



LSB Business Plan 2020-21 Consultation

Law Society Response

February 2020



Introduction

1. The Law Society welcomes the opportunity to respond to the Legal Services Board (LSB) consultation on its business plan 2020-21.
2. The LSB has a vital role to play in increasing confidence in the legal sector and the justice system of England and Wales, both domestically and abroad.
3. In our view, the LSB should primarily focus on discharging its core statutory function laid out under the Legal Services Act (LSA) 2007 and hold frontline regulators to account to ensure that high standards of regulation are maintained. With this in mind, we would urge the LSB to focus the vast majority of its resources on this purpose, rather than diverting resources to work which is outside of its core regulatory remit.
4. The stability and certainty of the legal system are vital to the health and continuous functioning of the legal services market and further, the whole UK economy. The LSB's oversight function is particularly important given significant regulatory changes, such as the transparency rules, the new Solicitors Standards and Regulations (STARs), the proposed Solicitors Qualifying Exam (SQE), and new Money Laundering Directive. Regulatory change has an unsettling impact not only on the regulated professions, but also on clients and the public. The LSB should focus on ensuring that high professional standards are maintained, so clients and the public continue to have trust in the profession, frontline regulators, and the legal system.
5. It is therefore vital that the LSB properly scrutinises frontline regulators' performance in delivery of the regulatory changes, monitors the impact on clients and the profession, and evaluates outcomes.
6. The LSB should also show leadership in ensuring that regulation is proportionate and underpinned by a robust cost benefit analysis. Any specific problems within the legal sector need to be properly evidenced, with workable solutions proposed which are rigorously impact assessed, before new regulatory arrangements are introduced.
7. The LSB's drive to "*act as an agent for change*" has a potential to be a destabilising factor at a time when the sector is going through a period of unprecedented change and uncertainty, and may undermine efforts made elsewhere to increase confidence in the regulated professions and the international standing of the English and Welsh jurisdiction.

Consultation Questions

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

8. We agree that the LSB has identified the most relevant political, regulatory and market developments and these should be factored into the LSB's considerations of how to

approach its work over the coming year. The LSB should also consider the cumulative impact of these developments on the profession and clients.

9. In addition, we suggest the LSB takes a holistic view of the various challenges faced by legal professions to better inform its future strategy. For example, there are issues around legal aid cuts, court closures, and court fee rises, diversity, wellbeing and mental health of the legal profession which all have a profound effect on the profession. The Law Society would be keen to collaborate with the LSB, the Solicitors Regulation Authority (SRA), and other stakeholders on increasing awareness of these issues and tackling them.

Q2 – What do you see as the key priorities/issues to be addressed by legal services regulation?

10. When setting out the key priorities for its future strategy, it is crucial that the LSB takes account of and reflects all regulatory objectives set out in the LSA in a balanced way. Given the central role of the law in society and the wider economy, the regulatory objectives must be carefully balanced to ensure one does not override the others in a detrimental way or bring about unintended consequences.
11. The LSB's own interpretation of the LSA acknowledges that the objectives are co-equal:¹

“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.”

12. We agree with this approach and would urge the LSB to ensure all frontline regulators adopt a similar approach.
13. It is also important that the LSB factors in the challenges and uncertainty the legal sector is facing in the short and long-term, which have a bearing on growth in the sector. For example, the Law Society's legal services sector forecast for 2017-25, predicts that real turnover growth for law firms in the medium to long-term will slow down.² Therefore, a key priority for the strategy is to instil greater stability and confidence in the legal sector during a period of change.

Q3 – What are your views on our current approach to market intelligence, and evidence more widely, and how would you like us to develop this function going forward?

¹ https://www.legalservicesboard.org.uk/news_publications/publications/pdf/regulatory_objectives.pdf

² Legal services sector forecasts 2017-2025, the Law Society, August 2018;
<https://www.lawsociety.org.uk/support-services/research-trends/legal-services-sector-forecasts/>

