



**A RESPONSE BY
THE CHARTERED INSTITUTE OF LEGAL
EXECUTIVES
AND
ILEX PROFESSIONAL STANDARDS LIMITED**

**DRAFT: STRATEGIC PLAN 2012/15
BUSINESS PLAN 2012-13**

**A CONSULTATION ON LSB'S STRATEGIC
PRIORITIES FOR THE PERIOD 2012-15 AND
OPERATIONAL BUSINESS PLAN FOR 2012-13**

DATE: 16 MARCH 2012

Introduction

1. This response represents the joint views of The Chartered Institute of Legal Executives (CILEx) an Approved Regulator under the *Legal Services Act 2007 (the 2007 Act)*, and ILEX Professional Standards Limited (IPS), the regulatory body for 22,000 members of CILEx. The consultation was separately considered, in the case of CILEx by a committee comprising of the President and the Vice President together with a number of Council members; and in the case of IPS its Board. The outcomes of those respective considerations were exchanged and with no significant difference of opinion between the two organisations, a joint response is tendered. For the purposes of this discussion document, 'we' is used to mean both CILEx and IPS unless the context suggests otherwise.
2. CILEx and IPS promote proper standards of conduct and behaviour among Chartered Legal Executives and other members of CILEx. We aim to ensure CILEx members are competent and trusted legal practitioners and are fully aware of their obligations to clients, colleagues, the courts and the public. We aim to help good practitioners stay good and improve throughout their careers and to ensure the public know the quality of work Chartered Legal Executives can provide.
3. We welcome the opportunity to comment on proposals put forward by the Legal Services Board (LSB) on its strategic priorities for the period 2012-15 and its operational business plan for 2012-13. The consultation paper is wide ranging and we hope the observations below may be of value to the LSB and help to inform its Plan.

Achievements

4. We recognise the LSB's major achievements in the first three years of operation. The LSB has worked with Approved Regulators (ARs) to:
 1. Embed independent regulation with the ARs;
 2. establish a new complaints handling scheme

via the Legal Ombudsman service and its work on first tier complaints handling; and

3. Establish the framework for the introduction of Alternative Business Structures (ABSs).

5. From the outset, CILEx and IPS have worked hard to ensure compliance with all the rules and timescales set out by the LSB. This is demonstrated in the work undertaken to comply with the Internal Governance Rules (IGR), which was a significant achievement for both CILEx and IPS. To this end, we have endeavoured to ensure a positive working relationship with the LSB and we are pleased to note that we are the only AR with a “clean bill of health” in respect of the IGR. It is our aim to continue to work closely and positively with the LSB for the purpose of ensuring compliance with the regulatory objectives as set out by the *2007 Act*. That said, we are somewhat disconcerted by one or two of the ARs being allowed persistently to fail to comply with the prescribed rules. At the risk of repetition, we fully subscribe to the view that oversight regulation should be proportionate to the actual risk that an AR poses. However, there comes a time when the LSB needs to be seen to be acting robustly when it comes to continued non-compliance or resistance to change. We are of the view that the LSB needs to actively deal with these ARs, otherwise “regulation that cannot be enforced is not just ineffective; it may actively harm businesses who do their best to comply, when their competitors fail to do so”¹.

LSB’s vision and approach

6. In moving forward, we recognise the challenges facing the LSB as it moves toward the new world of ABSs, reviewing designations and looking to grant new rights to regulate wider reserved activities. The LSB Business Plan represents important steps in the continuing activities to comply with the regulatory principles set out in section 1 of the *2007 Act* and how these principles underpin

¹ Reducing Regulation Made Simple: “Less regulation, better regulation and regulation as a last resort” at Para 57; Better Regulation Executive.

the work of the LSB. We also share the LSB's approach in ensuring that regulation is proportionate: reduced where possible to remove unnecessary barriers to delivering the regulatory objectives and imposed only where necessary to support the consumer and/or public interest.

