

Meeting: Legal Services Board

Date: 24 January 2023

Item: Paper (23) 03

Title: Access to justice and LSB's strategic positioning

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Status: Official

Introduction: Purpose of the paper/ Issue

1. This item is an opportunity for the Board to discuss the LSB's work to promote the regulatory objective to improve access to justice and the extent to which we should take positions on public policy that impact on access to justice. It follows the initial discussion on this topic at the November 2022 meeting, where it was agreed that a specific discussion should be scheduled.

Recommendation(s)

2. The Board is invited to **discuss** our work in this area and **agree** its future approach, which will inform the development of strategic priorities for 2024-2027 under the sector-wide 'Reshaping Legal Services' strategy.¹

Background

3. When the Board met in November 2022, in the context of the item on the proposed LSB Business Plan for 2023/24, it agreed the following action:

The Board should prioritise further discussion about the extent to which it should take positions on public policy that impacts on access to justice. A discussion session would be included on a future agenda.

4. We have approached this question in three parts:
 - What is our remit to deal with access to justice matters?
 - What can we influence directly?
 - How should we use our wider influence in the public debate?
5. In addition, we have also drawn a conceptual distinction between the 'consumer market' and the 'publicly-funded justice system' (on the grounds that it is the latter that attracts the most intense public debate).

¹ https://legalservicesboard.org.uk/wp-content/uploads/2021/03/Strategy_FINAL-For-Web2.pdf.

What is our remit to deal with access to justice matters?

6. As the oversight regulator for legal services in England and Wales, the LSB operates within the statutory framework set out in the Legal Services Act 2007 (the Act). The Act prescribes our functions and powers in respect of the approved regulators, Office for Legal Complaints and Solicitors Disciplinary Tribunal.
7. The Act also sets out eight regulatory objectives that we have a duty to promote, including improving access to justice. In doing so, we must act, so far as is reasonably practicable, in a way that is compatible with the objectives and which we consider is most appropriate to meet the objectives (having regard for the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed). As above, however, our direct regulatory purview is the frontline regulators, OLC and SDT and our explicit legal powers are focused on them.

What can we influence directly?

8. While the LSB has considerable 'soft power', our main direct levers are our powers to shape regulation through oversight of the approved regulators, as set out in the Act.
9. The LSB already has an extensive programme of policy and research activities dedicated in whole or in part to promoting improved access to justice, using the full extent of our regulatory levers to affect change in the public interest and that will benefit legal services consumers. This includes our statement of policy to empower consumers to have knowledge and capability to recognise they have a legal issue and engage effectively with the market², and proposals elsewhere on the agenda to develop statutory guidance promoting the use of technology and innovation for access.
10. We have two large-scale surveys to understand levels of unmet legal need for individuals and small businesses and have advocated for a legal support strategy for small businesses in the past year³. We will be collecting new data on individuals' legal needs in 2023 and are planning to target harder to reach groups with greater vulnerability, which will enable us to better identify differential outcomes for consumers accessing justice.
11. Most (but not all) of this work affects the consumer market. In terms of direct impact on the publicly-funded justice system, by far the most important factor is likely to be funding. Decisions about funding are for Government and have no regulatory locus.

² <https://legalservicesboard.org.uk/wp-content/uploads/2022/04/Statement-of-policy-on-empowering-consumers.pdf>.

³ <https://legalservicesboard.org.uk/research/small-business-legal-needs>; <https://legalservicesboard.org.uk/news/largest-ever-legal-needs-survey-in-england-and-wales>.

12. However, there are questions where regulation under the Act may interface with the publicly-funded justice system, such as:

- Are there any elements of regulation that might make it more difficult/costly to deploy lawyers in particular circumstances (e.g. rules that restrict the activities that lawyers might undertake) or might make a positive contribution to things like productivity (e.g. regulatory initiatives on wellbeing, support and supervision)?
- Are there any features of the structure of the professions that might make it more difficult/costly to deploy lawyers in particular circumstances (e.g. the distinction between barristers and solicitors, which is not present in many other modern jurisdictions)?

13. We have done little work historically on these questions mainly for the reason set out at paragraph 11, i.e. the difference regulation can make in the publicly funded space is likely to be dwarfed by the macro funding issue. However, this does remain a potentially fruitful line of enquiry to pursue if the Board was so minded (subject to resources and planning, and noting that some changes would require legislative reform).

How should we use our wider influence in the public debate?

14. In addition to this work, the Board wishes to discuss the wider contribution the LSB can have, in its convening role as oversight regulator, in informing public policy development that affects promotion of the regulatory objectives such as improving access to justice. This item is an opportunity for such a generative discussion.