14. We support the LSB's plans to use market intelligence to ensure a robust evidence base informs its work. It is critical that the LSB should ensure that any decision making is underpinned by the highest quality evidence.
15. For example, we raised concerns about a lack of adequate impact assessments in relation to the rule change application on the SRA handbook reform and provided evidence of both significant shortfalls in the proposals and the potential for serious negative effects.³ Yet, whilst the LSB acknowledged potential risks, it approved rule changes without requiring the frontline regulator to provide assurances on how it proposed to mitigate these risks.
16. We also note the LSB approved changes in the rules governing firms switching from being regulated by the SRA to one of the other frontline regulators despite its own admission that "the SRA's application did not provide an assessment of the precise extent of any risk to consumers".⁴
17. We therefore suggest that the LSB considers conducting research next year to evaluate the impact of the recent regulatory changes on the legal sector as a whole, and especially to what extent the 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.
18. Regarding the LSB's plans to develop a standing panel of members of the public to inform policy development, the LSB needs to carefully consider the pros and cons of this proposal. While a standing panel of members can offer the methodological advantage of consistency in comparison to traditional population surveys, sourcing members of the public for research can be challenging and costly.
19. Prior to commissioning new research, the LSB should also make use of the extensive data from the Legal Needs Survey, the largest ever survey of legal needs in England and Wales. We also support the LSB in seeking opportunities to work in partnership with other organisations when conducting market research and welcome the opportunity to work together wherever possible. This can prevent work duplication and lead to reduction in operational cost.

Q4 – What are your views on our plans to move away from a strategy for the LSB towards a strategy for legal services and their regulation, highlighting gaps and opportunities across the market?

20. It is currently unclear how the LSB's plans to move from a strategy for the LSB to an overall strategy for legal services and legal regulation would work and more detail is needed. It is certainly helpful to develop the LSB's strategy within the broader context of the wider legal market. However, if a strategy for legal services and legal regulation was to emerge, there would need to be clarity and transparency about distinct roles and responsibilities of the LSB, frontline legal regulators and other stakeholders. This

³ <https://www.lawsociety.org.uk/news/stories/law-society-opposes-sra-handbook-changes/>;
<https://www.lawsociety.org.uk/news/stories/concern-raised-over-lsb-handbook-decision/>

⁴ https://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/2017/SRA_PII_Switching_Regulators_Decision_Notice_FINAL.pdf

would be essential to avoid any duplication. As such, accountability would be key, alongside alignment with strategies of other legal regulators and policy-makers.

21. We do think that it is right to consider the impact that other significant factors, have on legal services and the role that such other factors can play in solving problems in the market, rather than focusing solely on regulation to fix problems which are caused elsewhere in the system. For example, the availability, accessibility and extent of legal aid play a significant role in whether or not people have access to justice and, arguably, a lack of access to justice cannot be addressed via regulation. Similarly, the state has a significant role to play in relation to public legal education which, arguably, is not best addressed through regulation of the sector.
22. We are keen to work collaboratively with the LSB on the development of its new three-year strategy over the course of this year. Prior to developing the strategy, the LSB should undertake work to ensure there is a firm understanding of the implications of social, political and economic pressures faced by regulated professions and their clients. These should include factors such as legal aid cuts, the decreasing number of trainees being paid minimum salary⁵, court closures, and court fee rises, which are outside the LSB's regulatory remit, but nonetheless have a significant impact on clients, the profession, wider public and the state of the legal system.

Q5 – Do you have any comments on our proposed business plan and work for 2020/21? Are there any workstreams that you disagree with? Is there any work that you think we should pursue that is not currently included?

Review of rule change approval process

23. We welcome the LSB's proposal to review the rule change application process with the aim to improve the quality of applications put forward by frontline regulators. We have raised concerns with the LSB on a number of occasions about a lack of supportive evidence and impact assessments in the rule change applications such as the SRA handbook and switching regulators. We are pleased that the LSB raised concerns with regulators about the poor quality of some rule change applications, confirming that some lacked supportive evidence and rationale.
24. In carrying out its statutory duties of overseeing the work of frontline regulators, the LSB must require regulators to provide a robust cost benefit analysis for any change proposals. For example, if a change is proposed in order to cut regulatory costs and improve access to justice, then as a minimum the impact assessment should assess:
 - the likely cost savings that would result from the changes
 - the degree to which these cost savings would be passed on to consumers
 - the number of practitioners likely to make use of this flexibility
 - the number of additional consumers who would seek legal advice as a result of these changes
 - whether alternative, less disruptive, approaches could bring about similar benefits.