7. We are particularly interested and pleased to see the LSB place an emphasis on breaking down barriers. Removing barriers to entry to reflect our communities is vital in the need to continue to deliver effective justice. CILEx has thrived for almost 50 years in breaking down barriers in order to ensure access to all, regardless of social background or status. We welcome such measures and look forward to working with the LSB in these areas of common interest.
8. The protection and promotion of the public interest, in its widest sense, must inform everything that the LSB seeks to achieve including "work designed to stimulate a growing and improving market for legal services". Proportionate regulation is in the public interest, and too great a regulatory burden is not. The latter would in fact stifle growth. It is unclear what is meant by 'market failure'. We would welcome clarification.
9. It must also be remembered that the LSB and the ARs are also charged with securing the regulatory objectives of supporting the constitutional principle of the rule of law and improving access to justice. These objectives may be more difficult to articulate in terms of policy objectives (and this may explain the comparatively sparse references in the draft Business Plan), but they must not be overlooked or their importance diminished. Indeed, the government made clear during the passage of the Legal Services Bill that the "objectives should not be weighted in any way².

² Legal Services Bill Deb 12 June 2007 col. 13-14.

Strategy 2012-15: Strategic priorities

The LSB has set the following three strategic priorities for the next three years:

1. Assuring and improving the performance of approved regulators;
2. Helping consumers to choose and use legal services with confidence; and
3. Helping the legal sector to flourish by delivering only regulation that address risks.

10. Regarding the first strategic priority - to assure and improve the performance of approved regulators. Whilst we accept that robust procedures must be in place for new applications for designations, we are of the view that adopting a "tough minded approach" to such applications is inconsistent with the better regulation principles. The better regulation principles are designed to free up businesses from unnecessarily burdensome regulation, and simplifying the complex regulatory system, can free up the capacity they have to innovate, diversify and develop. Striking the right balance - a level of regulation that promotes competition and stability without impinging on businesses ability to operate is more in keeping with the better regulations principles as opposed to a the adoption of "tough minded" approach. We are of the view that the approach should be proportionate and targeted. Demonstrable capability and capacity is very much dependant on the quality of recruitment conducted by the organisation. For example, when the Solicitors Regulation Authority (SRA) was set up, it was a new organisation, but the SRA recruited well in order to ensure capability and capacity.

11. It is fair to say that this strategic priority has been set to ensure that all ARs regulate at a high quality. In order to do this low quality regulation needs to be targeted and improved and that means ARs gaining insight into the quality of regulation they carry out in comparison to what is expected.

12. In the same way that ARs have been given time to comply with the rules on independent regulation, ARs should also be given time to raise and improve the standard of regulation they deliver. Regulation of the legal services market will be modernised through all ARs working towards providing high quality regulation in every area. In order for the market to modernize in this way, it is essential the LSB avoids inadvertently adopting an unduly detailed approach to oversight and a "one size fits all" approach.
13. The second strategic priority – helping consumers to choose and use legal services with confidence, is primary to a modern legal services market. We agree that it is important that ARs understand the diversity of the consumers of those they regulate. It would be helpful if the LSB could provide further details of work taking place in this area. Furthermore we would welcome any help the LSB could provide in this area.
14. CILEx is committed to ensuring that consumers are aware that the term 'lawyer' is not restricted to solicitors and barristers. When more alternative business structures are in place with different legal professionals and non-lawyers working together the confusion amongst consumers could be significant. As drafted, the strategy does not appear to address this potential difficulty.
15. We note that the LSB proposes that its work on the scope of regulation; education and training; and delivering outcomes focused regulation across the whole legal market will provide further opportunities to make sure that regulation is in place only where it can be justified against real risks. It is unclear from the consultation, how much the LSB will call into question the existing arrangements of ARs. Any requirements set in this area need to be proportionate to the regulator and to the clients they serve.
16. We note that the LSB will evaluate the impact of the Legal Services Act 2007 and the LSB's interventions when it produces its Annual Report for 2010/11.

