s handbook reforms, saying:<sup>3</sup>

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<sup>1</sup> <https://www.lawsociety.org.uk/policy-campaigns/consultation-responses/documents/consumer-behaviour-research/>

<sup>2</sup> <https://www.lawsociety.org.uk/policy-campaigns/consultation-responses/documents/consumer-behaviour-research/>

<sup>3</sup> [http://www.legalservicesconsumerpanel.org.uk/publications/consultation\\_responses/documents/20180105\\_LSCP\\_Response\\_To\\_The\\_SRA\\_Handbook\\_Review.pdf](http://www.legalservicesconsumerpanel.org.uk/publications/consultation_responses/documents/20180105_LSCP_Response_To_The_SRA_Handbook_Review.pdf)

“The Panel is of the strong view that the reduction in consumer protections which accompany the SRA’s proposals cannot be mitigated entirely by relying on information remedies. It is simply unsuitable for this purpose.”

22. Given the LSB’s intention to review the Practising Certificate Fee and carry out a targeted review of non-regulatory permitted purposes, it is imperative that proper regard is given to all aspects of the LSA. We would remind the LSB of their own correct interpretation of the LSA which stated that the objectives were co-equal:<sup>4</sup>

“The regulatory objectives are not set out in any hierarchy in the Act. Indeed, any attempt to weight or rank them would be doomed to failure by the significant overlap and interplay between them. Rather we look at them as a collective whole[.] We will test our policy making against the regulatory objectives and root our regulatory action in them. This means that we must balance them in the particular circumstances of the issue that is under consideration because no single course of action is likely to deliver each objective.”

23. While this approach makes allowance for weighting priorities differently in certain instances, it cannot admit any longstanding policy which places some of the regulatory objectives above the others, as the five-year plan appears to do.

### **Q3 – Do you have any comments on our proposed business plan and work for 2019/20? Are there any workstreams that you disagree with? Is there any work that you think we should pursue that is not currently included?**

24. Our comments on the workstreams in the business plan are as follows:

#### ***Regulatory performance***

25. As part of its regulatory performance role we would request that the LSB increases the frequency, scope and capacity of its impact assessments. Where any areas are found to be any less than ‘satisfactory’ measures must be put in place to ensure the regulator improves its performance in a timely fashion. This would enable any new framework to be more robust and clear, providing a better understanding of its impact on vulnerable consumers and the profession. The LSB should follow-up on previously identified actions.
26. A call for regulators to make greater use of research in the development and evaluation of policy decisions is a unifying thread running throughout our response.

#### ***Internal Governance Rules review outcomes***

27. We are concerned that the newly proposed Internal Governance Rules (IGRs) do not set out a clear enough framework for settling future complaints, and may create a context in which disagreements are more likely to arise.
28. Some of the changes proposed in the consultation appear to us to be inconsistent with the LSA. In particular, the revised IGRs may not be consistent with Section 30 of the Act, which makes clear that it is “prejudice” which must be prevented by the IGRs. We believe that the IGRs as drafted would go far beyond the requirements of Section 30.

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<sup>4</sup> [https://www.legalservicesboard.org.uk/news\\_publications/publications/pdf/regulatory\\_objectives.pdf](https://www.legalservicesboard.org.uk/news_publications/publications/pdf/regulatory_objectives.pdf)

29. Another fundamental concern relates to the distinction drawn between “oversight” and “assurance”. We believe that limitations placed upon the Society would prevent it from carrying out the approved regulator role as intended by the LSA.
30. One of the aims of revising the IGRs is to achieve clarity, but we do not believe that the changes proposed would achieve such clarity.

***Review of Practising Certificate Fee (PCF) approval process, including targeted review of non-regulatory permitted purposes***

31. The Law Society is in favour of a fair and reasonable review of the PCF approval process, and the targeted review of non-regulatory purposes, especially if it can provide greater clarity on how various activities ought to be categorised.

***Increasing consumer transparency***

32. The new requirements for transparency following the Competition and Markets Authority (CMA)’s 2016 market study are a significant change for firms, and we remain concerned about the additional burden these changes impose on many firms in terms of cost and capacity. This burden is particularly high for small firms which are likely to have less capacity to dedicate to ongoing compliance.
33. We support the SRA’s light-touch approach to enforcement, and believe that firms will need time to bed-in the changes.
34. In the longer term the LSB would be well advised to consider conducting or coordinating research across the legal sector to determine how, and to what extent, these changes have affected the ways in which consumers are utilising legal services and if the consumer experience has improved as a result of these changes.

