



LawWorks Response to the Legal Services Board's 2019 Business Plan

Introduction

LawWorks welcomes the opportunity to respond to the Legal Services Board's (LSB) consultation on its proposed business plan for 2019/20.

We acknowledge and support the LSB's five-year policy objectives in addressing the needs of the fast evolving legal services market and professions, and the LSB's role as an oversight regulator. The specific emphasis in the objectives on public legal education (PLE), and increased access to legal services through technological innovation is extremely welcome. However, we believe the LSB could go further to address an underlying market problem in respect of: addressing unmet need for social welfare law legal services; supporting the contribution of pro bono, and developing strategic solutions for ensuring that the supply and demand sides of the legal services market can be better matched.

About LawWorks

LawWorks (the Solicitors Pro Bono Group) is a charity that promotes, supports and facilitates pro bono legal services that extend access to the law for individuals and communities in need and the organisations that support them. We champion pro bono because of the positive contribution and difference it makes for individuals, communities and society. We work (in England and Wales) with the solicitors' profession and our members, the Law Society, law schools and law students, law centres, advice agencies and others to develop and support pro bono legal services, and to promote access to justice for all.

LawWorks has 20 years of experience in supporting pro bono clinics and has seen the positive impacts of good quality, timely legal advice. We also broker legal advice for small charities, and run projects which facilitate pro bono lawyers undertaking more 'in depth' casework outside their usual areas of practice (sometimes called 'secondary specialisation').

By building up a body of expertise on pro bono practice, we are able to raise issues with regulators and government that impact pro bono and access to justice, and provide a 'policy voice' for pro bono.

Strategic context and objectives

The strategic objectives from the LSB's 2018-2021 strategy are carried forward into the business plan; these are:

- Promoting the public interest through ensuring independent, effective and proportionate regulation;
- Making it easier for all consumers to access the services they need and get redress;
- Increasing innovation, growth and the diversity of services and providers.

These objectives broadly align with the regulatory objectives of the Legal Services Act, which include: a continuing duty to improve access to justice, consumer protection and the public interest, promoting professional principles, competition, independence and diversity, as well as the public understanding of legal rights, and rule of law principles. In developing these objectives into practical policies and regulatory frameworks for legal practice, we hope that the LSB will acknowledge and support a role for pro bono. The LSB can support this in a number of ways, such as promoting pro bono work as part of the core business of being a lawyer and law firms/entities corporate social responsibility, developing a supportive regulatory environment for not-for-profit legal service providers (i.e., special bodies) which often host pro bono legal advice clinics, and encouraging market entry and development of new models for delivering services to those with unmet needs or experiencing legal exclusion.



Whilst LawWorks is passionate about pro bono and its contribution to enabling access to justice, we are clear that it is not, and should not be seen as, an alternative to legal aid, nor to the funding of advice agencies and law centres. However, we believe that more could be done by regulators to enable and support the contribution that pro bono can make. Specific regulatory issues, some we touch on in this response include:

- *The role of law schools and student pro bono:* The clinical legal education (CLE) movement plays a significant role in developing legal clinics and public legal education initiatives. However, as a recent article from a leading CLE expert has noted, academic practitioners running clinics find they can face something of a “black hole” in dealing with regulatory systems and some aspects are unclear for this sector.ⁱ We highlight these issues later on in this response.
- *In house legal practice:* In house legal teams continue to grow, for example the number of solicitors working in-house is growing at a faster rate than those in private practice, having doubled over the past 10 years, and predicted to reach 35 per cent of the solicitors profession by 2020.ⁱⁱ
- *Multiple regulation:* In some areas of practice there are multiple tiers of regulation administered by different regulators - it can, in such contexts, be difficult for pro bono projects to navigate and secure appropriate accreditation, particularly given the costs and administration involved. Examples include: debt advice (licensed by the Financial Conduct Authority’s consumer credit advice regime) and immigration advice (accredited by the Office of the Immigration Services Commissioner). Whilst we do not advocate for lesser regulatory standards for pro bono, there may be scope for regulators to work together on more bespoke arrangements (such as group licensing) for pro bono providers that are already regulated to a high standard under the LSA regime.