⁵ <https://www.lawgazette.co.uk/news/over-a-third-of-regional-trainees-paid-less-than-minimum-salary/5103023.article>

25. In order to achieve the regulatory objectives of the LSA, it is 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. By improving the quality of rule change applications, the LSB has the opportunity to ensure consistent evidence-based regulation of legal services, which we believe is currently a significant weakness.
26. Over the course of this Business Plan the LSB will be considering rule change applications which are likely to have a significant impact on the profession, including a final application from the SRA in relation to the SQE. It is therefore critical that the LSB requires frontline regulators to improve quality of their rule change applications and supporting evidence.

Regulatory performance

27. We support the LSB's plans to carry out two risk-based performance reviews of selected regulators and a thematic review of the LSB's 'well-led standard', in addition to its day to day job of monitoring the regulators' performance against the LSB's revised performance framework.
28. However, we would like to see more progress in areas where frontline regulators fall short of expected outcomes and measures must be put in place to ensure regulators improve performance in a timely fashion. For example, the LSB's Regulatory Performance Assessment report published in December 2019, which measures progress of frontline regulators against the LSB's regulatory performance standards, reported a total of 17 outcomes classified as 'unmet', where action is required.⁶ The LSB confirmed that the number of completed actions since the previous review, published in August 2019, has not greatly improved, with a particular concern that *'the regulatory bodies have not embedded the regulatory performance framework fully into their own governance arrangements'*.⁷
29. In addition, the LSB should carry out proper scrutiny of implementation of the recent regulatory reforms, to ensure regulators provide adequate guidance to the profession, and clients and members of the public are well informed and aware of the new regulatory arrangements. For example, we are concerned about the lack of guidance being provided by the SRA for SQE's qualifying work experience (QWE). This is also particularly relevant with regard to STARS, which resulted in less prescriptive rules and introduced alternative models of solicitors' practice (solicitors working in unregulated firms and on freelance basis). The new rules may leave both clients and practitioners insufficiently clear about accepted conduct and behaviours, insurance requirements, redress provisions or circumstances in which enforcement action maybe triggered. It will be important that the LSB assesses the progress of STARS implementation in the course of the SRA's performance assessment and makes the impact assessment publicly available. Once the reform beds in we suggest the LSB conducts a thematic review of whether the regulatory changes delivered intended outcomes.

⁶ <https://www.legalservicesboard.org.uk/wp-content/uploads/2019/12/LSB-Regulatory-performance-report-December-2019.pdf>

⁷ Ibid, p. 3.

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

30. The Law Society is committed to work with the LSB on this issue and we await detail ahead of a discussion we are due to have later in February.

Oversight of the Office for Legal Complaints

31. We broadly support the LSB's plans for the oversight of the Office for Legal Complaints, and in particular the proposal to enhance the Legal Ombudsman's (LeO) capacity to disseminate intelligence and learning to the profession to eliminate common mistakes in complaints handling or to where practice could be improved.
32. We believe that LeO's primary focus should be improving the service experience for all of its users; both clients and service providers. Whilst we are pleased to note that LeO has made a number of improvements, through its modernisation programme, we remain concerned about its overall performance and the proposed substantial (20 per cent) increase to its budget. As such, the LSB should ensure LeO provides value for money, meets the required performance standards, and carries out work within its regulatory remit. For example, we note that some of LeO's proposals in relation to improving transparency and impact go outside its regulatory remit.⁸ While we support greater transparency for clients and services providers, any future solutions need to be within LeO's remit under the LSA and Scheme Rules.⁹

Continuing assurance of professional competence

33. In responding to the consultation on the LSB's Business Plan we note the LSB's related Call for Evidence on continuing competence, in which specific proposals are yet to emerge. We are working with our members to respond to the Call for Evidence and look forward to working with the LSB on this as their work evolves.
34. Continuing competence is, of course, a critical element of being a member of any profession. We believe solicitors represent a 'gold' standard in the provision of legal services and support the work of the profession to continuously improve the skills, knowledge and service they provide for their clients.
35. While we acknowledge that continuing professional development has a complex history across legal and other sectors, any steps towards genuine improvements to help all participants is welcome. At the same time, we would encourage a careful, balanced analysis of the evidence that emerges from the work. We are pleased to see that continuing competence is referred to under the Equality section of the LSB's recent document (paragraph 50) and will be considering that issue in our later response.

Implementing the revised Internal Governance Rules (IGRs)

⁸ <https://www.lawsociety.org.uk/policy-campaigns/consultation-responses/legal-ombudsman-transparency-and-reporting-impact-discussion-paper-law-society-response/>

⁹ Ibid.

