



Legal Services Board: Draft Business Plan 2014/15

A response by

**The Chartered Institute of Legal
Executives**

Submitted: 7 February 2014

Introduction

1. This response is submitted by the Chartered Institute of Legal Executives (CILEx) as an Approved Regulator (AR) under the Legal Services Act 2007 (the 2007 Act). This consultation response follows consultation with the CILEx Regulatory Committee and the President of CILEx.
2. CILEx continually engages in the process of policy and law reform. At the heart of its engagement is the 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 policy and law reform relating to justice issues.
3. As it contributes to policy and law reform, CILEx endeavours to ensure that relevant regard is given to equality and human rights, and the need to ensure justice is accessible for those who seek it. Where CILEx identifies a matter of public interest which presents a case for reform it will raise awareness of this with Government and other stakeholders and will advocate for such reform.

General comments

4. CILEx welcomes the opportunity to respond to the Legal Services Board's (LSB) draft business plan 2014/15. CILEx continues to support the overall structure for the regulation of legal services as originally envisaged by Sir David Clementi and believes that it remains appropriate for the LSB to continue to oversee the work of the ARs. We are pleased to see the duty to promote competition and consumer choice being actively reinforced with the approval of our rights applications in 2013. This will enable our members to compete equally with other lawyers promoting greater competition, innovation in service provision and greater consumer choice.
5. For the purposes of this response the term Approved Regulators (ARs) is used to reflect the definition in the 2007 Act. The term 'front line regulator' is used to refer to the regulatory body of the AR.

6. The LSB must ensure that the weight and cost of regulation are not unnecessarily burdensome. Through its directions, reviews and interaction with the ARs and through the resulting costs of compliance, such costs fall directly on the profession and ultimately the consumer.
7. We fundamentally disagree with the proposal to carry out “full reviews” of all ARs. This appears to be wholly inappropriate in the absence of strong evidence that a regulator is not complying with the regulatory objectives, or where there is a significant risk of failure or major barriers which need to be removed. Such reviews serve only as another layer of cost to the profession and are inconsistent with a “targeted” approach. It is important that LSB does not carry out burdensome reviews without a clear sense of the benefit to be achieved.
8. CILEx considers the LSB needs to be more transparent in relation to where it feels standards require improvement. Making general statements like “*we expect to see further improvements in regulators’ standards*” without indicating specific areas which require improvement are not helpful.
9. Frank dialogue between the LSB, the ARs and the profession about the front line regulators’ standards is a necessity. Such discussion should focus on where the front line regulator needs to improve and how this can be achieved.
10. CILEX will address the 3 regulatory strands discussed in the consultation paper in the order raised.

Regulatory performance and oversight

11. The draft business plan states at paragraph 19 that the LSB will:

“Review the regulatory standards against best regulatory practice, including the new regulators’ compliance code, the forthcoming requirement to promote growth, and other approaches to regulatory assessment in other sectors.”

12. We are aware that the Department for Business Innovation and Skills (BIS) will impose an obligation on LSB to support the idea of a growth duty being applied to the legal sector. We understand, however, that this duty will apply to the LSB and the Solicitor Regulation Authority (SRA) only and not to all front line regulators. This duty is being imposed as a separate provision in stand-alone legislation, alongside the regulators' Compliance Code.
13. CILEx wholeheartedly agrees that unmet need in legal services provision should be tackled. We understand that recent LSB research suggests that close to *"30% of the general population don't get their legal needs addressed for reasons of cost and approachability of the profession"*¹. To this end, we support the LSB regulatory vision to promote greater competition; innovation in service provision; and consumer choice in order to tackle this unmet need. Proportionate regulation can and should lead to greater innovation, keep regulatory costs down and improve access to justice.
14. CILEx remains committed to opening up the legal sector to new innovative ways of practice, promoting access to justice. The recent approval of applications by CILEx for practice rights will enable CILEx members to compete equally with other lawyers and to seek the development of new methods of practice to open up the market further.
15. CILEx believes that consumers must have access to a choice of providers offering distinctive service models. CILEx is committed to ensuring Chartered Legal Executives are regulated in a way which will enable them to offer high quality services subject to appropriate and proportionate regulation. In view of the above, we agree in principle that the economic growth duty can encourage competition, innovation and increase access to justice.
16. However, we feel it necessary to introduce the following caveat to this duty. The concept of an economic growth duty means being clear about what "growth" means in the context of the legal market and how this new duty can be reconciled with regulatory objectives of the 2007 Act. For example, it is

¹ <http://www.legalfutures.co.uk/latest-news/smes-deeply-unhappy-legal-services-lawyers-warned-risk-going-way-hmv>

essential that a growth duty does not fetter the capacity of front line regulators to take action against individuals or businesses which have breached the regulatory objectives. Nor should the duty restrict the capacity of regulators to prevent inappropriate individuals or businesses entering the legal services market.

