



Legal Services Board (LSB) Draft Business Plan 2021-22

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

[February 2021]



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1. Introduction

- 1.1. The Chartered Institute of Legal Executives (CILEx) is the professional association and governing body for Chartered Legal Executive lawyers, other legal practitioners and paralegals. As the Approved Regulator under the Legal Services Act 2007, CILEx has delegated these regulatory powers to the independent regulator CILEx Regulation Ltd.
- 1.2. As it contributes to policy and law reform, 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.

2. Q1 – Do you have any comments on the three strategic themes that we have identified?

- 2.1. CILEx supports the LSB's use of, and call for, ongoing collaborative thinking in identifying the three strategic aims of "fairer outcomes, stronger confidence and better services" whilst establishing a sector-wide strategy to bolster a joined-up approach in meeting these aims. The dichotomy between different regulators, strategies and thinking to date, has often disjointed the market creating anomalous restrictions on service provision and limiting access to those services that consumers should expect to receive in a modern 21st century legal services sector.
- 2.2. CILEx therefore sees real potential for a strategy which explicitly seeks to align efforts across the sector and may prove invaluable to addressing this fragmentation. It can only be a good thing if the assumption of sector leadership by the LSB drives increasingly heavily on collaborative input to achieving these aims. As a legal professional body, legal education provider and Awarding body, CILEx is confident that we can contribute to these strategic themes and hopes that it can add its perspective on balancing sensitivity to any associated time and costs factors against subsequent impacts on sustainability of a market that the LSB acknowledges has had much to contend with in recent times.

3. Q2 – Do you have any comments on the nine challenges that we have identified for the sector?

AND

Q3 – How can you/ your organisation contribute to overcoming the sector-wide challenges we have identified?

- 3.1. In analysing each challenge, CILEx has identified where we may work collaboratively with the LSB in contributing to overcoming many of these issues that we have ourselves been grappling with. We are confident that shared endeavour will support the delivery of a legal services sector fit to meet the needs of today, whilst still focused on innovating to create an enhanced sector that meets the needs of tomorrow.

Fairer Outcomes: *"this includes widening public access to advice and support and ensuring that no one has a worse outcomes or quality of service due to their background or life circumstances. The sector must also build a more inclusive culture which enables anyone to enter the law and achieve their full career potential."*¹

- 3.2. The LSB rightly identifies that financial exclusion, as it impacts access to justice and fairer outcomes, has been witnessed in two primary ways: 1). with respect to limited purchasing power, whereby consumers are increasingly unable to pay for those legal services that they need, exacerbating unmet legal need (particularly in cases involving vulnerable and marginalised consumers); and 2). in depleting the supplier market as typically high costs of

¹ Legal Services Board, *The State of Legal Services 2020*, [November 2020] p.5, Foreword.

entry to the legal profession not only limit sector diversity and inclusion, but further incentivise students to migrate to more lucrative career paths (thereby creating disproportionate impacts across the sector to recruitment, retention and resourcing).

(Fairer Outcomes) Challenge 1: Lowering unmet legal need prevalent across society