As well as looking at the regulatory landscape for pro bono, there may be other ways in which the LSB can support access to justice, including encouraging and facilitating innovation in models of practice, products and technology. Areas for further development include: the unbundling of legal services, product commoditisation (e.g., consumer-targeted off-the-shelf legal forms), online delivery platforms, and more widely available legal expenses insurance - all have the potential to significantly reduce costs and widen access for legal services consumers.

Q1 Have we identified the most relevant developments in our external operating environment?

The consultation identifies market context issues such as technological innovation, political developments and pressures in the justice system, and the regulatory context of evolving practice rules and training regimes, as key factors shaping the external environment. We agree with these but would add some further issues.

Whilst the ‘market context’ section references the “legal needs of small businesses” it does not mention other wider issues of unmet legal needs, and how the legal services market could evolve to address these. Measures of unmet need from the Civil and Social Justice Survey (CSJS) show that approximately one-third of the population experience ‘justiciable’ civil legal problems, with around 10 per cent of people with a legal problem ‘lumping it’ and taking no action at all, and around 46 per cent handling such problems alone without accessing formal or informal support or legal help.ⁱⁱⁱ The LSB’s commissioned research on legal needs (undertaken by the same research team responsible for the CSJS), suggests that the baseline figure for those handling legal problems alone may be closer to one in two people, with 18 per cent doing nothing and 46 per cent handling alone or with the help of friends or family - the most commonly cited reason for not

seeking formal legal advice being cost and affordability.^{iv} The absence of a specific mention of broader legal needs seems surprising, as later in the document there is a welcome section explaining that the LSB is currently recommissioning legal needs research and will publish this later this year.

The 'political context' section refers to "increased scrutiny of the impact of civil legal aid reforms and of the impact of financial pressures on the effective operation of the criminal justice system." This was drafted prior to the publication of the Government's post-implementation review of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), and the accompanying Legal Support Action Plan, which sets out the short and medium term objectives of the Government's access to justice policies. Alongside some changes to the legal aid scheme, the Action Plan prioritises initiatives and models which can help people access appropriate support at an early stage to resolve legal problems efficiently and effectively, but also states that "more needs to be done to understand what types of support work best, at what time, and for whom."^v Whilst it is uncertain the extent to which any policy changes may significantly reconfigure the operating environment for civil and criminal justice, it is no longer a static position and there will be a role for the LSB in shaping how the legal sector responds.

Another context issue is how the labour market is changing (i.e., with remote, flexible and part-time working etc),^v so for example we see the SRA embracing the concept of 'freelancing' and more flexible models of employment in their Handbook reforms. When combined with the displacing impact of new technology, the flexible employment and "ways of working" debates may become part of the discussion about the future of legal practice – including the relationship between employed work and volunteering (pro bono). Finally, we see a role for the LSB in reflecting on changing values and cultures in the legal sector – questions of values and ethics can, for example, help link-up other discussions about the future of the legal professions, the Legal Services Act's regulatory objectives, and the challenges around diversity in the profession, flexibility, access to justice and pro bono.

Q 2 - What are your views on our proposed five-year policy objectives?

We welcome the business plan's approach of building on high level strategic goals with specific policy objectives, as this could help the LSB to focus its work, resources and impact.

Objective 1: Professional Competence.

We welcome the objective that regulators should have "appropriate frameworks for continuing assurance of professional competence throughout the careers of the people they regulate." Related to this, we would point to the important role that pro bono can play in the development of practical legal skills, and its value (professional and personal) throughout the career pathways of legal professionals. It plays an important role in clinical legal education, but also throughout a legal career; it can enable the transfer of skills, contribute to fulfilling the CSR objectives of employing entities, and provide a connection with different communities and client groups.

Within the existing regulatory framework the SRA have included volunteering within a pro bono legal clinic as one of the ways in which "qualifying work experience" can be obtained under the proposed SQE framework, although further details need to be worked through. We do not believe that regulators should in any way make pro bono a mandatory requirement of legal practice – by definition pro bono is a voluntary activity – but there are ways in which regulators can encourage pro bono as "part of being a lawyer." The Joint 'Pro Bono Protocol for Legal Work' agreed between the Law Society, Bar Council and CILEX describes "participation in

pro bono legal work as a characteristic of being a member of the legal profession.”^{vi} If regulators were to use similar language it would provide a positive and incentivising signal about the contribution of pro bono and its link with professional ethics, values and competence.

