



Draft LSB Strategic Plan 2015-18 and Business Plan 2015/16

**A response by
The Chartered Institute of Legal Executives and ILEX
Professional Standards**

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For further details

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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 Act), and ILEX Professional Standards Limited (IPS), the regulatory body for 20,000 members of CILEx. The consultation was considered, in the case of CILEx by its Regulatory Working Party of five Council members, and separately in the case of IPS by its Board. The outcomes of the 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 document, 'we' means both CILEx and IPS unless the context suggests otherwise.
2. CILEx and IPS promote proper standards of conduct and behaviour among members of CILEx. We aim to ensure CILEx members are competent and trusted legal practitioners who are fully aware of their obligations to clients, colleagues, the courts and the public. We aim to help practitioners maintain competence and improve throughout their careers, and to ensure the public know the quality of work Chartered Legal Executives and other CILEx practitioners can deliver.
3. CILEx as an Approved Regulator under the Act has recently become able to award practice rights in litigation, conveyancing and probate. It regulates immigration and advocacy services. IPS is also a regulator of entities through which legal services are provided. This means that IPS is now able to authorise CILEx members and Conveyancing and Probate Practitioners to provide legal services through entities regulated by IPS.
4. IPS and CILEx provide an alternative route to legal qualification. The new practice rights will allow members and practitioners from less traditional routes to qualify as lawyers and practise through their own legal entities.

LSB strategic priorities for 2015-18

5. We welcome the opportunity to comment on proposals put forward by the LSB on its strategic priorities for the period 2015-18 and its operational business plan for 2015/16. We hope the observations below will be of value.

Access to justice

6. We continue to support the overall regulatory structure of legal services as set out in the Legal Services Act 2007 originally envisaged by Sir David Clementi. It remains appropriate for the LSB to oversee the work of the Approved Regulators (ARs). We also share Sir Michael Pitt's strong conviction that a healthy legal sector, access to justice and a well-functioning justice system are cornerstones of our civil society. We are encouraged to see the breaking down of barriers playing an important role in the LSB's strategic thinking.
7. Growth, concepts of competition and innovation are not new to CILEx. We are committed to opening up the legal sector to innovative ways of practice which can lead to competition and greater access to legal services for the consumer. We have achieved greater practice rights for CILEx members and others to be able to compete with other lawyers and to seek the development of innovative services to open the market further. Consumers must have access to a choice of providers offering distinctive service models and value for money alternatives to traditional legal firms. We are at the forefront of this change.
8. IPS provides an outcome focussed approach to regulation and adheres to the regulatory objectives and better regulation principles. As a membership regulator we understand the needs of the businesses we regulate and it is this understanding that has enabled us to create the regulatory framework to enable individuals and entities to grow.
9. However, as the consultation document recognises, the legal sector is experiencing unprecedented change in access to justice. The public sector is

likely to remain in a state of austerity following the general election in May 2015. The legal services sector, particularly that part of it offering services to the most vulnerable sectors of the community, is facing significant decline in its income and unprecedented turbulence and uncertainty. Although the total turnover of the legal sector has increased by 15% in six years, publicly funded legal services are in decline.

10. We note the LSB's commitment to tackle the 'justice gap'. Save for the proposed research, the consultation paper is silent on how this will be achieved. Improving access to justice is a regulatory objective under section 1 of the Act. 'Improving' connotes a positive act to make something better. The Clementi review acknowledged that access to justice has a geographic dimension but is '*critically also an issue about access for those who are disadvantaged and in particular those who cannot afford to pursue their rights*'¹. The LSB has been silent in respect of the legal aid scope changes. It is access to justice for the poorest members of our society and not just affordability that needs to be tackled. "*What we're seeing is the unemployed, the poor, the marginal, being prevented from accessing justice*"².

Vulnerable consumers

11. The LSB's strategic vision³, amongst other things, focuses on:

- (i) consumers who are well informed and able to choose from a range of services of appropriate quality and that offer value for money;
- (ii) diverse and ethical services.

12. The legal services sector does not operate like other market sectors.

Necessity often dictates an approach to a lawyer. It is unlike the insurance sector where the consumer may be well informed and can choose from a

¹ Review of the Regulatory Framework for legal Services in England and Wales: Final Report, December 2004 at page 16

² Ben Bowling, professor of criminology and criminal justice at King's College London: <http://www.newstatesman.com/politics/2014/01/how-legal-aid-cuts-are-harming-voiceless-and-most-vulnerable>

³ LSB Draft Strategic Plan 2015-18 and Business Plan 2015/16 paragraph 1

range of services. All consumers are potentially vulnerable when seeing a lawyer. Those on low income or with family/debt/welfare benefits problems often have few choices, sometimes none. A recent survey highlighted that the North of England, the Midlands, South West England and Wales are likely to be disproportionately impacted by reductions in casework, service closures and redundancies, leading to fears of the creation of ‘advice deserts’, with vulnerable people unable to get the advice they need⁴.