- 3.3. CILEx welcomes the LSB's focus on tackling the outstanding issue of unmet legal need; one that has been worsened by the impacts of COVID-19 as consumers face financial hardship at the same time as facing an increased need to access legal services. As the LSB rightly identify, more is needed to redress the balance of affordable costs and access to justice following years of significant underinvestment in public funding. Whilst sector sustainability is increasingly threatened, creating a fragile landscape for legal service providers, we hope that the LSB continues to advocate for increased public spend to appropriately finance the justice system and legal aid sector overall.² This shall be paramount to wider COVID-19 recovery efforts, not just in the legal sector, but in respect of wider socio-economic issues that the legal profession feeds into; such as unemployment, housing, financial security/debt management, estate management and more.
- 3.3.1. As the LSB also rightly note, proper funding of the justice system can be central to promoting greater competition in the sector and, by proxy, driving innovation. CILEx has direct experience of this where its members work in legal aid and require access to currently closed accreditation systems; but is also conscious that adequate resources for firms are still needed if they are to be incentivised to invest in associated training.
- 3.4. Against this fragile backdrop, the need to keep costs as realistic and proportionate as possible shall be central to combating the perception that *'lawyers are too expensive for most people to use'*³; and it is to this end that CILEx calls for proportionate regulation, both in terms of access and cost.
- 3.4.1. For example, CILEx is acutely aware of the cost implications that existing barriers to service provision have caused to the detriment of the consumer, in instances such as certifying copies of power of attorney. As the LSB are aware, the Powers of Attorney Act 1971 s.3 currently prevents CILEx lawyers from providing these services, and CILEx has evidence to suggest that this sole anomaly frequently arises, with 58% of CILEx lawyers reporting a consequential adverse impact of increased delays and costs to the consumer. The problem is exacerbated by the pandemic, with demand for such services increasing (as consumers put their affairs in order) and as lawyer supply to meet that need, is decreasing. HM Land Registry has judged regulatory risk to be low enough to now permit copies of power of attorney from CILEx Lawyers; mainstream regulation needs to catch-up with the real world.
- 3.4.2. Indeed, the same can be argued with respect to services associated with the grant of probate or grant of letters of administration; both of which CILEx lawyers specialising in the private client sector are often engaged with. Once again, due to barriers of access and issues relating to the current reserved legal activities⁴, unless authorised with the relevant practice rights to undertake probate activities, the effect of the current regulatory framework acts to prevent CILEx lawyers from completing the final step of preparing/signing necessary paperwork to the detriment of consumer choice and

² See footnote 1, at p.22, para 40. CILEx welcomes the LSB's acknowledgement that *"The underlying complexity of many legal issues and the effort and expertise required to resolve them means professional help will continue to be out of reach for large parts of the population to fund privately"* warranting increased public funding and support.

³ YouGov, *Legal Needs of Individuals in England and Wales*, [January 2020] as prepared for the LSB and Law Society, and as referenced within *The State of Legal Services 2020* report (see footnote 1, p.21, para 36).

⁴ See CILEx's response to Question 7 of the consultation paper below, at paragraphs 6.1-6.3, for more on reserved legal activities.

affordable service provision. The justification for requiring such high levels of regulation for such a narrow part of this process are still yet to be understood, and CILEx therefore calls for more proportionate regulation (such as activity-based regulation) to overcome these unnecessary added costs faced in the delivery of legal service provision.

(Fairer Outcomes) Challenge 2: Achieving fairer outcomes for groups experiencing deeper disadvantage;

Challenge 3: Dismantling barriers to a diverse and inclusive profession at all levels

- 3.5. Alongside issues of costs facing the consumer, CILEx welcomes the LSB's wider focus on social mobility within the profession in strengthening the diversity of the market. Not only should this be central to bolstering the supplier market, but to doing so in a way that ensures the profession is better able to reflect the demographic of its consumers, safeguarding fairer outcomes for groups experiencing deeper disadvantage. Whilst there are many initiatives to encourage diversity, these are still having but a minimal impact, with direct consequences on the sector's ability to achieve 'fairer outcomes' in respect of consumer choice and access to justice.
- 3.6. Against this backdrop, CILEx has one of the most demonstrably diverse membership of lawyers with 75% of members identifying as female, lauded by the LSB as a particularly strong record for diversity,⁵ and with a further 14% of members identifying as BAME. Indeed, the financial burdens facing students wishing to pursue a career in law, as noted in the LSB's State of the Legal Services report⁶, have worsened as a result of COVID-19; however even prior to the pandemic, it has always been the case that entry to the legal profession typically excludes certain pockets of our society by virtue of the high costs associated with a university education and post-graduate undertakings. For people from disadvantaged backgrounds therefore, CILEx has long offered an alternative, cost-effective and flexible qualification pathway; providing students with the opportunity to build skills and competencies in law, whilst accommodating a work-as-you-learn model that produces highly competitive and specialist lawyers with the necessary experience and competence needed to perform their duties from the outset. This has now been built upon and enhanced by the development of its new CPQ (CILEx Professional Qualification).
- 3.7. However, as the LSB rightly acknowledges, a stark absence of focus to date lies in tackling issues of diversity in the context of career progression and not just entry. In achieving this much broader aim, there is a realisation that a wider culture change focused on the "*testimony of differential treatment of specific groups*"⁷ is necessary to subvert our traditional notions of a 'good lawyer.' From our own lawyers, it is clear for example, that the unconscious bias often displayed to those coming from an alternative non-university route of entry into law has greatly impeded confidence levels and exacerbated barriers that prevent career progression, such as issues of imposter syndrome and experiences of microaggressions towards non-university-educated practitioners. More overtly, systemic barriers to career progression in legal institutions further contribute to the problem; such as