Objective 2: Public Legal Education

The objective that the LSB be perceived as being “at the forefront of enhancing public legal education” is especially welcome.

In the past there has been a perception that the public legal education (PLE) aspect of the Legal Services Act has not been sufficiently prioritised, and has been rather narrowly understood in terms of the provision of market information for consumers (for example, the Legal Choices website). However, the statutory objective of the Legal Services Act is described as “increasing public understanding of the citizen's legal rights and duties” (LSA s1(1)(g)). We suggest that this envisages a legal sector that is more actively engaged in promoting, explaining and communicating systems of rights and redress, from employment rights to consumer rights, to the fundamental protections provided by the Human Rights Act and civil and human rights instruments.

We draw particular attention to the recent ‘*Ten Year Vision for Public Legal Education*’ produced by the Solicitor General’s PLE working group which talks of “a country where legal capability is spread throughout our society - where everyone, and every group, is able to identify and act on legal situations when they arise [...] where no-one, no community, and no section of society is denied justice through ignorance of their legal rights and responsibilities, or of the actions which they can take to protect them.”^{vii} The statement includes seven goals for PLE stakeholders, which may be a useful framework for the LSB to work with.

Other regulators in different sectors have adopted highly proactive approaches towards consumer education and empowerment, including the FCA’s (formerly the Financial Services Authority) role in financial literacy and improving financial capability, seen an essential part of its consumer protection remit. Financial education, literacy and capability work are more mainstreamed within the financial services industry, with buy-in from the education sector, HM Treasury, and the media. By contrast PLE – enabling people to positively understand, claim and assert their rights - is sometimes treated more negatively, adding to negative (e.g., ‘compensation culture’) perceptions of the legal profession. A proactive lead by the LSB could potentially change this.

Objective 3: Access to justice through technological innovation.

Like other access to justice charities we are actively exploring the opportunities that LegalTech offers – including the piloting of an online ‘Free Legal Answers’^{viii} platform modelled on a US website supported by the American Bar Association (ABA). We therefore support the LSB adopting this as a policy objective.

However, it is important that technology is not seen as a ‘silver bullet’ for delivering improved access to justice, where this may displace or deprioritise other initiatives and responses. In the latest LawWorks Clinics Network report we say: “Digital technologies are also playing an increasingly important role both within the justice system, and in the way that people can access support. It is important though that we put the needs of the users first in the way that services are designed and accessed. There is an ever present danger that digital exclusion could further compound the problem of legal exclusion; the focus on ‘LegalTech’ solutions has potential to bridge the distance between citizens and their rights, but also to accentuate that divide.”^{ix} The

same is true of the HMCTS court modernisation process; easier online justice may primarily benefit those used to online access.

In developing this objective we would like to see the LSB consider the issues and challenges of digital exclusion, and how those who might otherwise be excluded can be reached by legal services.

Do you have any comments on our proposed business plan and work for 2019/20? Are there any work-streams that you disagree with? Is there any work that you think we should pursue that is not currently included?

As referenced above, we would like to see greater attention given to regulatory issues which can impact on pro bono, including the engagement of in-house lawyers. Sometimes regulatory compliance can have a chilling effect in respect of lawyers getting involved in new pro bono initiatives, and given that non-compliance can be a criminal offence it is understandable why legal professionals can be risk adverse where there is uncertainty.

For example, section 15 of the Legal Services Act is hard to understand, and can be read as a blanket prohibition on the delivery of the six categories of reserved legal activities by in-house solicitors for the benefit of anyone other than their employer, where such activities are carried out as part of their employer's business. There is room for a range of interpretations as to the effect of section 15 LSA in respect of pro bono activities given the ambiguities of the phrase "part of their employer's business".