***Individual legal needs survey***

35. The Law Society supports evidence-based regulation, which entails making use of available market intelligence tools (e.g. market surveys, consumer research and economic reports) that enable robust assessment of cost, benefits, risk and opportunities of any given regulatory intervention and supports the decision to update the individual legal needs survey, in partnership with the LSB.
36. It is welcome that the LSB should place a value on this research and reassuring to read that the legal needs survey informs their own policy, as well as providing a resource for stakeholders. However, the Law Society is aware that issues other than cost can and do influence the decisions of people who may be in need of legal services, and would caution against a simplistic interpretation of survey results which places undue emphasis on the influence of cost as the factor creating unmet legal needs.
37. We are particularly concerned about the crude and misleading way in which the LSB used the survey’s findings when considering the SRA’s application to approve its handbook reforms, where it appears that an unsophisticated approach to the data may have encouraged the LSB to approve reforms that pose substantial risks to solicitors and their clients.

38. In particular, the LSB appears to have accepted, without challenge, the SRA’s argument that the proposal to let solicitors deliver services to the public from unregulated entities will reduce unmet legal need, and therefore improve access to justice. Yet the decision notice reveals that the available research was not marshalled effectively to inform the approval process:<sup>5</sup>

“The SRA contends that the proposal would remove a regulatory barrier which could facilitate innovation in the unregulated sector. This could promote access to justice by providing consumers with greater choice of provider, including unregulated providers who may be deemed to be more affordable. This will help address unmet legal need. With regards to unmet legal need, the Board took into account the LSB commissioned research findings which showed continued high levels of unmet legal need among small business and individual consumers. LSB research has also shown that in both 2016 and 2017, unregulated providers had significantly lower prices than solicitors for a standard will, an individual will, and lasting power of attorney.”

39. The fact that there are high levels of unmet legal need does not mean that a particular regulatory rule change will reduce this unmet legal need, and steps should have been taken to establish a better understanding of the likely impact of the SRA’s rule changes among this group of potential clients.

40. The datasets from the legal needs surveys are vast, and contain multitudes of data, including demographic information about respondents and details about their legal issues. Although that means that it is possible to gain detailed insights into the way that people make decisions when they are dealing with what might be a legal issue, it is also easy to find statistics that superficially bolster a policy decision that has already been made.

41. But, the fact that 43 per cent of respondents who decided to handle issues on their own did so without even looking into the potential costs of legal advice or assistance,<sup>6</sup> demands much more considered thinking about the mechanisms by which lower prices might induce consumers to engage more with the market for legal services.

42. The LSB should have categorised (or asked the SRA to categorise) the different reasons why people might have unmet legal needs, and which services they might be able to access more cheaply as a result of the proposed regulatory changes. If this could not be done using the highly detailed reports prepared by Ipsos MORI, it would still be open to the regulators to have the data interrogated by their own research staff (and reforms on the scale of the SRA handbook would certainly warrant this).

43. A relatively straightforward analysis would have demonstrated that the large number of people who cannot access legal services because of legal aid cuts would not be helped by the proposals, and that only a very small number might be encouraged to take up legal services as a consequence of the comparatively small cost savings that the proposal would be likely to deliver (if the solicitors even chose to pass them on).

44. But meanwhile, as a consequence of the reforms, it is possible that consumers who are seeking out the services of a solicitor because they believe that solicitors are better

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<sup>5</sup>[https://www.legalservicesboard.org.uk/what\\_we\\_do/regulation/pdf/2018/FINAL\\_Revised\\_LtTF\\_Decision\\_with\\_Full\\_Annex\\_.pdf](https://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/2018/FINAL_Revised_LtTF_Decision_with_Full_Annex_.pdf)

<sup>6</sup><https://www.lawsociety.org.uk/support-services/research-trends/documents/legal-needs-survey-online-survey-individuals-handling-legal-issues-may-2016/>

regulated, or have better client protections, are now to be exposed to new and greater risks. In circumstances like these it is easy to see how substantial losses for a few clients who cannot claim against the Compensation Fund, or are not covered by the traditionally high minimum indemnity limit of the SRA's minimum terms professional indemnity insurance, could end up outweighing the slim prospect of increased access to justice; it may even negatively impact on the willingness of people to seek legal advice, especially if it results in media horror stories. Research should be able to provide a fair indication of whether or not the potential benefits of regulatory reforms are sufficiently large and realistic to justify the risk.