17. Furthermore, nowhere in the 2007 Act, save through an oblique and flexible interpretation, is there any requirement for ARs to stimulate a growing market for legal services provision. Public appetite for recourse to the law is often as a result of necessity and in that sense legal services 'market' does not function like other markets. The use of language borrowed from other sectors is undesirable and out of kilter with the 2007 Act.
18. Promoting competition in the sector is a different matter and can promote consumer choice and access to justice, which CILEx supports.
19. Relatedly, it is important for the LSB to bear in mind that the 2007 Act sets out as a starting point, 8 regulatory objectives. The 2007 Act does not prioritise these and it is clear from the Explanatory Notes to the Act that this was deliberate.
20. In view of the above points, we seek clarification as to how the LSB envisages the new duty working alongside the 8 regulatory objectives of the 2007 Act.

Thematic reviews

21. The LSB has stated:

“There are a number of areas where the information we have gathered from prior regulatory reviews, wider research and stakeholder discussion highlights that more in-depth exploration would be beneficial.”

22. We seek clarification of the areas that warrant this further exploration as information/research on the proposed areas may be readily available.

Full review of regulators

23. We are unclear as to why the LSB is planning for full reviews of all regulators to take place in 2015/16. Unless the review is evidence based, we question the need for such comprehensive reviews to take place.

Permitted purposes

24. The LSB intends to continue its work looking at current regulatory costs, including the costs imposed on the market by practising fees spent by the ARs on permitted purposes.

25. CILEx and ILEX Professional Standards (IPS) are transparent about costs to authorised persons in terms of how the practising certificate fee is apportioned. This forms part of our annual consultation with practising members. CILEx does not see the value of an examination of the permitted purposes, and indeed considers that such an examination would essentially result in additional cost to our members. This examination seems to imply that an initial assessment of costs imposed by the PC fee may lead to a full review of the permitted purposes rule. We seek further clarification as to whether this is the intention of the LSB.

26. During the passage of the Legal Services Bill, Parliament recognised the important role of the representative function of ARs. The 2007 Act provides that a portion of the PC fee can be used by the AR for permitted purposes. Baroness Ashton stated:

“It is important to recognise that although practising fees are raised mainly for purely regulatory purposes, some functions are more of a public interest nature than a purely regulatory nature where it might be

*appropriate for both the regulatory and the 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 the legal professions of other jurisdictions; or participation in law reform.*²

27. In view of the above, we feel it would not be appropriate to conduct a review of the permitted purposes which could lead to a restriction or the prevention of appropriate and efficient distribution of PC fee resources.

28. We remind the LSB that we have already set our budget and business plan for 2014/15 and any change to the rules would need to be incorporated into our workload and budget, and could add further to regulatory costs of the LSB.

Strategy development and research

Regulatory reform

29. The 2014/15 draft business plan promises an intensive programme of work for the LSB, the ARs and their regulatory bodies. We question whether it is necessary or appropriate in the light of the capacity of the ARs and their regulatory bodies, and the need to ensure that core functions are carried out.

30. Further discussion is needed between the LSB, and the profession about the priority of, and urgency for, the full set of proposals set out at paragraphs 32 to 34. For example, the final bullet point concerning how regulators identify and deal with firms in financial difficulty, including alternatives to intervention and issues concerning regulatory barriers to exit, has 3 different and significant strands to it, all of which are important in their own right.

31. CILEx suggests the LSB should identify the 3 most important areas of regulatory reform and limit its regulatory reform work to these areas. For

² Hansard: 23 January 2007: col 1048 per Baroness Ashton

example, prioritisation should take account of the evidence accumulated to date showing why a particular regulatory issue requires review and what could be gained as a result.

32. We welcome the LSB proposals to look at the rules in Schedule 13 regarding the “fit and proper test” for ABS purposes. The current rules are overly complex and ultimately costly for prospective ABSs. The test is restrictive and needs simplifying.
33. We also welcome the proposal to consider the SRA’s Separate Business Rule, which can delay approval of firms seeking to offer multi-disciplinary services and the extent to which restrictions on forms of practice are consistent with section 15 of the 2007 Act, when an entity needs to be authorised to provide reserved legal services to the public.
34. We consider that effective and proportionate regulation includes dealing with unnecessary costs and prescription. The priority should include looking at less prescription in the rule change approval process set out in the 2007 Act.
35. Paragraph 33 of the draft business plan sets out the LSB’s intention to identify a select number of issues either across regulators or for specific regulators and conduct an in-depth review of them. Given the already intensive work programme, we are unclear as to why the LSB is undertaking this work and without further clarification, it is difficult to know whether this is necessitated by evidence.
36. At a time when the Government and others are seeking to reduce costs and regulatory burdens, it would be appropriate to consider whether the LSB can cut its own costs further. The LSB should assess the urgency of the initiatives that it seeks to move forward in the current business plan and justify that urgency.

