

Draft: Strategy 2018-21 and Business Plan 2018/19

A public consultation issued by the Legal Services Board (LSB)

Comments from ACCA
February 2018
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GENERAL COMMENTS

ACCA welcomes the opportunity to comment on the LSB's consultation on its proposed three-year strategy and its business plan for 2018/19. We look forward to contributing to the development and delivery of its strategic plans.

We are encouraged by the progress the LSB has made against its existing 2015-18 strategy. The LSB has secured improvements in the legal services market for consumers, providers and the public by enhancing regulatory performance and focussing on the regulatory objectives.

The draft strategy for 2018-21 builds on this and recognises that there is scope to deliver further improvements over the next three years. We support the focus on the public interest by way of proportionate regulation, improved access to legal services, and increased innovation and competition through the diversity of service providers. In particular, we welcome the strategic focus on regulators' performance as this is core to the role of an oversight regulator, and it is important that this process is transparent and remains robust.

We believe the LSB's strategic focus should be on working closely with individual approved regulators to enhance regulatory performance. We would welcome the adoption of a risk-based and targeted approach to legal services regulation that reflects the diversity of approved regulators. This would minimise regulatory burdens and ensure that regulators are seen to regulate independently, effectively and responsibly.

We would expect the LSB to place less emphasis on issuing rules in accordance with the Legal Service Act 2007 (the Act), conducting research, and publishing reports. Although compliance with legal requirements is of course important, we feel there is too much focus on rules and structures and a lack of focus on achieving the right outcomes.

We are broadly supportive of the LSB's proposed business plan for 2018/19. The key workstreams provide clarity on the activities that the LSB intends to complete in the first year of its three-year strategic planning period.

Where appropriate, we have suggested further improvements to the LSB's draft strategic plan 2018-21 and business plan for 2018/19. In particular, we would encourage the LSB to focus more on what it can *achieve* and demonstrate greater ambition to improve outcomes.

AREAS FOR SPECIFIC COMMENT

In this section, we set out our responses to the specific questions set out on pages 17 to 18 of the consultation document.

Question 1: Are there any additional significant market trends or drivers for change that you are aware of that we should also take into account?

We believe the trends and drivers for change identified through research and stakeholder engagement represent the most significant challenges to the legal services sector and the LSB's operating environment. We are not aware of any additional significant market trends or drivers for change that should also be taken into account.

However, it is disappointing that the strategy developed from these market trends and drivers for change appears to focus more on what the LSB cannot do, instead of what it can do. For example, in paragraph 12 of the consultation document, the LSB believes there is '*no realistic prospect*' of legislative reform over the next three years and seems resigned to '*make the most of the current framework*'. Furthermore, the outcomes and indicators of success suggest a lack of ambition to seek improvement, without the need for legislative change, in some areas.

We also suggest that the LSB reconsiders the strategy developed from the following trends and provides further clarification:

Government and economy

In paragraph 12, the LSB states '*The next three years will see the UK leave the European Union. As a result, we do not envisage legislative reform of the regulatory framework for legal services being a realistic prospect during the next three years*'. We appreciate that the scope for change may be restricted by the Government's focus on delivering Brexit. However, we believe that this should not prevent the LSB from pressing for legislative reform.

Consumers and society

We welcome the recognition that some consumers of legal services are more vulnerable than others, and the consumers' engagement with, and experience of, legal services will vary according to the extent of vulnerability, regardless of its cause. Mental health problems are given as an example, although there are innumerable causes of vulnerability, including many associated with age, culture, past experiences, etc. We are concerned that a reaction to vulnerability that requires segmentation or over-prescriptive requirements will be counter-productive, as such measures obscure the ability of the legal services provider to identify vulnerability in any given situation. It starts to overlook the individuality of consumers, and appears out of line with the objective of increasing diversity within the profession.

It is also a reality that, in any profession, the consumer is vulnerable due to their knowledge gap in that field. For this reason, a professional is subject to a code of conduct, and the desired outcomes are only achievable if conduct requirements are based on firm but broad principles. Appropriately defined principles serve to protect consumers by placing responsibility on the professionals to determine whether the principles (eg recognising and adequately protecting vulnerable consumers) have been safeguarded.

Question 2: Do you have any comments on our proposed strategic objectives?

We support the focus on the public interest by way of proportionate regulation, improved access to legal services, and increased innovation and competition through the diversity of service providers. Although the three objectives identified for 2018-21 are similar to those identified for the previous strategy period, this provides a degree of continuity while, at the same time, recognising the scope to deliver further improvements in these outcomes over the next three years.

We welcome the strategic focus on regulators' performance. ACCA considers the assessment of regulators' performance to be core to the role of an oversight regulator, and it is important that this process is transparent and remains robust.

In our response to the regulatory performance assessment consultation, we expressed our support for the LSB's aim to drive improvements to the performance assessment process. We welcomed the adoption of a risk-based and targeted approach to legal services regulation which takes account of the regulatory objectives, the better regulation principles, best regulatory practice and the diversity of approved regulators. We understood that the proposed approach

was aiming to minimise regulatory burdens while, at the same time, ensuring that regulators are seen to regulate independently, effectively and responsibly. We believe the assessment of regulatory performance should focus on outcomes that identify areas for regulatory attention. This will drive continuous improvement in the effectiveness and efficiency of regulatory arrangements, and so deliver public value. The publication of these regulatory performance assessments also promotes transparency.

Paragraph 33 explains the strategy with regard to overseeing the performance of approved regulators (consistent with the diagram on page 5 of Annex A, and the Regulatory Performance Assessments process published in December 2017). This suggests a linear process that considers five elements in a prescribed order: identifying the key risks; setting out the LSB's expectations; seeking assurance through oversight; tackling concerns; and taking formal action. We believe that a continuous cycle of review, remedial action and renewed risk assessment is required.