45. We contend that it is not enough to commission research, but the LSB must use it intelligently to inform their decision-making. Failure to do so will lead to adverse consequences, beginning with the needless cost of carrying out research the results of which are not properly applied to policy decisions, all the way through to the potentially serious negative effects of policies that were wrongly implemented because of a failure to apprehend the true significance of the studies' findings.

### ***Responding to the regulatory consequences of EU exit***

46. The legal services industry is worth £25.8 billion to the UK economy and supports 354,000 jobs.<sup>7</sup> It is a key enabler for UK trade, investment and export, and this is largely due to the position of trust and respect occupied by the English and Welsh legal system internationally. The legal services sector is responsible for net exports worth nearly £4 billion, so any disruption of the system or its regulation could have a disproportionate negative impact on the economy. While this would be damaging at any time, it is a particularly acute concern in the circumstances of Brexit.
47. As well as a compliance challenge, Brexit brings with it another consideration, which is that it has focused attention upon the reputation of the jurisdiction in England and Wales. The widespread use of English law in international commerce, its highly skilled international workforce, the quality and efficiency of its courts and arbitral institution, the agglomerative efficiencies of financial and related professional services, and the mobility and flexibility of UK-based lawyers makes the UK a global legal services hub in direct competition with other jurisdictions. Continuing with a stable regulatory regime is an important factor in maintaining the current high reputation of this jurisdiction.
48. The legal services market is facing an unprecedented period of instability. Our legal services sector forecasts that Brexit is likely to have a significant negative knock-on impact on the legal sector. Because issues like Brexit are time-limited, we would argue that these risks and uncertainties should be managed before a far-reaching review of regulation is implemented.
49. Regulators, including the LSB, must be conscious of the need to promote the English and Welsh jurisdiction as a place to do business. Part of that is ensuring that we have a trusted and stable regulatory framework, and part of that is ensuring that the international perception of the framework remains positive.
50. Regulators will need time and space to make necessary changes to rules to react to, and prepare for, whatever the shape of the eventual Brexit deal.

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<sup>7</sup> <https://www.lawsociety.org.uk/support-services/research-trends/a-25-billion-legal-sector-supports-a-healthy-economy/>

51. The impact on firms of EU exit may be significant, and should be factored in when considering the cumulative effect of regulatory changes.
52. The future, mutual recognition (or reciprocity) may be a crucial factor in determining whether overseas markets remain open to English and Welsh firms. In that sense, regulators have a key role to play in being prepared to support that mutual recognition (e.g. of qualifications).

### ***Market evaluation exercise***

53. The Market Evaluation Exercise relies heavily on data shared with the LSB by the frontline regulators, but the quality of these datasets is variable. Frontline regulators may use different metrics which can frustrate direct comparisons between legal professions, and make it difficult to build a complete picture of the market in legal services.
54. The LSB wants to be data-driven in its decision-making, but it is hampered by the unavailability of comparable data from the frontline regulators.
55. There have been informal and piecemeal attempts to coordinate between research staff in regulatory and representative bodies, but such steps can only take us so far. If the LSB wants to better understand the sector that it regulates, and enhance its ability to make properly informed decisions, then it ought to give far greater thought to the steps that it could take to standardise at least core sets of data across the professions.
56. Making such data available to consumers – thoroughly analysed and presented in a single, easily comprehensible, whole market review of the regulated legal sector – would also mark a substantial step towards achieving the aspiration outlined in strategic objective 2, for the LSB to encourage “the frontline regulators to simplify their public-facing processes, and to develop more cross-regulator coherence in those processes, to build public confidence in navigating the sector”. By publishing and publicising reliable information about the performance of various segments of the market and various legal professions the LSB would empower people to make educated decisions about which legal provider is most likely to meet their needs.

### ***Ongoing competence***

57. The current system of assuring ongoing solicitor competence, which is termed Continuing Competence by the SRA, has been in place since 1 November 2016. The introduction of this was a big change for the profession as it removed requirements for a certain number of CPD hours and the requirement for courses with approved providers.
58. When applying to the LSB for the necessary rule changes, the SRA committed to actively reviewing and evaluating the new approach. A thematic review by the LSB of this process of implementation and the effectiveness of the continuing competence regime in ensuring competence would be welcome.
59. We agree with the LSB’s observation that as with all professional services, whilst consumers can usually evaluate the surface-layer quality of the legal services that they receive, they are often ill-equipped to make informed judgements about the technical quality of work.