⁵ See footnote 1, at p.26, para 50.

⁶ See footnote 1, at p.23, para 41: "*There are concerns about the sustainability of the profession, especially where the next generation of crime and social welfare lawyers to serve people's legal needs will come from. As students face the realities of tens of thousands of pounds of debt upon qualification, it is little surprise that universities we spoke to told us that more students are pursuing careers in much better remunerated areas.*"

⁷ See footnote 1, at p.27, para 54.

those seen within the judiciary and Crown Prosecution Service where alternative pathways to progression are still lacking. The impacts of these barriers collectively work to limit progression pathways and cap competent and able lawyers from developing further. As such, CILEx is keen to work collectively as one, supported by government, to tackle these anomalies and workplace perceptions.

Stronger Confidence: *“this will involve resolving difficult questions around the scope of regulation and broadening access to redress. It also requires regulators to put the right mechanisms in place so that legal professionals deliver consistently competent and ethical legal services.”*⁸

(Stronger confidence) Challenge 4: Ensuring high-quality legal services and strong professional ethics

- 3.8. As a legal professional body, legal education provider and Awarding Body, CILEx strives to ensure that it produces CILEx Lawyers of the highest quality and calibre to meet the needs of a sector that is currently in flux. As such, we are looking to enhance our qualifications to ensure that it continues to deliver ethically aware and tech savvy lawyers with commercial awareness alongside core legal knowledge, fit for the 21st century. Part of the supporting rationale is the recognition of the growing need to embed greater ethical sensitivity within our qualification framework particularly in the context of delivering legal services remotely, as well as acknowledging the shift in lawyer responsibilities as basic automation takes away the more process-heavy aspects of being a lawyer and allows lawyers to focus their efforts on the more human side of service delivery including client care and professional ethics.
- 3.9. In respect of the LSB’s work on ongoing competence, CILEx commends the need for regulatory oversight in safeguarding minimum standards of skill, knowledge and competence amongst legal professionals for the ongoing protection and promotion of the public and consumer interests. With this in mind, the CILEx qualification framework aims to deliver training and education that is tailored to the specific competencies required of legal professionals working in each individual practice area. Consequently, as specialist lawyers, regulated and authorised for the specific activities they deliver, CILEx professionals are required to evidence ongoing competence to standards which directly reflect the work that they do on a day-to-day basis. In strengthening these levels of assurance, CILEx would like to reiterate the benefits of parallel calls for activity-based regulation in ensuring high standards in services delivered.

(Stronger confidence) Challenge 5: Closing gaps in consumer protection

- 3.10. CILEx concurs with the LSB’s observation that *“the current list of reserved activities is an ‘accident of history’ and not based on a consumer protection rationale.”*⁹ As rightly noted, these activities lacked proper review and scrutiny prior to the passing of the Legal Services Act 2007, and in recent years, the growth of technological changes has rendered this framework increasingly *“unsustainable.”*¹⁰ This is especially prevalent in the context of novel digital solution providers entering the market; who, by virtue of being driven by third-party players in the technology sector and involving input from non-lawyers, operate outside the regulatory framework. In so doing, new gaps to consumer protection have arisen, and CILEx emphasises the need for wider change to bring these providers within the fold of legal services regulation. Only in so doing, shall consumers have confidence that they are protected when using the full suite of services available to them in the market.