13. Experienced criminal lawyers have warned the government that cuts to criminal legal aid fees and the number of contracts will mean that such deserts will emerge across rural areas, cities and towns.⁵ With a further 8.75% cut in fees for criminal cases to be imposed in the next few months, worst case scenarios predict that as many as two-thirds of affected independent firms could be forced to close their doors⁶.

14. On paper, diversity in the provision of legal services is a laudable goal⁷. However, it is unclear whether this relates to BAME firms reflecting local communities or diversity in the range of legal services provision. We expect further clarification in the final version of the plan.

Regulation of the legal sector

15. We welcome, however, the LSB proposal to take into account both regulated and unregulated sector providers. It is important for regulated providers to have a level playing field with the unregulated sector. However, the plan is silent as to how this will be achieved. The paper also assumes that the two sectors find it difficult to coexist. This is not so. There are many examples of the voluntary sector working with law firms for the benefit of clients.

⁴ <http://www2.warwick.ac.uk/fac/soc/law/research/centres/chrp/projects/legalaidcuts/>

⁵ <http://www.lawgazette.co.uk/practice/criminal-lawyers-warn-of-advice-deserts-as-they-stage-walk-out/5040262.fullarticle>

⁶ <http://www.lawgazette.co.uk/law/society-opens-new-front-on-legal-aid-cuts/5045600.article>

⁷ LSB Draft Strategic Plan 2015-18 and Business Plan 2015/16 paragraph 1

16. The LSB needs to be clear what it means by the unregulated sector. Does it, for example, include Citizen Advice Bureaux, law centres and welfare rights organisations (usually non-charging and offering free services); or does it include only unregulated *fee charging* legal providers? The decline in publicly funded legal services is linked to the rise in the demand for unregulated services.
17. We note the significant amount of research/work proposed in relation to enabling the need for legal services to be met more effectively⁸. We support this activity in principle and believe the LSB, with the Legal Services Consumer Panel, is uniquely placed to undertake it. However, we have reservations about whether the depth and range of research can be completed in the timescale proposed.
18. The predicted expansion of the unregulated sector is a cause for concern. Consumers are not always confident about identifying which legal service providers are regulated or unregulated. The expansion of the unregulated legal sector will most certainly be detrimental for consumers as there are limited options to seek redress, for example consumers are unable to submit a complaint/claim to the Legal Ombudsman. We note that the LSB will work with the Legal Ombudsman to support the expansion of redress to cover unregulated legal services.
19. Although this will enhance consumer protection, practical questions need to be asked about how this expansion will be achieved, and how it will be funded. Also the growth of the unregulated sector could lead regulated legal service providers to exit the market, leaving consumers with poor choice and inhibiting competition, innovation and growth.
20. IPS has recognised the demand for online legal services and the consumer preference to ‘shop around’ before services are purchased. With this in mind IPS is looking at options for working with comparison websites. We are working to empower consumers through the information on our website and

⁸ LSB Draft Strategic Plan 2015-18 and Business Plan 2015/16 paragraph 65

the Legal Choices web-site. This includes a survey which encourages consumers to provide feedback on the quality of services provided by the IPS regulated community.

21. IPS is open to adopting a shared approach to education, training and diversity with other approved regulators. At present IPS is supporting the initiatives proposed by the LSB to encourage regulators to co-ordinate their rules and arrangements more closely where appropriate, for example client protection and disciplinary procedures.

The growth duty

22. The LSB confirms its role in ensuring that ARs meet their responsibility to promote the regulatory objectives and the new duty to promote economic growth⁹. This new duty is still progressing through Parliament in the Deregulation Bill and is not yet law. CILEx in its response to the Department for Business, Innovation and Skills (BIS) consultation on extending the growth duty to all ARs, welcomed the duty to have regard to economic growth. It is a misnomer, however, to call it a 'growth duty'.

23. We believe the concept is already addressed through the objectives set out in the Act and the better regulation principles. The imposition of a further requirement, while not objectionable in itself, will superimpose an additional layer of regulation. The government's draft guidance makes clear it obliges regulators to have regard to economic growth only when making decisions¹⁰. This duplicates existing regulatory obligations.

24. Economic growth is not a new concept to CILEx. We are already committed to ensuring that Chartered Legal Executives are regulated in a way that will enable them to offer high quality services subject to appropriate, transparent and proportionate regulation. The principles are incorporated in our primary duties and responsibilities and have been positively conducive to economic

⁹ Paragraph 18 of the LSB Draft Business Plan

¹⁰ [Draft Guidance: Non-economic Regulator: Duty to Have Regard to Growth](#) p4

growth rather than undermining it. Once the Deregulation Bill becomes law all ARs will need to have regard to economic growth by virtue of section 28 of the Act.