60. A determination to ensure that practitioners were maintaining an appropriate level of relevant knowledge was one of the main reasons that there was traditionally a requirement for solicitors to supply information about their continuing professional development to their regulator.
61. The return of a requirement to provide 'evidence' of relevant education and training to the regulator could improve confidence in practitioners. It would also be more in line with recognised good practice in other professional bodies.
62. Solicitors in England and Wales are now alone among lawyers' in Europe, in having a requirement for continuing legal education (CLE), but without any rules or reporting requirements.<sup>8</sup> This discrepancy may put the profession at a relative disadvantage against their European counterparts when competing for business from well-informed international consumers in search of well-regulated lawyers.

### ***Public legal education***

63. Public legal education is important for the rule of law, access to justice, and the efficiency of the court system. People need to know what their rights are and how they can get help to enforce them. The wealth of information now available for free online has been shown to be of little use to most people, who struggle to locate or apply the information relevant to their problem.
64. A review of the public legal education landscape and how it could be improved would be welcome. There should be a focus on ensuring that the most vulnerable in society – including the elderly, the disabled, those without English as their first language – are catered for. In particular, there should be an awareness that over-reliance on technology to advance public legal education could further marginalise and disadvantage these groups.
65. Furthermore, we would remind the LSB that improved public legal education will not solve the problem of unmet legal demand. There are clearly parts of legal work which will always require a safety net of government funding to help people who cannot obtain legal advice at any cost point. Bearing in mind that the Ministry of Justice has suffered the deepest funding cuts of any government department,<sup>9</sup> we must make certain that improvements in the public understanding of the law are not used to justify reductions in government spending on legal services and legal aid. The Law Society continues to campaign on this vital issue, and we call on the LSB to join us in doing so.
66. Indeed, on this latter point, the Ministry of Justice has recently announced its intention to carry out a variety of work relating to legal aid. They plan to:<sup>10</sup>
  - Review the legal aid means test (by summer 2020);
  - Bring forward proposals to expand legal aid to include separated migrant children in immigration cases (by spring 2019);

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<sup>8</sup> There are a few bars without any CLE requirement, but our members are unique among those who are required to complete CLE.

<sup>9</sup> <https://www.theguardian.com/uk-news/2017/nov/22/public-services-face-real-terms-spending-cuts-of-up-to-40-in-decade-to-2020>; <https://www.lawgazette.co.uk/law/budget-no-end-to-austerity-for-justice/5068121.article>; <https://www.newstatesman.com/politics/uk/2018/06/crumbling-britain-quiet-decline-english-courts>

<sup>10</sup> <https://www.lawgazette.co.uk/news/8m-pledged-for-innovative-and-lip-support-as-laspo-review-published-/5069182.article>

- Bring forward proposals to expand legal aid to cover special guardianship orders in private family law (by autumn 2019);
- Work with the Law Society to explore an ‘alternative model’ for family legal aid;
- Consider introducing an emergency procedure for urgent matters to access the exceptional case funding scheme (by the end of 2019);
- Remove the mandatory requirements from the telephone gateway for debt, discrimination and special educational needs, and reinstate access to immediate face-to-face advice (by spring 2020).

67. The Law Society has already committed to assisting with some of this work, but support from the LSB could prove valuable in securing the future of legal aid. In particular, the LSB’s ability to help coordinate the responses of relevant legal professions, and to provide a clear moral voice for protecting and promoting the public interest and improving access to justice, could do much to ensure that this indispensable resource is strengthened and retained.

68. As discussed in the “Market evaluation exercise” section (above), the LSB could coordinate between frontline regulators to provide comprehensive and comprehensible data about the state of the legal services market, enabling consumers to make properly informed decisions.

69. The CMA released the final report of its legal services market study, in December 2016. The report found that the legal services market was not working well due, in its view, to the lack of upfront information for consumers. The CMA believes that giving more information to consumers will allow them to make more informed choices about the most appropriate legal services for their needs. To that end, the report recommended all frontline regulators act to improve the information available.<sup>11</sup>

70. The SRA Transparency Rules, which came into force on 6 December 2018, are a result of this.<sup>12</sup> The rules require firms offering specified services to publish price and service information. As part of our response to the consultation on these rules, we commissioned our own consumer research, and discovered that simply publishing information online may confuse rather than aid consumers, especially given that the prices published will not reflect the reality of many clients’ situations.<sup>13</sup> The new rules impose a significant burden on firms, and we question whether the requirements will result in the outcomes that the regulators intended.

71. Our research also found that consumers do not necessarily understand the implications of their choice of legal advisor on the consumer protections available to them, including the redress provisions, should there be a problem with the service they receive.