36. The Law Society's Board and Council have agreed a programme of work to ensure compliance with the new rules, including a number of changes to our governance arrangements (notably the disestablishment of the Business and Oversight Board and removal of the oversight function fulfilled by that board, and a large number of consequential changes to other parts of our General Regulations), as well as a programme of operational changes to meet requirements in the revised IGRs in relation to the identification of dual role holders; the training of key personnel, protocols to ensure the safeguarding of information required for assurance purposes; and ensuring that we can continue to meet the expectation of candour on compliance matters on an ongoing basis. On this last matter, we look forward to contributing to the consultation on the mechanism by which the LSB will monitor ongoing compliance with the IGRs.

Enhancing Public Legal Education

37. We support greater public legal education and are keen to work in partnership with the LSB and other organisations to enhance public awareness of legal services and how they can be used. The recent Legal Needs Survey¹⁰ demonstrates that there are many people who do not understand how and when they should take legal advice from a qualified solicitor or other regulated professional. Making people aware of how to recognise legal issues and from whom to seek help, could help people seek advice from a solicitor at the right time in order to prevent legal problems from escalating and get the best result for all concerned. This would increase people's access to justice and reduce unmet demand.
38. However, the sort of broad public legal education that is necessary in order to achieve this outcome, which we strongly support, is not best achieved through regulation of the profession. Given the profession's lack of access and capacity to deliver this broad understanding to the public, this is more the purview of the state, with solicitors contributing appropriately.

Access to legal services through the promotion of responsible technological innovation that carries public trust

39. While we support the overall goal of increasing access to legal services through promotion of responsible technological innovation, we are not entirely clear that all aspects of the proposed workstream fit within the LSB's regulatory ambit. We suggest a more joined up approach and close collaboration with frontline regulators, representative bodies and other stakeholders on this strand of work to prevent duplication. The Law Society has been engaged in similar work and we would be keen to collaborate with the LSB.
40. At a time of exponential technological advances, we believe that regulation of LawTech¹¹, if any is needed, is carefully calibrated to protect legal service consumers without stifling innovation. This will enable the UK legal services to maintain its industry-leading position in the face of growing competition, market liberalisation and disruption.

¹⁰ Legal Needs of Individuals in England and Wales, YouGov report jointly commissioned by and undertaken on behalf of The Legal Services Board and The Law Society, 27 January 2020.

¹¹ The LawTech Delivery Panel defines LawTech as technologies which aim to support, supplement or replace traditional methods for delivering legal services, or which improve the operation of the justice system.

41. LawTech is still evolving and there are several challenges which the LSB and other regulators must address in their work, particularly on risk-based models of regulation. Any future initiatives for use of regulatory sandboxes or similar initiatives should be transparent, the subject of consultation with stakeholders and carefully planned to avoid the creation of unlevel playing fields. Any proposals for change must be carefully costed as, ultimately, there will be a financial and time impact on practitioners, firm futures and access to justice.

Responding to the regulatory consequences of EU exit

42. We support the LSB's plans on responding to the regulatory consequences of EU exit and contributing to the process of adapting regulatory arrangements in light of the final agreements that are made as the UK leaves the EU.
43. Given our expertise in promoting the services of English and Welsh solicitors internationally, we are keen to work closely with the LSB and other stakeholders to ensure stability and the good standing of the profession and legal system throughout the process of Brexit, to ensure that the pre-eminent position of the solicitors' profession globally is not adversely affected, either economically or in terms of reputation.

Engaging with the CMA review of progress on its legal services market study

44. We strongly welcome the LSB's proposal to look at the indicators of quality of service, rather than price alone, in considering the status of the market. Our consumer research¹² shows that there is a clear risk that clients make decisions on the most obvious and easily understood information (price), as is common in a number of sectors, and either stop searching or overlook other important factors. This is not in the public interest. Therefore, it is important consumers are able to use quality indicators alongside price when making choices about legal service providers.
45. In addition, there is a need to raise awareness of what regulation means. The consumer research found the low consumer awareness of regulatory arrangements. For example, many consumers did not clearly understand the differences between the terms solicitor and lawyer. When asked about regulation, many assumed the existence of some form of regulation but were unaware of who regulated or what regulation meant. These findings were also confirmed by the Legal Needs Survey¹³ which found majority of people lacking basic knowledge about regulation and their rights. We suggest a link between this work and the planned activities on the public legal education.