15. We note that while the LSB used to rarely comment on matters of public policy, such as the funding of the public justice system, the 'State of the Legal Sector' report in 2021⁴ marked a change in our stance. In this report, we highlighted extensive data available that was relevant to promotion of the regulatory objectives, including highlighting changes, over the preceding ten years, in public funding and evidence of the impact that this, and other changes, were having on access to justice and unmet legal need.

16. This recognised the credible role we can play in gathering and sharing evidence from across the sector that supports development of public policy that promotes the regulatory objectives. It was also an opportunity to identify challenges the sector faces, including with regards to the publicly-funded justice system: for example, lowering unmet legal need across large parts of society, achieving fairer outcomes for people experiencing a greater disadvantage and reforming the justice system and redrawing the regulatory landscape.

17. We have since contributed to meeting these challenges by carrying out research into consumers' legal needs (as above) and the challenges faced by citizens in

⁴ <https://legalservicesboard.org.uk/wp-content/uploads/2020/11/The-State-of-Legal-Services-Evidence-Compendium-FINAL.pdf>; https://legalservicesboard.org.uk/wp-content/uploads/2020/11/The-State-of-Legal-Services-Narrative-Volume_Final.pdf.

vulnerable circumstances⁵, as well as providing evidence to government consultations, for example the Independent Review of Criminal Legal Aid⁶ and Economic Crime and Corporate Transparency Bill⁷.

Proposal

18. It is proposed that the approach that the LSB has taken under the Reshaping Legal Services strategy is appropriate and we should continue to contribute our significant evidence base to public policy debates where there is likely to be an impact on the regulatory objectives. We should continue to gather data and consider how to best monitor sector-wide progress against the strategy, making this available publicly so it is clear where further efforts are needed to maintain momentum, including with regards to improving access to justice.
19. One instance where we could use our data to support public policy development is the Government's upcoming review of publicly-funded civil legal aid, announced this month⁸. We would seek opportunities to engage with MoJ to ensure it has access to information, such as from our legal needs surveys and engagement with the sector, that will support its analysis of the current state of services.
20. There may also be scope for us to look more proactively for opportunities to contribute to public policy development in support of the publicly-funded justice system. For example:
 - We engage with a broad range of stakeholders across the sector in our work, including the consumer groups, third sector and membership organisations that face the challenges in the Reshaping Legal Services strategy first hand – can we use our convening role to give weight to their evidence and ensure that their voices are heard in designing solutions to improve access to justice in the publicly-funded justice system?
 - We carry out a range of policy and research work - can the LSB use this to assist in identifying the range of solutions (including non-financial options) that might be available in addressing unmet legal needs?
21. In doing so, the LSB should be careful to avoid straying into lobbying or advocating for particular approaches on issues that are not within our powers or direct remit. However, there is a balance that can be struck in recognition of the range of levers we have available, including our influence and advocacy, to give effect to change that evidence indicates will positively promote the regulatory objectives, including access to justice for all users of legal services.

Conclusion/Next steps

⁵ <https://legalservicesboard.org.uk/wp-content/uploads/2022/10/Vulnerability-in-legal-services-research-FINAL-REPORT-v2-1.pdf>.

⁶ <https://legalservicesboard.org.uk/20210506-lsb-submission-to-clar-call-for-evidence>.

⁷ <https://legalservicesboard.org.uk/wp-content/uploads/2022/11/Written-evidence-to-the-House-of-Commons-Public-Bill-Committee-from-the-Legal-Services-Board-on-the-Economic-Crime-and-Corporate-Transparency-Bill.pdf>.

⁸ <https://www.gov.uk/government/news/government-review-to-explore-options-to-improve-civil-legal-aid-market>.

22. We welcome Board members views on this starting proposal, which will inform the development of strategic priorities for 2024-2027 under the sector-wide 'Reshaping Legal Services' strategy.

Risks and mitigations	
Financial:	N/A
Legal:	The legal team will be engaged throughout the policy development work proposed in order to mitigate any risks of challenge, and to ensure alignment to the legislative framework and duty to promote the regulatory objectives.
Communications and engagement:	We will continue to engage with a broad range of stakeholders in our policy development and research work, which will ensure any public policy positions we take in the future are well-evidenced.
Equality and diversity:	The promotion of the regulatory objective to improve access to justice supports all consumers to access services that meet their legal needs.
Resource:	No additional resources are required.

Freedom of Information Act 2000 (Fol)		
Para ref	Fol exemption and summary	Expires
N/A	N/A	N/A