72. The SRA’s new Transparency Rules try to address this, somewhat. All firms, regardless of area of practice, will be required to publish details of their complaints procedure and display the SRA’s digital badge. The digital badge will be a key way to validate that a firm is regulated by the SRA. It is intended that this will give consumers confidence when purchasing services from a regulated firm displaying the badge, (although it will take some time for the new system to bed-in). The digital badge is now available for firms to use but display of the digital badge will not be

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<sup>11</sup> <https://assets.publishing.service.gov.uk/media/5887374d40f0b6593700001a/legal-services-market-study-final-report.pdf>

<sup>12</sup> <https://www.sra.org.uk/documents/solicitors/sra-transparency-rules.pdf>

<sup>13</sup> <https://www.lawsociety.org.uk/policy-campaigns/consultation-responses/documents/consumer-behaviour-research/>

mandatory until Spring 2019 (date to be confirmed). The Council for Licensed Conveyancers have also taken steps to implement similar assurances for the users of licensed conveyancers.

73. If there is any chance of realising strategic objective 2's aspiration of making it easier for consumers to access services and get redress, it will require the LSB as the only organisation with the regulatory authority and breadth of vision to encompass all of the legal professions, to be considerably more proactive in the collection and publication of market data.

### **Regulatory approaches to technology**

74. We support the LSB's decision to continue its work looking at the regulatory implications of developments in technology in legal services. Indeed, the Law Society has been engaged in similar work of its own, and would be happy to share insights with the LSB.
75. For instance, the Public Policy Commission's final session is on the 14th February 2019.<sup>14</sup> The Commission has investigated the applications of algorithms to the justice system, whether additional controls or mechanisms are needed to protect human rights and cultivate trust in a digitally enabled justice system, and to gain insights into state-of-the-art technologies, anticipate how they may be applied to the justice system and gather evidence for a principle based regulatory approach to algorithms which maximises their positive social impact.
76. The business plan says that the LSB "will promote wider use of regulatory sandboxes in the sector", going on to note that the SRA is already using waivers to "allow providers a 'safe space' to develop innovative ideas that could test regulatory boundaries".
77. If there is to be greater use of experimental arrangements, there must be full transparency and such arrangements must not be used to create unlevel playing fields. Waivers that put consumer protections at risk should be treated with extreme caution.

### **Other work that the LSB should pursue**

#### **Evidence and accountability in regulatory reform**

78. By overseeing the work of all frontline regulators, and having the ultimate authority to determine whether rule change applications should be approved or rejected, the LSB must ensure that it is acting as an appropriate check and balance on the proposals of the frontline regulators. It is understandable that the LSB might not have recognised the risks that its own conduct poses to the legal sector, but we are wary that an increasingly *laissez faire* approach to evidence on the part of regulators poses a threat to the integrity of the legal professions and the welfare of the clients they serve.
79. In the introduction to this consultation response we were clear that to achieve the regulatory objectives of the LSA, it was increasingly important for the decisions of the LSB and frontline regulators to be robust and well-evidenced, and for them to take account of the cumulative impact of all the changes on the legal professions and on the consumers of legal services.
80. The LSB has the opportunity to ensure evidence-based regulation of legal services, the absence of which we believe is currently a significant weakness. To put it simply, if a

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<sup>14</sup> <https://www.lawsociety.org.uk/policy-campaigns/articles/public-policy-technology-and-law-commission/>

frontline regulator puts forward a proposal for a regulatory change without providing evidence or even projections of its likely impacts, then the LSB must ensure that the changes are not approved.

81. To do otherwise would remove any incentive for frontline regulators to assess likely impacts or produce risk assessments. More importantly, without requiring evidence (or at least reasonable estimates) of costs, benefits, risks and opportunities, it is impossible for the LSB to have any confidence that a proposed rule change will promote the regulatory objectives.
82. The LSB is aware of this responsibility, as it outlined in its decision notice approving changes in the rules governing firms switching from being regulated by the SRA to one of the other frontline regulators:<sup>15</sup>

“The LSB’s consideration of an application is not a negotiation with an approved regulator, it is an assessment of finished proposals against the refusal criteria contained in paragraph 25(3) to Schedule 4 of the Act. We expect an application to be complete and, unless there are valid reasons, there should be no changes to critical elements part way through the LSB’s assessment. We urge the SRA (indeed all regulators) to ensure that before submitting an application, all key elements, whether or not they are regulatory arrangements (and in particular mechanisms that are intended to mitigate risk to consumers), are settled.”
83. But despite this cogently stated, and unquestionably correct explanation of how the approval process ought to work, the final sentence of the paragraph is in fact a tacit admission that in this instance the application on which the decision was based was not complete, and that the mechanisms that were “intended to mitigate risk to consumers” were not “settled”.
84. More critically, the notice stated that the “LSB notes that the SRA’s application did not provide an assessment of the precise extent of any risk to consumers”, and yet despite these manifest omissions and failures on the part of the frontline regulator, the LSB went on to approve the rule change, on the following basis:<sup>16</sup>