Future approaches to enforcement

¹² London Economics, Consumer behaviour research: A report by London Economics and YouGov for the Law Society (November 2017).

¹³ Ibid.

46. We support the LSB's commitment to improve transparency around regulators' performance information, ensuring effective and consistent use of interim sanctions, and gaining assurance of the quality of enforcement decisions made by regulators.
47. The LSB's role is particularly welcome in the light of the SRA's new enforcement strategy and STARs. The profession would benefit from a greater focus on the quality and consistency of regulators' decision making. Therefore, we support the idea of file reviews to assess the quality of regulators' enforcement work to give the profession and the public confidence in the fitness of regulators' decision-making processes.

Q6 – Do you have any comments on our proposed budget for 2020/21?

48. The consultation proposes a 3.3% budget increase which the LSB is partly planning to spend *'to conduct more research, improve business management and invest in [its] communications functions in order to meet [its] ambition to play a stronger sector leadership role'*.¹⁴ While we support the LSB in placing value on evidence and research, the LSB should ensure savings are maximised by avoiding research duplication, ensuring a joined up approach to intelligence gathering by working closer with frontline regulators and other stakeholders before looking at budgetary increases.
49. We also are not entirely clear how investing in communications functions will help the LSB to become a stronger sector regulator, considering the LSB is not a public facing body and does not provide services directly to the public or regulated professions. We think closer collaboration with representative bodies who have a direct outreach to the professions and the public could achieve far more tangible communication outcomes and spare the need for additional expenditure.

Q7 – 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.

50. We are keen to work in partnership with the LSB to support the delivery of its Business Plan and the development of its new strategy. We already have a well-established working relationship with the LSB on the Legal Needs Survey and LawTech. In addition, we would welcome the opportunity to work closely with the LSB in the areas of public legal education and promotion of legal services with national and international stakeholders.

Q8: Please provide comments regarding equality issues which, in your view/experience, may arise from our proposed business plan for 2020/21.

51. We welcome the LSB's commitment to its obligations under the Equality Act 2010 when carrying out its statutory duties. We would like to see the LSB's work in assessing equality implications translated into its decision-making on rule change applications.

¹⁴ The LSB Business Plan 2020-21 consultation, p. 19, December 2019.

52. We highlighted with the LSB the importance of understanding the diversity implications associated with the introduction of the new SRA handbook and SQE, and mitigating any diversity risks, yet we felt our concerns were not properly taken into account.
53. For example, we were concerned about the disproportionate impact on small firms and sole practitioners arising from the SRA handbook changes, because small firms lack the resource of larger organisations. BAME practitioners are overrepresented in this sector, and there was a real risk that the changes could affect them disproportionately more than others.¹⁵
54. In our letter to the LSB in January 2018 we also raised the importance of understanding diversity implications associated with the introduction of the SQE, and the need to mitigate any diversity risks.¹⁶ 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. We are also concerned that the SQE 1 pilot test carried out by the SRA showed that BAME candidates performed worse than their counterparts.¹⁷
55. The LSB should always ensure the most robust Equality Impact Assessments for all substantive reforms which are likely to impact disproportionately on groups with particular protected characteristics. The onus should be even greater if a regulator is claiming that changes will benefit such groups without providing any supporting evidence.
56. The LSB must also ensure the impact on equality, diversity and inclusion (EDI) is considered in the process of regulators' performance assessment. We raised concerns with the SRA over potential EDI implications in relation to the introduction of the new SQE, such as issues around funding and accessibility. Similarly, the SRA's impact assessment on the handbook reform identified risks for BAME practitioners arising from STARs.¹⁸ It is important the LSB conducts proper assessment of whether the SRA adequately addresses potential EDI issues arising from the implementation of these reforms, and requires the SRA and other frontline regulators to be transparent and report on the EDI impact in assessments of their reforms.

¹⁵ The Law Society response to the LSB Business Plan 2019-20 consultation, February 2019.

¹⁶ https://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/2018/SRA_SQE_Regulations_-_TLS_letter.pdf

¹⁷ <https://www.sra.org.uk/sra/policy/sqe/sqe-pilot/>

¹⁸ SRA Looking to the Future: Phase two of our Handbook reforms Impact assessment, June 2018, para 14, p. 19.