Liberalising the legal workforce

37. CILEx recruits a wide range of individuals into its membership. The majority of CILEx members are female. Furthermore, our members also come from a wide range of backgrounds both educational and social. The contribution that CILEx makes to social mobility was recognised by the House of Lords when it observed:

“This branch of the profession draws from a wider social background than other parts of the profession – something that the strategy for social mobility..... could learn from.”³

38. CILEx has created opportunities while firmly maintaining standards of qualification. From a consumer perspective, CILEx has made a real contribution towards ensuring clients have access to lawyers from a wide social understanding and background. The continued emphasis on diversity is strongly supported. We are particularly pleased to see the LSB place an emphasis on encouraging a diverse workforce, together with an effective data monitoring system. We welcome such measures and look forward to working with the LSB in these areas of common interest.

39. We note that the term “liberalising” is used for the first time in the draft business plan and would ask for more detail on the thinking behind the use of this terminology, which does not appear in the 2007 Act. Whilst the use of new terminology can sound effective, all initiatives need to be evidence based. The LSB has been operating long enough now to take forward initiatives that are evidence based and should be in a position to more than just “think” they would like to research a particular issue, or indeed to rely on terminology that is wholly out of kilter with the 2007 Act. The LSB should use an evidence based approach to determine the focus of resources on research initiatives.

³ Hansard: 5 April 2011: col 1686 per Baroness Gale.

Improving the consumer experience

40. CILEx accepts that regulation should set a minimum level of intervention necessary to set a framework for a market which puts consumers at its centre by balancing the equality of bargaining power whilst at the same time allowing innovation of service provision.
41. It is however extremely important that the LSB does not inadvertently adopt a narrow definition of consumer, for example, consumers of high street services. This narrow approach means that its recommendations are often inappropriate for the sector as a whole. Many lawyers increasingly work in larger firms and focus on commercial work. A regulatory approach for consumers of high street services will not be suitable for many of the practices in the sector.

Research and evaluation

42. It is clear that research and evidence remains central to the LSB's work. Where gaps are identified we accept that new research may be necessary to fill these gaps.
43. However, in previous business plans, it has not always been clear why proposed research projects have been chosen or what the LSB intended to do with any findings. There is a plethora of evidence and research available, and bearing in mind that the LSB is now in its fifth year of operation we would expect it to have a sound evidence base to develop effective regulator policy.
44. Moreover, the evaluation and research that the LSB has commissioned has not always generated the outcomes envisaged and in other cases has unnecessarily duplicated research already available. Duplication and overlap result in unnecessary costs to the profession and ultimately the consumer.

Statutory decision making

45. We are unclear as to why the LSB is considering changing its approach to assessing compliance with the Internal Governance Rules and whether “self-certification” by the ARs should continue as the only form of assurance. The LSB needs to be more transparent on this. If the LSB considers self-certification is no longer appropriate it must explain why. If this is not working with certain ARs, we would expect the LSB to deal with them rather than considering a wholesale change of rules, which will act only to add to cost and intrusion unnecessarily.

Relationship with the Office of Legal Complaints

46. From the outset, we welcomed the establishment of the Legal Ombudsman scheme. We are pleased to note that the objective, following on from the objectives set out in the 2007 Act, was to set up a scheme which stakeholders recognised as independent, impartial, accessible and most importantly, useful.

47. We applaud the good start made by the Office of Legal Complaints (OLC). The ‘one-stop shop’ has simplified what was previously a convoluted, slow and expensive process.

48. We would urge the OLC to continue its transparency, and encourage it to enter into more dialogue with ARs regarding the types of complaints made to ensure a greater understanding and intelligence about the nature of complaints.

Budget

49. The LSB’s costs are levied on the ARs in proportion to the number of ‘authorised persons’. Although, this does have flaws (it is only one measure of proportionality and it ignores a targeted risk approach) the advantage is its

ease of application. We would not advocate a more sophisticated calculation of the levy. As an AR, we are rightly and reasonably concerned with the control of the LSB's budget, which will ultimately determine the overall leviable expenditure imposed on the ARs. Expenditure is carefully controlled and monitored at CILEx, mindful that it is our members' money. We expect the LSB to be equally vigilant.

50. The draft business plan draws attention to the possibility of legal actions arising which ARs may bring (or defend) against the LSB. It is clearly right that where the LSB is successful in such litigation, the LSB's costs should be attributed only to the AR involved, rather than shared amongst all the ARs.