“Having taken the above into consideration, the LSB made a carefully balanced judgement against the refusal criteria in paragraph 25(3) to Schedule 4 of the Act and concluded that there is insufficient reason to refuse the application solely on the basis of potential harm to consumers, when there is no evidence that the change would lead to significant consumer risk.”
85. It appears that in this instance, the LSB wrongly interpreted the lack of a risk assessment as a lack of risk, and this after it explicitly noted the absence of such research from the SRA’s rule change application.
86. We believe, and are entitled to expect, that the LSB would hold to its own governing principles, as set out above, that a risk assessment, including a transparent mitigation plan, should be a pre-requisite for the LSB to even consider approving any regulatory reforms.
87. Indeed, the LSB recognises the need for frontline regulators to make decisions in an open and accountable fashion. We know this because in its recent regulatory performance

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<sup>15</sup>[https://www.legalservicesboard.org.uk/what\\_we\\_do/regulation/pdf/2017/SRA\\_PII\\_Switching\\_Regulators\\_Decision\\_Notice\\_FINAL.pdf](https://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/2017/SRA_PII_Switching_Regulators_Decision_Notice_FINAL.pdf)

<sup>16</sup>[https://www.legalservicesboard.org.uk/what\\_we\\_do/regulation/pdf/2017/SRA\\_PII\\_Switching\\_Regulators\\_Decision\\_Notice\\_FINAL.pdf](https://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/2017/SRA_PII_Switching_Regulators_Decision_Notice_FINAL.pdf)

assessment of the SRA, the LSB pointed to an outcome requiring regulators to be transparent about their own decision-making, their regulatory approach, the risks faced by regulators and their regulated communities, how those risks are mitigated, performance, the market, and financial costs. It called for the:<sup>17</sup>

“(1) SRA to review current publication policy and ensure that supporting evidence for decisions taken by the Board or Executive which impact on the regulated community is published as soon as possible after decisions are taken. This should include Board papers which should only be withheld or have content removed in limited circumstances.

“(2) SRA to review the transparency of its performance information (e.g. KPIs and performance reports, complaints about the regulator etc.) and that this information should be published as soon as possible after Board consideration.”

88. The LSB should also follow up on commitments made by frontline regulators in their applications, to carry out evaluations of the effects of rule changes if they are approved. It is insufficient for the LSB to accept on trust that assessments will be made; they should insist on seeing the results, and build in remedial actions to be taken if the commitments are not kept, or if the assessments show that the reforms are delivering outcomes that are, on balance, worse than those under the former regulatory arrangements (for more on this point, see the example of the SQE reforms, which we address in our response to Q5, below).

89. Given the constraints imposed on the LSB by ongoing austerity measures we are sympathetic towards the LSB and understand that it cannot be easy to find the resources to assess the research that frontline regulators include in their applications, but to accept applications where a frontline regulator has singularly failed to provide evidence is simply inexcusable.

### ***Harassment in the workplace***

90. One of the major social and political issues of the last year and a half has been the radical shift in public dialogue and attitudes around sexual harassment and abuse, especially in an employment context. This has been precipitated by the high-profile movements, Time’s Up and #MeToo, spearheaded by figures in the American entertainment industry.

91. #MeToo may no longer be making daily headlines, but its underlying causes and perhaps thousands of historical cases are still to be addressed, and the LSB should use its oversight powers to encourage frontline regulators to direct their attention to this important matter. Specifically, the LSB should seek reassurance that plans are being developed and implemented to:

- minimise the risks and improve the reporting of sexual harassment and abuse in the workplace;
- ensure that individuals working at all levels of all regulated legal professions are not adversely affected by such behaviours;
- safeguard the equality and diversity of the legal professions as a whole;
- take the appropriate steps to remedy past wrongs;
- avoid potential negative impacts on public trust; and
- recognise the considerable public interest in protecting victims and holding perpetrators to account.