25. By contrast, we support proposals to simplify the legislative burdens on the profession and streamline the regulatory process. The LSB must ensure that the weight and cost of regulation is proportionate and not unnecessarily burdensome. Through its direction, reviews and interaction with the ARs and through resulting costs of compliance, such costs fall directly on the profession and ultimately the consumer.
26. We support the need to explore regulatory barriers hindering existing regulators. Post entrance reviews would be helpful to explore barriers to entrance and how difficult entrants found these to overcome in order to become a new regulator or extend the scope of regulation. Challenger events for potential new entrants, without evidence of their utility, do not appear to be an effective use of limited resources.
27. The second bullet at paragraph 55 of the draft plan explores the option for regulators jointly to commission services such as 'back office' functions. It is unclear whether this refers to the opportunity for shared service arrangements. We recognise shared services offer economies of scale. These can be achieved by bringing together disparate activities into one place, either within one organisation or across organisations. In this context, 'back office' services are generally referred to as Finance, Payroll, HR, Estate Maintenance and Management, Governance, PR/Communications and Fleet management¹¹.
28. We can see opportunities in the public sector for shared services but have yet to see evidence as to how well this would work in the regulatory legal sector. IPS will engage with the LSB to explore such options. Nonetheless there may be logistical issues for compensation, investigation and enforcement

¹¹ <http://www.employment-studies.co.uk/pdflibrary/qipp10.pdf>

provisions as each regulator has its own procedures. Subject to this, with the diversification of legal practices and with a range of legal professionals, it may be beneficial to merge enforcement provisions. This would enable regulators to identify individuals who were/are under investigation, and exchange information about them more easily, provided the standard of proof is satisfied. We seek further clarification of this proposal.

29. We note the strategic priorities for 2015-18 are subject to review in the event of changed priorities. We expect the LSB to share any proposed review with ARs before the change.

LSB draft Business Plan

30. We are pleased to note the LSB's commitment positively to engage with regulators¹². However, we hope this extends to ARs and not just the independent regulators. Frank dialogue between the LSB, ARs and all parts of the profession is imperative in the interests of collaborative working. Such dialogue will identify where ARs need to improve regulatory performance and how such improvement can be achieved. Good regulation works in the interest of providers as well as consumers. The LSB needs to facilitate a balanced approach to each constituency.

Consumer Panel advice requests

31. The unbundling of legal services could usefully form the basis for an advice request to the Legal Services Consumer panel. 'Unbundling' refers to the provision of isolated portions of legal advice, where a case is managed under a limited or partial retainer, rather than a traditional full retainer, where a lawyer typically deals with all matters from initial instructions until the full conclusion of a case. This non formal provision of advice may make traditional law firms more attractive to a diverse range of consumers.

¹² Paragraph 22 of the LSB Draft Plan

32. Evidence from Shelter indicates 213,000 private tenants were evicted or served with an eviction notice in the last year “because they complained to their landlord, letting agent or Council about a problem that wasn’t their responsibility”¹³. These retaliatory evictions are undermining the rights of private sector tenants. Although, there is now an amendment on the Deregulation Bill preventing retaliatory evictions, it may be an area where alternative research is undertaken on the impact of vulnerable consumers.
33. Evidence reveals workers with legitimate employment grievances being deterred from pursuing claims in employment tribunals following the introduction of fees. A recent TUC report shows a 79% fall in overall claims taken to employment tribunals, with women and low-paid workers the worst affected¹⁴. Access to justice is being denied by consumers being priced out of court.

Diversity

34. We share the LSB’s commitment to diversity within the legal profession, which reflects the client population better than it did before the Act. This is an area in which we are fully committed and recognised by Parliament as a *“profession that draws from a wider social background than other parts of the profession ... something and others could learn a lot from”*¹⁵. We continue to work on policies and initiatives which support social mobility in terms of entry to the profession and progression within it.

Reviewing and removing regulatory obligations

35. Subject to the comment below, we welcome the continuing commitment to reviewing the regulatory framework to reduce unnecessary burdens on the profession. This would be consistent with the better regulation principles and the forthcoming growth duty. We consider that effective regulation includes

¹³ <http://www.insidehousing.co.uk/journals/2014/12/15/n/s/l/tackling-revenge-evictions.pdf>

¹⁴ <http://www.tuc.org.uk/workplace-issues/employment-rights/tribunal-fees-have-been-%E2%80%9Chuge-victory%E2%80%9D-britain%E2%80%99s-worst-bosses>

¹⁵ Hansard HL col 1687 (5 April 2011) per Baroness Gale

dealing with unnecessary costs and prescription. Priority should be given to significantly less prescription in the rule change approval process provided for by the Act.