⁸ See footnote 1.

⁹ See footnote 1 at p.34, para 64 with reference to: LSB, *A vision for legislative reform of the regulatory framework for legal services in England and Wales*, [2016].

¹⁰ See footnote 1 at p.35, para 67.

We outline more on our thinking in relation to this body of work, and the pressing need for wide-scale review, in response to Question 7 below (see para 6.1-6.3).

- 3.11. In addressing regulatory gaps nearer-term, CILEx strongly welcomes the suggestion put forth by Professor Stephen Mayson and others for the unregulated market to be included within the scope of the regulatory framework with respect to after-the-event regulation and access to ombudsman services as long as this is done in a proportionate way. As a short-term measure this will seek to ensure that the current imbalance of supply and demand in the sector, alongside the growth of new providers to meet that void, does not inadvertently give rise to consumer vulnerabilities or regulatory gaps.
- 3.12. However, as the LSB rightly recognises, part of this proposed transition will require additional financing, and there is a need to consider proportionate distribution of any associated costs as a result. In making this a viable option therefore, CILEx would like to understand more about how this expanded remit would expect to work (for example, in relation to a single digital register and data sharing therein) as well as how financing ombudsman services are envisaged to operate. Indeed, it is on this basis that we have sought further clarity from the Office for Legal Complaints on proposed budgets for 2021/22 and the extent to which budgets and forecasting have included the currently unregulated supplier base.¹¹ In light of the levels of financial instability current facing the sector, as noted above in respect to unmet legal need, the need for additional transparency of any cost increase to regulatory budgets such as these, is greatly heightened.

(Stronger confidence) Challenge 6: Reforming the justice system and redrawing the regulatory landscape

- 3.13. CILEx agrees that an acceleration in the drive for regulatory independence between the regulatory and representative arms of the legal professions is needed. The current dichotomy between these two components, separated and yet not independent, has embedded unnecessary complexity within the regulatory framework. As a result, the current arrangement blurs the distinction between these two key functions, making it harder to navigate and less visible to the consumer.
 - 3.13.1. A main tension within this is the representative bodies' role of Approved Regulator, which as currently drafted in statute, means it is one with responsibility but without control, testing existing relationships between the regulatory and representative functions. In acknowledgment of these inherent barriers, and as part of CILEx's continuing internal governance reforms, CILEx and CILEx Regulation have taken the view that enhancing independence between itself and CILEx Regulation should be a priority. Both Boards are therefore committed to making this a reality in practice (when made possible by legislative change) by being ready in having achieved the greatest degree of regulatory independence possible under the current legislation, exceeding mere compliance with the LSB's new Internal Governance Rules.
- 3.14. However, we recognise that public trust and confidence in legal services goes beyond regulatory independence and extends to wider reaching challenges, such as the current fragmentation of the regulatory framework which is difficult for consumers to perceive, navigate and understand. In this respect, CILEx calls for simplification of regulatory oversight in a manner that ensures: 1). That all providers fall within the remit of regulation, 2). Regulation then operates on a proportionate basis in light of the specific activities being undertaken, and 3). that access to an efficient and effective ombudsman service for consumers is subsequently secured. In so doing, it is paramount that the regulatory framework is still able to facilitate flexible and alternative routes of entry to law so as not to

¹¹ CILEx Response, *OLC Business Plan and Budget Consultation 2021/22*, (January 2021), para 3.1.2.

undermine the parallel aims under “fairer outcomes” for embedding social mobility in the sector and achieving greater diversity and inclusion of the profession at all levels.