This has very practical implications for pro bono programmes. For example, the LawWorks' Not-for-Profits programme brokers free legal advice for smaller charities. Charities often need assistance with property related matters, which can involve 'reserved legal instruments' (e.g., leases). At present we do not broker property matters with in-house solicitors, owing to a combination of the SRA's Practice Framework Rule 4.10 and their ethics guidance on s.15 LSA. However, we have received legal opinion that "reserved instrument activities" which are "part of employer's business" may be undertaken pro bono by in-house solicitors by virtue of an exemption in Schedule 3 of the LSA.

Matters such as this would benefit from clearer policy and/or clearer guidance; it seems unlikely that it was the intention to restrict pro bono in this way. We have other examples of the difficulties caused by section 15, and other regulatory uncertainties that pro bono service providers can face, including the legal entity structure of pro bono clinics. The SRA recently issued an extremely helpful position statement on volunteering,^x however with greater clarity from the outset in practice rules this may not have been necessary.

Some policy uncertainties remain in respect of 'special bodies' and the LSB will need to keep on top of the issues and challenges facing this sector and respond proactively. For LawWorks, an ongoing issue is that given the diversity of pro bono provision and the range of different initiatives operated by charities, law schools and law firms, it cannot always be assumed that all legal clinics will be hosted or constituted as special bodies. For example, Universities exist as both public and private institutions, so it may not always be clear whether law school clinics count as special bodies for the purposes of regulation, and whether academic staff, with practice rights and undertaking supervision roles in clinics, are effectively 'in-house' practitioners. A useful work-stream for the LSB would be to direct some resources to ensure that there is greater certainty, clarity and assurance around the regulatory aspects of pro bono provision. So, for example, the SRA have, in addition to their statement on volunteering, helpfully commissioned some bespoke guidance for the non-profit and pro

bono sectors about their handbook reforms, and have involved the sector in developing this. Building on such initiatives, we suggest that enabling a supportive regulatory environment for pro bono would be consistent with, and help fulfil, the LSB's regulatory objectives under the Legal Services Act.

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

As outlined above, there is scope for dialogue on aspects of the LSB's strategy, business plan and work-programme and related contexts. We would welcome an ongoing dialogue with the LSB, including opportunities for participation in events and the facilitation of engagement with the pro bono sectors. We have also suggested above that there may be scope to co-produce resources and develop policy that would be of benefit both for regulators and pro bono providers, especially on cross-cutting themes that might engage all legal professionals undertaking or interested in pro bono.

Please provide comments regarding equality issues which, in your view/experience, may arise from our proposed business plan for 2019/20.

Whilst the Business Plan includes a short paragraph on how it has "given due consideration to its obligations under the Equality Act", it is a little surprising and disappointing that wider aspects of the equality agenda relating to legal services are not referenced or discussed in more detail in this final section of the consultation, including the ongoing debate about social mobility in the professions and barriers to minority groups, the findings of the Lammy Review into criminal justice, gender equality and issues of health and wellbeing in the legal services workplace. The Lammy review and diversity issues are referenced though under 'political developments' and we appreciate that the LSB sees these as important to its operating context, but they are also relevant to the equalities impact of the LSB's work given the LSB's agency in shaping the legal services sector.

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ⁱ Linden Thomas: *Law clinics in England and Wales: a regulatory black hole* The Law Teacher Journal 2017

ⁱⁱ <https://www.lawsociety.org.uk/law-careers/features/should-i-work-in-house/>

ⁱⁱⁱ http://doc.ukdataservice.ac.uk/doc/7643/mrdoc/pdf/7643_csjps_wave_one_report.pdf

^{iv} <https://research.legalservicesboard.org.uk/wp-content/media/Online-survey-of-individuals-legal-issues-REPORT.pdf>

^v https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777036/legal-support-the-way-ahead.pdf

^{vi} <https://www.lawsociety.org.uk/support-services/practice-management/pro-bono/the-pro-bono-protocol/>

^{vii} <https://www.lawworks.org.uk/about-us/news/public-legal-education-new-vision-statement>

^{viii} <https://www.lawworks.org.uk/about-us/news/free-legal-answers-briefing>

^{ix} <https://www.lawworks.org.uk/sites/default/files/files/LW-Clinics-Report-2017-18-web.pdf>

^x <https://www.sra.org.uk/solicitors/guidance/waivers/waiver-employment-status-pro-bono-work.page>