



LawWorks Response to the Legal Services Board 2021 - 2022 Strategy and Business Plan

Introduction

LawWorks welcomes the opportunity to respond to the Legal Services Board's consultation on its proposed strategy and business plan for 2021/22. We acknowledge and support the LSB's strategy objectives for reshaping legal services to better meet the needs of society, and the three strategic themes that run throughout: fairer outcomes, stronger confidence and better services. We believe that there is a role that pro bono can play in contributing to this, and hope this can be reflected in the strategy.

As the strategy acknowledges, there is significant unmet need for legal support, advice and representation; the LSB's "State of the Legal Services Sector" found that 3.6 million adults in England and Wales have an unmet legal need.¹ Addressing this gap must therefore be the priority. Whilst not a substitute for legal aid, or a replacement for funding for law centres and advice agencies, the contribution of pro bono is necessary, significant and growing – drawing on the legal professions' social responsibility and proud tradition of providing legal advice and representation on a voluntary basis. However, this does not exist in a vacuum - pro bono needs appropriate investment and infrastructure to flourish and be effective and sustainable, and a supportive regulatory environment. As the legal services sector rapidly evolves with new ways of working, delivering services, and digital innovation, we hope that in the post-Covid environment issues around access to justice will be central to the LSB's work.

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, including 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 also able to raise issues with regulators and government that impact pro bono and access to justice, and provide a 'policy voice' for pro bono.

Qs 1 – 4 Strategic objectives, priorities, and sector wide challenges

The proposed strategic objectives for the LSB's 2021-2022 strategy are carried forward into the business plan; these are:

- **Fairer outcomes:** Lowering unmet legal need across large parts of society; achieving fairer outcomes for people experiencing greater disadvantage; and dismantling barriers to a diverse and inclusive profession at all levels;
- **Stronger confidence:** Ensuring high quality legal services and strong professional ethics; closing gaps in consumer protection; reforming the justice system and redrawing the regulatory landscape;
- **Better Services:** Empowering consumers to obtain high quality and affordable services; fostering innovation that designs services around consumer needs; supporting responsible use of technology that commands public trust.



These objectives continue to broadly align with the regulatory objectives of the Legal Services Act (LSA), 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. On this last LSA objective, we note however that the LSB's draft strategy (unlike the 2019-21 strategy) does not have a strong focus or message on Public Legal Education (see our response to questions 4 and 5, below).

In support of these objectives, we hope that the LSB will acknowledge, encourage and support a role for pro bono. As we said in our response to the LSB's 2019-2021 strategy consultation,ⁱⁱ the oversight regulator 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 and professional ethics, 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. Pro bono can offer a space to trial new methods of delivery (for example LawWorks is currently piloting a 'Free Legal Answers' website service).ⁱⁱⁱ

Fairer Outcomes

The focus on legal unmet need is of overriding importance, and the LSB's research has been valuable in identifying the scale and extent of this challenge. In this context, we fully support the LSB's statement in the strategy that "a properly funded legal aid system, strong third sector and sustainable provider base are all vital components of a fair justice system."^{iv} However, we note the LSB's call for 'realism' about how far a better functioning legal services market can deliver greater access to justice, and that public policy has a more direct impact, e.g., in relation to legal aid, the funding of advice agencies and the operation of the courts. It is important therefore that the LSB follow through with its priority to "play a more active role in public policy issues."^v

We welcome the strategy's emphasis on diversity and inclusion – there is an important role here for the LSB in developing greater insight into the lived experience of both consumers and the workforce in the legal services sector. Whilst building diversity and inclusion into regulatory performance frameworks is important, this needs a strong evidential base to determine what will be effective. Good progress has been made on race, gender and LGBTIQ diversity in the workforce, but disability and socio-economic diversity are lagging, and there remain significant issues with retention, attainment, promotion and progression gaps across all protected characteristics.

On the consumer side, the LSB should be looking at all forms of discrimination, consumer detriment and exclusion in the sector, including digital exclusion, stagnating social mobility, and the impact of Covid-19 in widening and entrenching inequalities in society. We welcome that one of the workstreams will include carrying out case study research to understand the experiences of citizens in vulnerable circumstances, focusing on how access to, and delivery of, services is best enabled. The demographics of engagement with legal services are also important to understand; an interesting finding from the state of the sector report is that whilst two-thirds of the public generally trust lawyers, trust is consistently much lower among BAME communities.^{vi} And whilst the public perceive lawyers as professional and knowledgeable, the public also perceive lawyers as being too expensive for most people to use for civil and family issues.