- 3.14.1. Within this context, CILEx appreciates the rationale of having a single regulator which could have clearer and better oversight of the sector as a whole; driving efficient joined-up regulation and creating a more manageable regulatory landscape for consumers to navigate. However, in the absence of such changes being realised any time soon, particularly considering limitations to the current legislative timetable, we urge maximum sectoral collaboration to provide relief in addressing these issues mid-term.

Better Service: *“this will require giving consumers the information and tools they need to drive stronger competition, compelling providers to deliver legal services that respond to their needs. It also entails regulators fostering responsible innovation that commands the trust of both the public and legal professionals.”¹²*

(Better Service) Challenge 7: Empowering consumers to obtain high quality and affordable services

- 3.15. CILEx appreciates the progress that has been made towards achieving these aims by virtue of the transparency rules; the importance of this body of work has been recognised by firms regulated by CILEx Regulation, having successfully implemented these measures since.
- 3.16. CILEx supports the LSB’s aims for further exploration in making improvements on the progress made thus far, and in seeking viable solutions for getting this right in what is universally recognised to be a complex market of service provision.

(Better service) Challenge 8: Fostering innovation that designs services around consumer needs; Challenge 9: Supporting responsible use of technology that commands public trust

- 3.17. CILEx regards the growth of innovation and digital services in response to changing market demands and consumer expectations as a positive development for the sector, particularly in relation to how it can overcome challenges such as COVID-19. Whilst we recognise that there has not been much change to overall levels of innovation over the last ten years, 2020 alone gave rise to a series of initiatives for developing legaltech involving the regulators, the private sector and even government bodies such as the Ministry of Justice and HM Land Registry working collaboratively.
- 3.18. To cultivate market liberalisation, CILEx believes that overhaul of the regulatory framework to an activity-based model shall be key to overcoming any outstanding barriers of entry, whilst simultaneously providing parameters that can be trusted for the consumer, and assurance for tech providers as to the parameters they should be operating in. Alongside this transformation, is the parallel need for building technological knowledge and competence amongst the profession, including within educational frameworks. Jointly, these may cultivate a shift in thinking and reception of digital solutions in a profession that is historically trained to think and operate within the strict parameters of the law.
- 4. Q4– Do you have any comments on the suggested areas of priority for the sector 2021-24?**
- 4.1. CILEx does not have any further comments beyond those outlined above on the suggested areas of priority identified for 2021-24.
- 5. Q5 – Do you agree with our proposal to pursue these workstreams? Is there anything missing that you think we should focus on in 2021/22?**

¹² See footnote 1.

AND

Q6 – Do you see any areas of joint working between the LSB and you/ your organisation?

- 5.1. Whilst CILEx may have complimentary or differing views on the timing of some of these objectives against the current climate, we are broadly in agreement with the workstreams identified by the LSB for their 2021/22 business plan. As outlined above, a number of these core objectives, including those focused on diversity and inclusion, technology and innovation and regulatory reform, are issues of key interest to CILEx and we hope to engage constructively with the LSB in relation to all of the proposed workstreams as such.
- 5.2. One particular workstream, however, where more detail may be needed is in relation to the LSB's proposals for simple legal products. Whilst we understand the rationale behind this offering and its linkages to similar products developed in the finance sector, it would be helpful to better understand which specific areas of law/legal service provision would be considered for developing these types of product; how ownership and/or licensing of the products/badge would operate; and, whether these products would be envisaged in line with the need for greater innovation in the sector, and therefore the growth of legaltech solutions.

6. Q7 – Do you agree with our proposals that we should not undertake a statutory review of reserved legal activities in 2021/22?