Section 51 of the 2007 Act (Permitted Purposes Rule)

36. We note the intention to review the treatment of underspent practising certificate fees. We are transparent about costs to CILEx practitioners and how the practice fee is apportioned. Our practising fee policies are informed by annual consultation which determines the level of the practising fee and where the income is spent.

37. Parliament recognised the importance of the practising fee and of the representative functions of the ARs during the passage of the legal services bill. This is reflected in the Act. Baroness Ashton observed:

“It is important to recognise that although the practising fees are raised mainly for purely regulatory purposes, some functions are more of a public interest nature where it might be appropriate for both the regulatory and representative arms to be involved. Functions could include the promotion of relations between the approved regulator and other national – or even international – bodies, governments or legal professions of other jurisdictions; or participation in law reform”¹⁶.

38. We agree reserves of unused practising fee income should only apply to purposes permitted by the Act. In this context the LSB should focus on those ARs showing reserves of unused practising fee income and whether underspend is being used in accordance with the Act. This would be proportionate, targeted and consistent with the Act.

¹⁶ HC debate: 23rd January 2007; col 1048 per Baroness Ashton

Reviewing the LSB's statutory decision making process

39. We welcome the LSB's ongoing commitment to reviewing and improving its statutory decision making. It is imperative that decisions are made not only within statutory timescales but as soon as practicable. This will benefit not only the regulatory processes of ARs, but also the legal services end user.

Developing options for legislative change

40. We look forward to working closely with the LSB to explore options for statutory change that will streamline regulatory processes. Some statutory processes are overly complex and may ultimately be costly for prospective new service providers and alternative business structures (ABSs). An example is Schedule 13 to the Act in respect of the 'fit and proper' test for ABSs. Looking for less prescription in rule changing processes should be a priority.

Enabling need for legal services to be met more effectively

41. Regulation should set a minimum level of intervention necessary to set a framework for a market which puts consumers at its centre, by balancing equality of bargaining power and allowing innovation in service provision. The LSB must avoid a narrow definition of 'consumer' such as consumers of high street services. A narrow approach means recommendations risk being inappropriate for the sector as a whole. Many lawyers increasingly work in larger firms and focus on commercial work; others in in-house teams with internal consumers. A 'one size fits all approach' will not be suitable.

42. Considerable activity is proposed in relation to 'the needs of consumers'. This is an area where both the LSB and the Legal Services Consumer Panel could provide assistance to regulators in helping us to reach or understand consumers who are difficult to identify or contact. The LSB could use its central position to make a real difference here. We encourage it to do so.

43. We believe there is an opportunity for the LSB to gather examples of good practice and disseminate them to frontline regulators across all activities.

Performance, evaluation and oversight

44. We note with interest that delivering the LSB plan relies on a significant amount of research. We have reservations about whether this 'comprehensive programme of research' can be completed within the framework of the 2015-16 operational business plan.

45. Paragraph 106 of the draft plan confirms the LSB's intention to conduct a complete review of the regulatory standards of all ARs. We note the need to incorporate the 'economic growth duty' in these reviews. As mentioned, growth is not a new concept to CILEx. For example, proportionate decision making, increased transparency, and a move to outcomes focused regulation have been incorporated in all our primary duties.

46. CILEx and IPS are at the forefront of modernisation of the legal services market. The LSB should avoid adopting an unduly detailed approach to these oversight reviews. The approach should be proportionate, targeted and evidence based - for example, where there is evidence of an AR's underperformance, or non-compliance with the regulatory objectives

47. High costs of regulation restrict access for clients. Research shows that clients struggle to access legal services. A fair regulatory system needs to balance protection of those clients who can access services with extension of that access. The LSB's vision is that extension of access can be achieved by diverse and ethical legal providers. Increasing competition in the legal services market can have that highly desired effect. However, regulatory burdens on moving from one regulator to another are undermining competition.

48. For example, the requirement for run-off cover could prove prohibitive in some circumstances. Run-off cover for a firm closing is essential for consumer

protection. However, the justification for applying run-off cover rules is less obvious for an entity moving to a different regulator. Insisting on strict adherence to run-off cover rules in those circumstances must undermine choice of regulator and render such choice illusory. We seek confirmation that this issue will be resolved in the period covered by the business plan.

49. We note, from paragraph 119, that research and professional services are grouped together and amount to an annual projected spend of £250,000. It would be useful to understand how the budget is apportioned between the three main areas of work identified: breaking down barriers; enabling need for legal services to be met more effectively; and performance, evaluation and oversight. This will enable greater transparency as to how costs are apportioned in the operational business plan for 2015-16. Without it, we still question which of the functions could be delivered more effectively.