Stronger confidence

The LSB's stress on quality, professionalism and ethics all speak to the live debate about what regulators can do to ensure that legal education and ongoing competency frameworks address changing expectations, the challenges of technology, and good client care, so that

lawyers have the knowledge and skills required to deliver legal services effectively and ethically. An ethical grounding links to the encouragement of pro bono, for example, Professor Steven Mayson referenced at a recent LawWorks seminar on the ethics of pro bono: “the tremendous value of pro bono contribution to the continuing realisation of professional ethics”.^{vii} The notion of ethics addressed in the seminar went beyond the codes of conduct that bind the legal professions, to the moral principles and motivations of working to improve access to justice through free legal advice clinics, other pro projects, and wider CSR activities.

We welcome the LSB’s conclusion that building a well-functioning legal services will require “major reforms to the justice system and regulatory landscape”,^{viii} reflecting on the Competition and Markets Authority (CMA) study and other reports, and taking into account the huge advances in LegalTech since the Legal Services Act was framed. And whilst we welcome that the LSB will “engage in policy reviews of the criminal, civil and administrative justice systems where these relate to our statutory objectives” the LSB in turn has an important role in engaging with stakeholders, the wider advice sector, consumer groups, and gaining more insight into both users of legal services, and also those engaged in the justice system who don’t use legal services (i.e., litigants in person).

Better Services

As regards the LSB’s objective of empowering consumers to obtain high quality and affordable services, we welcome the focus on transparency (eg., on price and quality information), consumer engagement, simple legal products and use of tech and digital tools. However, quality can be a contested concept and difficult to measure as it means more than minimum standards of regulatory compliance, and can be perceived differently in different contexts - so the LSB will need to identify specific solutions on quality indicators.

The LSB’s overall challenge is to convert all the above objectives into practical policies and regulatory frameworks for legal practice through a collaborative approach with frontline regulators, professional bodies and stakeholders, to build collective intelligence and solutions, and provide a strategic lead on the big issues.

Qs 5 – 6 Proposed ongoing and new workstreams for the LSB in 2021-22

The proposed workstreams are all appropriate. As above however, we would like to see greater attention to issues concerning pro bono and its important contribution to enabling access to justice, including how regulatory frameworks might better support legal professionals undertaking pro bono work, and the incentives and barriers.

As well as looking at the regulatory landscape for pro bono, there are other ways in which the LSB can support access to justice, including encouraging and facilitating innovation in models of practice, products and technology. Some of these are flagged within the proposed workstreams - 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. We would also like to see greater reference to the following policy and regulatory issues:

- **Public Legal Education (PLE):** The legal sector’s engagement in PLE activities can help empower citizens to know their rights and take steps to resolve legal problems, and for legal services consumers to make informed choices. It is noticeable, however, that the strong commitment to PLE in the LSB’s 2019-2021 strategy does not appear to be taken forwards in this strategy; the engagement of regulators is key to achieving the goals of the ‘PLE Vision Statement’ published by the Solicitor-General and stakeholders.^{ix}

- ***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,^x and several analyses of the legal services market shows that a significant and increasing volume of lawyers (about 20%) and legal services are now delivered in an in-house setting. The State of the Legal Services Sector report identified a number of areas where there are bespoke issues, such as tensions of professional obligation and commercial pressure, and some of these issues are also discussed in the Mayson Review. A particular concern we have raised is the impact of section 15 of the Legal Services Act on in house pro bono (see our response to question 7 below).
- ***Multiple regulation (and relationships between regulators):*** In many areas of practice, especially in areas of social welfare law, there are multiple tiers of regulation administered by different regulators. In this context it can be difficult for pro bono projects to navigate and secure appropriate accreditation, and manage 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 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.

In the LSB's proposed work on legal needs there is a particular focus on the legal needs of small businesses, including making the case for a legal support strategy for small businesses. Whilst this is important work, it should not be undertaken to the exclusion of wider issues of unmet legal needs, and how the legal services market could evolve to address these.