- 6.1. CILEx is pleased to see the LSB setting out a jointly concerted effort for embedding greater flexibility within legal service provision; with *“reshaping legal services to better meet the needs of society [a]s the golden thread in this strategy for the sector.”*¹³ As part of this ‘reshaping’, it is CILEx’s belief that a review of the reserved legal activities under the Legal Services Act 2007 will be necessary. We recognise the LSB is currently seeking input as to the most appropriate timing for conducting this piece of work and we are minded to agree with the Competition and Markets Authority (CMA)¹⁴ in seeking this review sooner rather than later.
- 6.2. As the LSB recognises,¹⁵ COVID-19 continues to act as a catalyst for rapid change, and it is beyond a doubt that we shall see, and indeed are beginning to witness, the transformation of legal service provision. Ensuring that this transformation takes place in a safe and measured way that does not increase consumer vulnerability, shall not only necessitate bringing wider providers and legaltech within the fold of legal services regulation, but looking to reforms, such as those proposed by Professor Stephen Mayson, to ensure *proportionate* regulation. In their current iteration, the reserved legal activities fail to achieve this, establishing an all-or-nothing approach that overregulates certain activities whilst underregulating others.¹⁶
- 6.3. It is CILEx’s belief that this rigidity risks, in turn, compromising the sector’s ability to achieve two notable aims: 1). To ensure adequate consumer protection, whilst 2). Reducing unmet legal need by promoting healthy competition in the market (particularly now, at a time where that need is increasing). In contrast, CILEx is not convinced that the disadvantages to conducting such a review now, such as that *“the processes involved are*

¹³ See footnote 1, at p.4 Foreword.

¹⁴ Competition and Markets Authority, *Review of the Legal Services Market Study in England and Wales*, [17 December 2020], p.13 (recommendations) / p.133 (para 5.118).

¹⁵ See footnote 1, at p.13, para 15: *“Some argue that the sector needs a period of stability to recover from the effects of the pandemic. However, we need to seize the opportunities afforded by major policy reviews into legal aid, the criminal justice system and other aspects of public policy. Society will not allow the legal sector to continue to inch forward on improving diversity; a step-change is required. Society itself has changed, and expectations are different in many ways.”*

¹⁶ See for example, the scenario outlined in paragraph 3.4.2 above (in relation to services associated with the grant of probate or grant of letters of administration).

*lengthy, and there is no guarantee that the Lord Chancellor will accept the LSB's recommendations,*¹⁷ outweigh the benefits, and it is our view that the reserved legal activities, and their relevance to the landscape of legal service provision, ought to be examined in the nearer term. There is never a good time to undertake something of this scale and, arguably, this is a particularly bad time! But the prizes to be won in change are real drivers for taking this on sooner rather than later.

7. Q8 – Do you have any comments on our proposed market intelligence work? Is there anything missing that you think we should focus on?

7.1. CILEx welcomes the LSB's more direct engagement with consumers via the use of its Public Panel. In looking to assess issues such as consumer vulnerability and the social acceptability of developments in technology we would simply caution that due regard be paid to the limitations in data gathered from a relatively small sample size of 41 members of the public.

8. Q9 – Do you have any comments on our proposed budget for 2021/22?

8.1. CILEx would like to reiterate the financial sensitivities facing the sector in the current climate. As noted by the LSB, chronic underinvestment of the justice system, now overlaid by the logistical and resource challenges that COVID-19 has brought, has meant that in the context of the legal sector, many practitioners and firms are now at risk of closing their doors at a time where public demand for legal services is dramatically increasing. Rationalising any allocation of increases to budget at such a financially sensitive time will therefore require greater transparency and justification to assure the profession that the added costs, as inevitably passed to the consumer, are both proportionate and realistic in meeting essential aims. Against this context, therefore, there is even more of an imperative to explain as fully as possible the proposed 4.4% (£175K) budget increase from £3.923m to £4.098m.

9. Q10 – Do you have any comments regarding equality issues which, in your view/experience, may arise from our proposed business plan for 2021/22? Are there any wider equality issues and interventions that you want to make us aware of?

9.1. CILEx does not have any comments with respect to any equality issues caused by the proposed business plan for 2021/22.

For further details

Should you
require any
further
information,
please contact;

Chandni Patel
Policy Manager
chandni.patel@cilex.org.uk
01234 845740

¹⁷ LSB, "Draft strategy for legal services regulation and draft business plan 2021-22", Consultation paper (December 2020), p.14, para 34.