

A consultation on the proposed work programme of the Legal Services Board for 2017/18

**A response by
The Chartered Institute of Legal Executives (CILEx)**

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1. Summary of recommendations

- 1.1. We would like the LSB to recognise that any work streams will, to varying degrees, apply pressure to a sector that is already under significant flux, including from drivers that are not referenced in the draft plan. The LSB should therefore consider only taking forward those strands of work that are absolutely necessary at this time. (3.1 – 3.4)
- 1.2. We would like the LSB to publish details of how the 2018-2021 strategy will be developed and consulted on. (3.5)
- 1.3. A review of education and training guidance would be better to take place once reforms have been more fully embedded. (4.1.1)
- 1.4. The LSB's support for government reforms to open the market to new competitors should be reframed to ensure the LSB's independence is not seen to be undermined. The LSB should retain its role as, and be seen to be, an independent and critical friend to government as it is to regulators. (4.2.1)
- 1.5. Consideration should be made for how online comparison websites can be supported to not inappropriately restrict the providers they supply information on, i.e. only offering details of solicitors, and not Chartered Legal Executives providing similar regulated services. (4.3.1- 4.3.2)
- 1.6. Statutory decision making should be one of the LSB's primary focuses for the year. Particularly we anticipate that on behalf of CILEx Regulation Ltd we will be making an application for designation as a Licensing Authority. (4.5.1 – 4.5.2)
- 1.7. Maintaining the independence of frontline regulators should be monitored by the LSB, and intervention take place where necessary, but otherwise a significant work programme is not required at this time. (4.7.1 – 4.7.3)
- 1.8. We believe there is merit in considering how to assess the cost implications on providers and practitioners of compliance with the rules that stem from the LSB and the frontline regulators. (4.9.1 – 4.9.2)
- 1.9. A review of enforcement activity should not be limited to the 'larger regulators' but should consider all frontline regulators' enforcement activities. (4.10.1 – 4.10.2)

2. Introduction

- 2.1. The Chartered Institute of Legal Executives (CILEx) is the professional association and governing body for Chartered Legal Executive lawyers, other legal practitioners and paralegals. CILEx represents around 20,000 members, which includes approximately 7,500 fully qualified Chartered Legal Executive lawyers.
- 2.2. CILEx continually engages in the process of policy, regulatory reform, and law reform. At the heart of this engagement is public interest, as well as that of the profession. Given the unique role played by Chartered Legal Executives, CILEx considers itself uniquely placed to inform these developments.

- 2.3. As it contributes to reforms in policy, regulation and law, CILEx endeavours to ensure relevant regard is given to equality and human rights, and the need to ensure justice is accessible for those who seek it.

3. General points

- 3.1. The consultation contains details of the market, political, and broader regulatory contexts that have informed the proposed programme of work.¹ In our view some contexts have not been fully considered in the plan for their potential impact on the market and consumers. These include:
 - 3.1.1. The implementation of Lord Justice Briggs' proposals for an Online Court (OC), and the parallel modernisation programme underway by HMCTS, which will impact on litigation and advocacy providers.
 - 3.1.2. Proposals to reform the personal injury market, including raising the small claims limit for PI claims, which would make it uneconomical for providers to support claimants, and would reduce access to justice.
 - 3.1.3. The review announced by the Ministry of Justice of the Legal Aid, Sentencing and Punishment of Offenders Act. This outcome of this review will be particularly relevant to vulnerable consumers.
 - 3.1.4. The myriad of seismic changes that will be caused by Brexit, and the ways in which it will affect different legal services markets for both individual consumers and organisations of all sizes.
 - 3.1.5. The proposals to extend the Fixed Recoverable Costs regime, which risk introducing a one size fits all approach that will be inappropriate for particularly complex cases.
 - 3.1.6. The impending Prisons and Court Reform Bill.
- 3.2. We would recommend that these items be considered more fully by the LSB when finalising this business plan, and in the development of the upcoming strategy.
- 3.3. Furthermore, quantifying the impact of the proposed work plan, both in terms of individual projects and as a collective work stream, would enable a more balanced assessment of what projects should and should not be taken forward at the current time. We would suggest there is a need for an appropriate assessment of impact of these developments, grounded in evidence and referenced. (See 4.9 below).
- 3.4. Upon considering all of the various drivers that are impacting the sector, including those referenced in the consultation, it is clear that the sector is undergoing significant and simultaneous waves of reform. Any additional work programmes that the LSB undertakes will add to this. We therefore ask that the LSB carefully consider only taking forward those strands of work that are absolutely necessary at this time.
- 3.5. This business plan represents the final year of activity within the 2015-2018 strategy. The consultation contains a commitment to 'engage with our

¹ Para 11

stakeholders as we develop our new Strategy², though no further details are provided. We would like the LSB to publish details of how the new strategy will be developed and consulted on so it can be built into CILEx's work plans.