As regards the LSB's work on skills, competency frameworks, and training, we highlight the role of law schools and student pro bono, and engagement with stakeholders like the Clinical Legal Education Organisation (LEOC) with whom we have recently published a report.^{xi} The clinical legal education (CLE) movement plays a significant role in developing both legal clinics and PLE initiatives. However, as an 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.^{xii}

Q 7 Reserved legal activities review

We note the LSB's conclusion that on balance now is not the time to carry out a review of reserved legal activities or a focus on the unregulated sector, the concern about the resources required, and that any review would be limited by the binary reserved / non-reserved framework of the Legal Services Act. Indeed, the limitations of the Legal Services Act's binary framework echoes what the Mayson review has been saying about this "all or nothing" approach to regulation.^{xiii} However, we question whether revisiting issues around reserved and unreserved activities and the status of the unregulated sector (eg., Mackenzie friends) is something that can be put off indefinitely. We hope that the LSB will engage positively with the outcomes of the Mayson review, including scoping out how alternative models and proactive approaches to consumer protection might work in practice. The CMA have also noted that their recommendations and call for a regulatory review of the Legal Services Act 2007 have yet to be progressed.^{xiv}

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. We have worked very hard with in-house lawyers to overcome misperceptions that there may regulatory barriers to pro bono; given that non-compliance can be a criminal offence it is

understandable, however, that 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 all 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".

These issues can have 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 rules 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.

We would therefore like to see section 15 reviewed and its policy intention clarified - it seems unlikely that it was ever the intention of the LSA to restrict pro bono.

Whether activities undertaken are reserved or unreserved, regulatory regimes should enable lawyers (whether in their capacity as employees or as individuals) to volunteer through a range of different structures, including through non-profit organisations. Uncertainty can itself be a disincentive, whether in practice rules or legislation. For example under the SRA's previous practice rules it became necessary for the SRA to issue a clarifying and helpful position statement on volunteering,^{xv} however with greater clarity from the outset in practice rules, this may not have been necessary.

Q 8 Market intelligence

The LSB has been able to develop some interesting market intelligence and data tools, including dashboards that track legal needs, the market impact of Covid, and metrics on price and consumer confidence. The legal needs research commissioned by the LSB provides extremely relevant data for policy-makers, and there is especially rich data in the State of the Legal Services Sector report. Our main comment on the LSB's market intelligence work, is to look at how these can be shared with and used by stakeholders, and how stakeholders with expertise in particular areas of practice can best engage with the LSB's research agenda. Perhaps an external research and analytics engagement or knowledge sharing group, working alongside the consumer panel, could provide a useful sounding board for exploring priorities and new methodologies with stakeholders.

Q 9 Budget

We do not have any comment on the LSB's budget.

Q 10 Equality Issues

See our response to questions 1 – 4. In addition we would encourage the LSB to work with the Equality and Human Rights Commission and other stakeholders to develop best practice on EDI reviews in the sector, and with frontline regulators. Whilst the LSB cannot be an equalities watchdog for the sector, we hope that it can work collaboratively with the EHRC to promote the values of diversity and inclusion throughout the legal professions.

February 2021

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- i <https://www.legalservicesboard.org.uk/state-of-legal-services-report-2020>
- ii <https://www.lawworks.org.uk/solicitors-and-volunteers/resources/lawworks-response-legal-services-board>
- iii <https://www.freelegalanswers.org.uk/>
- iv <https://www.legalservicesboard.org.uk/wp-content/uploads/2020/12/FINAL-draft-strategy-for-consultation.pdf>
- v *Ibid*
- vi <https://www.legalservicesboard.org.uk/state-of-legal-services-report-2020>
- vii <https://www.lawworks.org.uk/solicitors-and-volunteers/resources/ethics-pro-bono>
- viii <https://www.legalservicesboard.org.uk/wp-content/uploads/2020/12/FINAL-draft-strategy-for-consultation.pdf>
- ix <https://www.lawworks.org.uk/about-us/news/public-legal-education-new-vision-statement>
- x <https://www.lawsociety.org.uk/law-careers/features/should-i-work-in-house/>
- xi <https://www.lawworks.org.uk/solicitors-and-volunteers/resources/lawworks-law-school-pro-bono-and-clinics-report-2020>
- xii Linden Thomas: *Law clinics in England and Wales: a regulatory black hole* The Law Teacher Journal 2017 <https://www.tandfonline.com/doi/abs/10.1080/03069400.2017.1322858>
- xiii <https://www.ucl.ac.uk/ethics-law/publications/2018/sep/independent-review-legal-services-regulation>
- xiv <https://www.gov.uk/government/news/cma-publishes-review-of-progress-in-legal-services-sector>
- xv <https://www.sra.org.uk/solicitors/guidance/waivers/waiver-employment-status-pro-bono-work.page>