Question 3: Do you have any comments on our proposed equality objectives?

We support the revisions to the equality objectives in order to maintain their relevance and achieve greater alignment with the outcomes set for regulators. We have no further comments in this respect.

Question 4: Do you have any comments on our proposed approach to market intelligence within our strategy?

In our opinion there are many references, throughout the consultation document, to surveys and research and published reports. However, there is insufficient explanation of why this work is to be done, what the weakness is that it is addressing, what specific improvements are required, and how success will be measured. This is particularly relevant in respect of Objective 1 of the draft business plan 2018/19, where there is too much focus on rules and structures (with emphasis on independence), and no indication of the weaknesses in regulation that might exist.

Question 5: Do you have any further comments about the presentation or content of our strategy?

In terms of presentation of the strategy, we feel the different areas of work set out in the proposed strategy and plan could be better prioritised. In relation to each of the three strategic objectives the activities are grouped under two overarching functions: 'Overseeing performance' and 'Acting as an agent for change'. There may be a tendency to direct resources equally to these 'overarching functions'. However, we believe this would be a mistake, and that focus should be on the former.

Within the consultation document there is little mention of costs, apart from paragraph 65. We note the statement, on page 9 of Annex A, that '*LSB currently costs an average of £18.33 per authorised person (2017/18)*', and the statement on page 10 of Annex A that '*we will seek further efficiencies in how we operate, to reduce our overall costs to the sector*'. There is no indication of whether the LSB believes £18.33 to be a satisfactory level, and there is no estimate (or even acknowledgement) of the additional cost per authorised person incurred by approved regulators.

Principles-based regulation and oversight is both efficient and effective, as it focuses on the required outcomes, and responds appropriately to assessed risks. A reduced focus on 'gilding' the rules (which we acknowledge are required by the Act) would allow the LSB more time to

assess the performance of the approved regulators, including how the approved regulators have responded to existing and emerging risks. A more efficient use of LSB resources would allow the LSB to undertake 'deep dives' into relevant aspects of approved regulators' activities.

Question 6: Do you have any comments on our proposed business plan and work for 2018/19? Are there any workstreams that you disagree with? Is there any work that you think we should pursue that is not currently included?

The proposed business plan for 2018/18 provides clarity on the key workstreams that the LSB intends to complete in the first year of its three-year strategic planning period. Our comments on the specific workstreams within each of the three strategic objectives are set out below.

Objective 1: Promoting the public interest through ensuring independent, effective and proportionate regulation

Technology and regulation

With regard to the project referred to in paragraph 43, we would urge the LSB to avoid duplicating research into the regulatory implications associated with new technology that has already been done by regulators.

We believe the focus of this workstream should be on the provision of legal services. New methods of delivery of legal services are to be encouraged, so long as fundamental principles concerning compliance and client care are observed.

In the area of technology and regulation, the requirements of the LSB must be set out as broad, but fundamental, principles. It is the observance of those principles that should be the focus of the LSB's work.

Objective 2: Making it easier for all consumers to access the services they need and get redress

CMA action plans

We are pleased to see reference to the recommendations arising from the Competition and Markets Authority (CMA) market study. However, we believe that focus on the CMA action plans of the approved regulators (to improve transparency for consumers) does not pay due regard to the diversity of legal services providers, and the extent to which each may be required to address existing shortcomings. The LSB should carry out risk-based reviews of the action plans and address deficiencies with proportionality paramount. This would reduce the effort and resource required by the regulators to consult on proposed regulatory changes and gain LSB approval.

It is difficult to see where specific proposals within the strategic plan are focused on such issues as the unmet need for legal services. For example, the reference to the diversity of legal services providers within the proposed strategic objectives may provide a link to addressing unmet need.

Paragraph 48 states that the LSB will '*report publicly on the regulators' collective progress*' against their CMA action plans. While transparency is important, we have already stated why we feel the approach to addressing the CMA's recommendations is flawed. Therefore, public reporting risks giving the perception that the LSB is congratulating itself on its achievements (and perhaps is conflicted). We suggest the focus should be on actually improving the standards, where required, through effective engagement with the approved regulators.

Individual legal needs survey

Paragraphs 49 and 50 refer to surveys conducted in the past, which have revealed the extent of unmet legal need, and state the LSB's aim of repeating the survey every three years. This workstream fails to take account of the *need* for further surveys. This will depend on activities undertaken in the intervening periods that may have impacted the results. It gives the impression that the LSB may not give due consideration to why it conducts surveys, or to what action might be taken based on the results.

Objective 3: Increasing innovation, growth and the diversity of services and providers

Planning for EU exit

We support the contents of paragraphs 57 and 58, regarding Brexit, which recognise that the LSB must be ready to respond to changes, and to facilitate work to identify risks to the regulatory objectives.

Diversity guidance

There appears to be an assumed relationship between the diversity of legal services providers (and their approved regulators) and diversity within authorised firms (especially at senior levels). The two should not be confused as they each have different impacts on such issues as competition, innovation, unmet need and opportunity.

We strongly support open access to the legal profession, which encourages talented individuals into the profession, and enhances opportunity for all. We support transparency concerning diversity data, but suggest that appropriate change may only come about through compliance with well-articulated ethical principles, rather than more prescriptive requirements.

Question 7: Please identify any elements of our strategy or business plan that you think present an opportunity for more detailed dialogue and/or joint working between your organisation and the LSB.

We welcome the opportunity to engage with the LSB and contribute to the development and delivery of all aspects of its strategy and business plans over the next three years. We would encourage the LSB to engage fully with ACCA and other approved regulators in order to build trust, confidence and understanding.