4. Proposed programme of work

Breaking down regulatory barriers

4.1. Assessing effectiveness of LSB's education and training guidance.

4.1.1. The changes that have been made in the sector as a result of the LETR and the subsequent LSB guidance are still being embedded, and other regulators are in the process of their own changes. We therefore consider that this review would be better to take place once reforms have been more fully embedded, and potentially can be considered for inclusion on the 2018-21 strategy.

4.2. Supporting changes in legislation to remove barriers.

4.2.1. CILEx supports measures to remove barriers to effective functioning of the legal services market, including opportunities for ABSs and expanding opportunities for CILEx's specialist practitioners. However the LSB has a particular role to play in such reforms; to be a critical friend, and to maintain its independence. We believe this work programme as worded risks undermining the appearance of independence from government.

4.2.2. The LSB should maintain its critical position of governments, as it does for frontline regulators and approved regulators. There will be some circumstances where the Government proposes to remove barriers that may not be in the public interest, or may harm consumer protection. In such circumstances the LSB has a duty to make a balanced assessment, informed by appropriate and expert stakeholders, and speak in the public interest. Whilst the reforms as proposed arguably do not pose such risks, they may be altered, amended or otherwise revised. The wording of the business plan appears to offer near-unconditional support for the Government's agenda, which is not the LSB's role.

Tackling unmet legal need

4.3. Increasing market transparency for consumers

4.3.1. The LSB should consider its role as being to support the frontline regulators as they implement the CMA's recommendations through the programme board. We consider it important that this work is owned by the frontline regulators, and that the LSB facilitate and coordinate only where necessary.

² Para 18

- 4.3.2. On the particular point of digital comparison tools (DCTs), the LSB should consider what it can do to ensure that DCTs do not restrict themselves to certain professions or areas of the market inappropriately. For example, DCTs who only carry legal service providers regulated by the SRA will bar those providers offering comparable services that are regulated by other regulators, such as the Council for Licensed Conveyancers, CILEx Regulation Ltd, etc. Far from increasing market transparency, this risks distorting it.
- 4.4. Vulnerable consumers
 - 4.4.1. We believe this to be an important area of focus, and should explicitly consider legal services that vulnerable groups are more likely to need.
 - 4.4.1.1. It would be appropriate to consider the impact on vulnerable people of declining legal aid spending in the context of the review of LASPO.

Performances, evaluation and oversight

- 4.5. Statutory decisions
 - 4.5.1. We believe this should be one of the LSB's primary focuses for the year. Particularly we anticipate that on behalf of CILEx Regulation Ltd we will be making an application for designation as a Licensing Authority.
 - 4.5.2. Given the rapidly advancing market in ABSs, ensuring a swift authorisation process is important to ensure that prospective ABSs have a full suite of regulators from which to select the most appropriate regulatory model for their business.
- 4.6. Regulatory performance
 - 4.6.1. We agree to a review of the way in which regulatory performance is assessed, and we look forward to engaging in the review.
- 4.7. Independence of regulation
 - 4.7.1. To all intents and purposes, we consider CILEx Regulation to be independent from CILEx. They have a separate board and management structure, and are not influenced by CILEx in the regulatory decisions that they take.
 - 4.7.2. We are inclined to agree with indications we have received from Ministers that, given the effective independence of frontline regulators, this is not an issue they see as being of priority to pursue.
 - 4.7.3. We therefore recommend that maintaining the independence of frontline regulators requires monitoring by the LSB, and that any issues arising can be used to consider whether the Internal Governance Rules remain fit for purpose, but otherwise a significant work programme is not required at this time.
- 4.8. Diversity
 - 4.8.1. We believe there is value in considering what, if any, regulatory role there can be to improve diversity in the senior levels of the profession,

but that this should not duplicate the significant efforts already underway by CILEx, CILEx Regulation, and others.