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<sup>17</sup>[https://www.legalservicesboard.org.uk/Projects/developing\\_regulatory\\_standards/pdf/2019/FW\\_Web\\_up\\_date\\_for\\_12pm\\_on\\_Thursday/SRA - current performance assessment.pdf](https://www.legalservicesboard.org.uk/Projects/developing_regulatory_standards/pdf/2019/FW_Web_up_date_for_12pm_on_Thursday/SRA_-_current_performance_assessment.pdf)

92. The issues of sexual harassment and abuse have particular salience in the legal sector. For instance, solicitors have to comply with their regulatory and ethical duties when advising clients on the use of non-disclosure agreements, including those covering sexual misconduct. They also have a duty to act appropriately themselves and, if they have management responsibilities, to foster a professional environment.

**Q4 – Please identify any elements of our business plan that you think present an opportunity for more detailed dialogue and/or joint working between your organisation and the LSB:**

93. Some of this has been addressed in our answer to the previous question, but we are always happy to work with the LSB in support of accomplishing the LSA's regulatory objectives.

***Review of Practising Certificate Fee (PCF) approval process, including targeted review of non-regulatory permitted purposes***

94. The yearly experience of justifying the funding of our various activities within the statutory requirements of the LSA means that we are well-placed to share advice and experience with the LSB, to help them with their review of the PCF. We would be interested in feeding into this work at the scoping stage.

***Individual legal needs survey***

95. As detailed above, we are working together with the LSB to produce the individual legal needs survey.

***Responding to the regulatory consequences of EU exit***

96. With our office in Brussels and expertise in promoting the services of English and Welsh solicitors internationally, we are determined to do what we can to ensure stability and the good standing of the profession and legal system throughout the process of Brexit, and through whatever eventuates on the other side, to ensure that the pre-eminent position of the solicitors' profession globally is not adversely affected, either economically or in terms of reputation.

***Market evaluation exercise***

97. The Law Society carries out regular surveys of its members and other pieces of research, and we are willing to share our research to avoid duplication, reduce costs, and inform the LSB's policy making.
98. An example of the sorts of data information that we have, which might be of use to the LSB, includes results from a series of annual surveys that examine the state of the market for solicitors' professional indemnity insurance. These data provide a record of changes in PII, and they would be a useful resource to help the LSB gain a better understanding of how the market works should the SRA make an application to overhaul the existing set of consumer protections.

99. We would also be willing to work with the LSB to examine whether it would be feasible to develop a standardised core set of data, which would be collected in common by all frontline regulators, improving the capacity for regulators and consumers alike to make meaningful comparisons across the different regulated legal services available in England and Wales. Such a development would be in the spirit of transparency.

### ***Ongoing competence***

100. Our Education and Training Committee concentrates expertise from academic and practicing lawyers. It possesses a deep knowledge of legal education and training in general, and takes a special interest in the issue of ongoing competence. Indeed, in previous years much of the Committee's agenda was filled with monitoring and influencing the requirements of the regulator's CPD programme, to ensure that solicitors kept abreast of important developments in relevant areas of practice, and that this in turn would provide a degree of assurance that the services they provided would be of a consistently high quality.
101. The Committee maintains contact with key figures and organisations across the legal sector in England and Wales, the rest of the UK, and internationally, taking in a wide range of professions and jurisdictions, and furnishing them with a unique vantage point to survey developments in the field.
102. We would be happy to offer the Committee's assistance to the LSB at all stages of their work on ongoing competence.

### **Q5 – Please provide comments regarding equality issues which, in your view/experience, may arise from our proposed business plan for 2019/20:**

103. The Law Society is dedicated to the principles of the Equality Act and we consider equality to be an integral part of the profession and the legal sector as a whole. We developed an Equality, Diversity and Inclusion Framework 2016-19 to assist our members and remain willing to share our experience in this area with the LSB.<sup>18</sup>
104. In addition, we expect the LSB's strategy to ensure that any regulatory change proposed by frontline regulators has a positive impact on the equality and diversity of the profession.
105. One important consideration is the disproportionate burden that frequent or substantial regulatory changes place on small firms. Practitioners from minority ethnic communities, for instance, are overrepresented in this sector, but small firms often struggle to keep up with the demands of regulatory reforms, because they lack the resources of larger organisations. Given those circumstances, there is a real risk that regulatory churn could constitute a form of indirect discrimination against practitioners from non-traditional backgrounds.
106. We have also highlighted the importance of understanding the diversity implications associated with the introduction of the SQE, and mitigating any diversity risks, which we

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<sup>18</sup> <https://www.lawsociety.org.uk/about-us/corporate-responsibility/equality-diversity/equality-diversity-and-inclusion-framework-2016-19/>

outlined in our letter to the LSB in January 2018, at the time it was considering the SRA's application on the SQE.<sup>19</sup>