17. We would like to comment on the 17 outcomes that will be used to measure improvements in the legal services market. Outcomes need to be measurable if they are to demonstrate improvements and it is unclear how some outcomes listed will be measured. For example, under the heading “consumer” the outcome is listed to be “a higher proportion of the public are able to access justice than in 2009”. We are at a loss as to how the LSB can objectively measure this as an outcome, and is far beyond the LSB’s ability to produce this measure in light of the impending legal aid cuts and the proposed changes to the civil justice system. For example, funding for legal aid is already capped.
18. Moreover, an efficient legal aid system goes beyond frontline providers of legal services. There also needs to be consideration of the court systems and outside stakeholders: these are beyond the control of the LSB.
19. We share the LSB’s commitment to ensure that the diversity of the legal profession is more closely aligned to the client population than in 2009. This is an area in which CILEx is fully committed and recognised by Parliament as a “profession that draws from a wider social background than other parts of the profession ... something that others could learn a lot from”³. We continue to work on a wide range of policies and initiatives which allow people to enter the profession, thereby increasing social mobility.

Business Plan 2012-13

1. Regulator performance and oversight

Standards and performance

20. We note the LSB’s planned work on developing standards and performance. This work was outlined in the LSB’s consultation *Developing Regulatory Standards*, in 2011. We plan to fully engage with the assessment. That said, we are of the view that it would be helpful for consumers, thus in the consumer interest if the LSB

³ Hansard HL col 1687 (5th April 2011) per Baroness Gale

could work on information that outlines what certain members of the legal profession can and cannot undertake, not just in relation to CILEx members, but all legal professionals. It is our view that the LSB is best placed to press the government to tackle this issue.

Thematic reviews

21. We note, during 2012/13, the LSB plans to carry out thematic reviews into immigration, conveyancing and appeals mechanisms. We would welcome further details on those reviews particular the review into conveyancing. Other areas, for example, employment law appears to have a much greater need for review, where more and more cases are being taken on and is an area currently not reserved or regulated.

22. We would also welcome clarification on whether the review of appeals mechanisms will solely be related to ABS appeal mechanisms or wider.

Ensuring effective redress for consumers

23. It is noted that the LSB expects both the Legal Ombudsman (LeO) and the ARs to maximise the use of information provided by complaints as a vehicle to drive lasting improvements in complaints handling and service provision. This is reinforced at paragraph 36 of the proposed Plan where it states that 'information from complaints can be crucial evidence for the purpose of continuously promoting competition and consumer protections in a changing environment.' We accept that provision of such information could be a useful tool in helping consumers decide whether to use a particular legal services provider and to drive improvements to service provision. We are not convinced, however, that it would actually promote competition. In any event, the right balance needs to be struck in the use of such information to drive through quality changes and promote competition, which is a regulatory objective in the 2007 Act. The LSB needs also to recognise that another important purpose of an effective complaints procedure is the building of public confidence and trust.

24. It would also be helpful if more detail was provided on how the LSB reviews the OLC's assessment of the LeO's performance.
25. We agree that ARs must ensure that their regulatory arrangements ensure protection and promotion of the public interest and the interest of consumers. We would welcome more detail on the rolling annual review planned by the LSB to assess how ARs demonstrate that their regulatory arrangements achieve the outcomes that consumers require.
26. We are pleased that the LSB has recognised that "special bodies" under the *2007 Act* will also need to be authorised and regulated once the transitional protection applicable to such bodies comes to an end. Consistency of regulation in the whole sector offering "reserved legal activities", including not for profit agencies, is vital in order to maintain public confidence. That said, we also note that no firm commitment has been made even though the rest of the legal sector has been brought within the regulatory sphere.
27. We note the LSB's plans to commission specific advice from the Legal Services Consumer Panel (LSCP) in a number of areas. We would be very interested in the advice the LSB receives from the LSCP on consumer protection and hope that the advice will be published and available to ARs.
28. Paragraph 41 is unclear. The LSB states that confidence and consistency in regulation will create a market that is attractive to investors but provides no reasons as to why that would be the case. We agree with the principle; but each profession has its own needs and requirements. As long as the minimum standards in terms of consumer outcomes are met, uniformity is unnecessary. Furthermore, striving for consistency in regulation could go against the principles of an evidenced risk based approach to regulation where the risks may differ between approved regulators and the communities they regulate.
29. We are pleased to note the recognition, at paragraph 49, that the LSB should act as a licensing authority for the purposes of section 73 of the *2007 Act* only as a

measure of "last resort". In view of this we feel it is inconsistent and wasted expenditure to develop a scheme to "be ready to fulfil this role". This is a role that can be currently fulfilled by the SRA or the Council of Licencing Conveyancers (CLC), and is one that CILEx and other ARs wish to offer in any event.