4.8.2. The revised diversity guidance, published 15 February 2017, provides a timescale and structure for this work, and we expect that pursuing this will satisfy this element of the business plan.

4.9. Transparency of regulator costs

4.9.1. We appreciate the findings of the LSB's Cost of Regulation survey identified that 'providers consider the totality of regulation that they must comply with rather than the source of this regulation.'³ However, we believe there is merit in considering how to assess the cost implications on providers and practitioners of compliance with the rules that stem from the LSB and the frontline regulators specifically

4.9.2. This would require delineation between legal services regulatory requirements (i.e. processes for authorisation, obtaining PII, maintaining CPD, etc) and other compliance requirements (i.e. data protection, money laundering, employment law, etc). These would also be distinct from discretionary compliance costs, such as for accreditation schemes. This can build on the research and model used in the ICF investigation in 2015.⁴

4.9.3. Whilst the cost of compliance is ultimately paid by the consumer through meeting the costs of providers, there are cost implications among frontline regulators and approved regulators in complying with LSB rules and guidance. This should be considered in such analysis as part of the picture of ensuring that the cost of regulation is not prohibitively high.

4.10. Reviewing delivery of enforcement activities

4.10.1. We welcome the LSB's positive assessment of CILEx Regulation's enforcement activity, indeed they were the only body to achieve a 'good' rating in the last assessment of regulatory performance, specifically in the area of enforcement.

4.10.2. We recognise that a review would be appropriate given the high profile nature of enforcement activity; however we do not think it necessary to limit this review to the 'larger regulators'. All frontline regulators should be considered in the review.

4.11. OLC responsibilities

4.11.1. Given that the CMA's interim report found that complaints handling does not raise any significant problems⁵, CILEx would suggest that incrementally making gradual improvements to the system might be the best approach, allowing both the LSB and LeO to investigate how best those improvements could be made, rather than

³ LSB Cost of Regulation Survey Report, March 2015 (Para 1.5)

⁴ 'In-depth investigation into the costs of regulation in the market for legal services', ICF Consulting Services Ltd, September 2015

⁵ Para 5.61, CMA market study into legal services interim report .

introducing more dramatic changes such as moving to the Scottish Legal Complaints Commission's approach to accepting complaints from third parties, for example.

- 4.11.2. An incremental response is also arguably in the best interests of a sector which is, as stated above, already in the throes of much other reform. This would enable considered investigation of, for example, whether and how LeO's remit might be extended to unregulated providers without which there is capacity to add to the regulatory costs of legal services providers cancelling out the excellent work of the LSB in reducing its ongoing costs (and therefore burden on those regulated).

5. Proposed research

Innovation

- 5.1. Whilst growth in CILEx Regulation regulated firms has been modest, we expect that there are many more to come, enhancing consumer choice as they do. Therefore any future research programme should explicitly consider CILEx entities as a real means for facilitating greater competition and innovation in the sector.
- 5.2. We also recommend that research into innovation should ensure it has a focus on the consumer experience of innovative services.

Prices of individual consumer legal services

- 5.3. We recognise that this is a significant and valuable piece of work, but that the drivers of price change must be properly understood so lessons can be effectively taken.
- 5.4. There are a myriad of factors that affect pricing, with cost of regulation being only one component. The research should consider all the relevant drivers.
- 5.5. It is important to consider the variable economic power of market providers, and the ability for larger providers to achieve economies of scale relative to smaller or medium sized providers. In such a market it is important that small, often niche or specialist, providers are not squeezed out of the market, and that their value to the market is considered both in terms of the services on offer as well as their prices.

The legal needs of small businesses

- 5.6. We consider that this research would be better informed if it followed the updated research into the prices of individual consumer legal services, with the associated points we make above.

6. Proposed indicative budget

- 6.1. We recognise that the budget has benefitted from structural underspend as a result of overestimation on the previous budget. We welcome that this saving is being passed on.
- 6.2. However this budget reduction is not indicative of a reduced cost of regulation in and of itself. This is why we recommend a fuller consideration of the impact of LSB decisions, and an assessment of the cost of compliance with LSB rules and those of frontline regulators.
 - 6.2.1. Whilst the cost of compliance is ultimately paid by the consumer through meeting the costs of providers, there are cost implications among frontline regulators and approved regulators in complying with LSB rules and guidance. This should be considered in such analysis as part of the picture of ensuring that the cost of regulation is not prohibitively high.

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