107. The LSB's decision notice states that, "it will be important that the EDI is updated as the SQE is developed and that the proposed mitigating actions are followed through. The LSB will want to review an up to date version of the EDI when the SRA applies for approval of the additional regulatory arrangements that are required to give effect to regulation 1.1(a)."<sup>20</sup> It is essential that the LSB follows through on this.
108. Elsewhere in the decision notice the LSB states that, "the regulations will only be brought into force once the SRA's Board is satisfied that SQE assessments represent value for money. In addition, the application records that one of the desired outcomes of the SRA's changes is to 'remove artificial and unjustifiable barriers' to qualification. It is difficult to see how this outcome would be achieved if the changes resulted in increased costs of qualification."<sup>21</sup> This will be a key factor for both the SRA and LSB to monitor.
109. The SRA should ensure that costs are not increased for any aspiring solicitor, but also that funding and loans are available for all those seeking to enter the profession. These will be needed to enable many to take the preparatory courses and to cover the costs of the assessments. If this issue is not resolved, it will constitute an unjustifiable barrier to entry to the profession and the SRA Board should not agree the policy. Likewise, the LSB has a responsibility to ensure that the requirements set out in the decision notice are met, and must refuse any application which does not provide clear evidence of how this has been done.
110. The Law Society has long promoted and supported a diverse legal profession, and we are committed to ensuring diversity of all kinds, but under the presidency of Christina Blacklaws we have had a particular focus on the issue of women in leadership roles. In March, we will be holding a major event to celebrate International Women's Day 2019. The theme of the event is inspiration and action in the workplace, and it will include a panel of distinguished speakers discussing the interim findings of research conducted as part of our Women in Leadership in Law project. It will also feature the launch of the Law Society's report on the barriers and perceived solutions to gender balance in the legal profession, following a series of roundtables held in the UK and internationally with senior women and men working in the legal sector.<sup>22</sup> Our international symposium, in June, will consider the related issue of the power of gender equality to transform the business of law.<sup>23</sup>
111. It is a century since the Sex Disqualification (Removal) Act was passed, allowing women to qualify as solicitors. Since 1990 women have represented over 60 per cent of new solicitors, and our Annual Statistics report for 2017 revealed there are now more women than men practicing as solicitors.<sup>24</sup>

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<sup>19</sup> [https://www.legalservicesboard.org.uk/what\\_we\\_do/regulation/pdf/2018/SRA\\_SQE\\_Regulations\\_-\\_TLS\\_letter.pdf](https://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/2018/SRA_SQE_Regulations_-_TLS_letter.pdf)

<sup>20</sup> [https://www.legalservicesboard.org.uk/what\\_we\\_do/regulation/pdf/2018/FINAL\\_decision\\_notice.pdf](https://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/2018/FINAL_decision_notice.pdf)

<sup>21</sup> [https://www.legalservicesboard.org.uk/what\\_we\\_do/regulation/pdf/2018/FINAL\\_decision\\_notice.pdf](https://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/2018/FINAL_decision_notice.pdf)

<sup>22</sup> <https://events.lawsociety.org.uk/ClientApps/Silverbear.Web.EDMS/public/default.aspx?tabid=37&id=2300&orgId=1&guid=0529bdd1-5e81-4ad5-893c-c6648a8bfefe>

<sup>23</sup> <https://www.lawsociety.org.uk/international-symposium-2019/>

<sup>24</sup> <https://www.lawsociety.org.uk/support-services/research-trends/annual-statistics-report-2017/>

112. Yet despite these advances, women are not becoming partners in equal proportions to men. Our statistics show that of the approximately 30,000 partners in private practice, 72 per cent are men and only 28 per cent are women. Women over the age of 35 are leaving the profession, often at the point when they have the skills and experience to become partners in firms.<sup>25</sup>

113. Therefore, while the position of women solicitors has improved, gender inequality remains a relevant issue. We do not know the extent to which sexual harassment and abuse might be impeding the advancement of women in the legal sector, or influencing their decisions to leave, but we owe it to the women who are the future of the legal professions to find out.<sup>26</sup>

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<sup>25</sup><https://events.lawsociety.org.uk/ClientApps/Silverbear.Web.EDMS/public/default.aspx?tabid=37&id=2300&orgId=1&guid=0529bdd1-5e81-4ad5-893c-c6648a8bfefe>

<sup>26</sup> The Law Society recognises that research elsewhere has shown that it is not only women who are subjected to sexual harassment and abuse, and we would of course want to protect all of our members; our point here is that from an equality and diversity perspective it is women who are affected disproportionately.