30. We welcome the LSB's approach to CRB checks in relation to ABSs and its commitment to work with the MoJ and ARs in developing a consistent approach. We look forward to working with the LSB to develop this approach further.

2. Strategy development and research

Reviewing the scope of regulation

31. During the year the LSB will be investigating the scope of regulation. This will consist of developing recommendations on will writing, probate activities and estate administration for consultation, developing responses to recommendations received in responses to its July 2011 Discussion Paper and investigating the evidence of problems and causes of problems in the chosen areas of investigation. We are disappointed that the LSB appears not to be taking up the opportunity and challenge to conduct a proper review of the basis for reservation across the board. This is an opportunity missed: a continued piecemeal approach can only lead to greater problems in the future.

32. The LSB states that it will work to find the right balance of regulation. When introducing new regulation, the LSB needs to consider fully the transitional arrangements required and how existing providers are accommodated.

33. We would be interested to know what 'other markets' the LSB has received recommendations to regulate in response to its July 2011 Discussion paper (page 27).

Education and training

34. We agree with the LSB's proposal to support the SRA, BSB and IPS in carrying out their education and training review and implementing the findings. That said, the recommendations that have been proposed by the education and training review are being led by the SRA, BSB and IPS and the LSB will have little or no involvement with their delivery. In any event, under the 2007 Act, the remit of the LSB in respect of education and training is with assistance and development and not with delivery.

35. We take issue with the statement at paragraph 67 that the LSB believes that "without reform of education and training, we believe that there is a significant risk that England and Wales will fail to keep up the changes in global markets for both legal education and legal services". This is a sweeping statement of what the LSB perceives as a significant risk to the legal services market. We would welcome the sharing of information and or evidence that led the LSB to this conclusion. A far stronger argument would be that greater diversity and social mobility would lead to a more innovative and effective legal sector that would be able to complete globally and reflect the needs of the diverse community of England and Wales.

Diversity

36. The LSB will support the approved regulators in developing their data collection and ensuring that the plans produced by approved regulators are open, transparent and effective. It is important that the LSB recognises that the collection of data must be proportionate and that significant change in this area – which in some areas will require changes in attitudes that may not come readily - cannot be delivered overnight. There is a lot of emphasis on data collection, which is fine in itself; but the ways in which the data will be used are significantly more important. For us, the essential activity listed on page 28 is the work to identify specific areas for policy development. As mentioned above, CILEx is committed to diversity and is actively pursuing initiatives that enhance social mobility in the profession. It is essential that any new equality and diversity

initiative is co-ordinated with the existing groups and bodies that are promoting the same in order to save on costs and work duplicated for no gain.

Quality

37. We are pleased to see at paragraph 72 that the LSB has recognised the importance of ensuring that education and training requirements provide the most effective regulatory protections.

38. We note that the LSB is of the view that it is important for regulators to develop robust strategies to monitor service and advice quality and it will support approved regulators to develop strategies, by creating a quality monitoring toolkit. We welcome details on what this toolkit will include.

Research and evaluation

39. Research that will be undertaken in the first year of the LSB's new strategy includes understanding solicitor practices, benchmarking small business access to justice, benchmarking professional principles and understanding consumer behaviour. It is unclear why the LSB will be solely focussing on solicitors' practices throughout this work; why the LSB is not also going to research into practices of other legal professionals; and why the LSB does not plan to work with other approved regulators to benchmark professional principles. Increasingly, references in legislation are to those authorised to exercise legal rights under the 2007 Act, in which lawyers are referred throughout as 'authorised persons'. We hope the mention of solicitor practices in this section of the proposed plan was merely an oversight.

3. Statutory decision making

40. We note that the LSB may be required to make ad hoc decisions on AR changes to regulatory arrangements made as a result of approved regulators' response to LSB policy developments. The LSB therefore has a wide remit as it can drive changes to ARs' codes of conduct and other regulatory arrangements through LSB policy developments. We are keen to ensure that any changes required in

response to LSB policy developments are proportionate and demonstrably in keeping with the better regulation principles. We would welcome reassurance on this.

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