

Quality in Legal Aid

SQM Outsourcing

Response to informal consultation

November 2009

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Introduction

1. In July 2009 the Legal Services Commission (LSC) issued a discussion paper regarding the future of quality assurance in legal aid and began an informal consultation process on its proposals for change. The current position places ownership of quality with the Commission, rather than with providers and regulators where it properly belongs. It also places the costs of quality assurance with the Commission, largely as an administrative expense. The new proposals signalled a change in the approach to quality, moving towards a position where the profession takes greater responsibility for assuring its quality.
2. This paper sets out the key themes that were raised in responses to the initial proposals, and explains how the LSC has revised its policy proposals in the light of this exercise.

Informal Consultation Process

3. In the discussion paper *Quality in Legal Aid: SQM Outsourcing* the LSC invited comments on proposals intended to change the current quality system, without eroding the assurance it gives to clients. The principal proposals concerned:
 - Details of how the SQM might be outsourced between 2010 and 2013, including the timeline and certain key operational questions.
 - The impact of placing the costs of quality assurance on providers, including an equalities impact assessment.
 - Proposed changes to the Supervisor Standards that key staff working under the SQM are required to meet.
4. Five organisations, for the most part representative bodies, responded to the discussion paper in writing. The LSC broadened its informal consultation process by discussing the proposals in detail at three meetings of the Quality Working Group (QWG), and various discussions with individual group members. The QWG was originally established as part of the agreement between the LSC, Ministry of Justice and Law Society that followed the Court of Appeal judgment on the LSC's Unified Contract in November 2007, but has continued as a helpful venue for discussion of quality issues. Members include The Law Society, the Solicitors Regulation Authority, the Advice Services Alliance, Resolution, the Institute of Advanced Legal Studies, Legal Aid Practitioners Group and the Ministry of Justice.
5. Details of and questions regarding the paper were also shared with the LSC's Provider Reference Groups in July and November 2009, which bring together providers in various different parts of England and Wales.

Summary of Responses and LSC Comments

6. Written responses to the discussion paper were received from:
 - Advice Services Alliance (ASA)
 - Advice UK (AUK) (endorsing ASA's response and making some extra points)
 - Bristol Debt Advice Centre (BDAC)
 - The Solicitors Regulation Authority (SRA)
 - The Law Society (TLS)

7. The five key themes raised were:

A) *LSC's general approach to quality*

8. There was qualified support for the LSC's approach to quality assurance. The SRA expressed an aspiration very similar to the Commission's, namely that the assurance provided by its regulation "would be acceptable as the basis for LSC procurement requirements with limited and justified departures from this principle only on an exceptional basis". BDAC agreed that "Regulators should be taking the lead in ensuring that advice centres remain open and able to deliver quality advice but supporting them in any way possible, especially in the current economic climate". ASA supported the LSC's tailored approach but wanted greater discussion over the detail of the methods of quality assurance required in different categories of law.

9. TLS said there was a "tension between low fees and high standards" and called for "a debate about the level of service that the LSC considers that it is appropriate to provide, given the money available". TLS's view on quality was that "the SRA's role is to police overall compliance with the Code of Conduct," not "to provide additional accreditation or other schemes for individual purchasers".

LSC Comment

10. The LSC welcomes the consensus on the view that regulation should secure a basic standard of service on which all purchasers of legal services can rely. However, we do not believe that current regulatory enforcement gives enough assurance that the minimum standards set by the Solicitors Code of Conduct are adhered to – in particular rule 1.05 regarding the standard of service. Because of this shortfall, the LSC has established its own methods of quality assurance. We look forward to working with the SRA and others to establish a robust framework that will aid purchasers and add to the brand cachet of regulated legal providers, but until this is achieved we consider it appropriate to pass some of the costs we incur making good the gap back to the professions.

B) *How LSC proposes to use Peer Review*

11. Respondents thought that Peer Review was one of the better quality tools available to the LSC. Whilst TLS recognised the practicality of LSC's proposal to move to a risk-based and random sampling approach, SRA thought that "routinely followed quality assurance measurements" had a more beneficial effect. ASA was concerned that the change of approach was a precursor to moving away from Peer Review altogether, when its preference was for the required standard to be raised to a Peer Review score of 2 or better. Both TLS and ASA were concerned about the impact on legal providers if the LSC passed the cost of peer review on to them.

LSC Comment

12. The support for Peer Review is encouraging, and the LSC is happy to confirm that it remains the principal quality tool for assessing quality of advice. The move to a risk and sampling basis for selection of providers to review will still mean several hundred reviews taking place each year, and actually increases the number undertaken in many civil categories.

13. The LSC is committed to purchasing services of good quality, but the benchmark for this has to be professional standards. The LSC and Institute for Advanced Legal Studies have modelled the PR3 criteria on the regulatory standard of reasonable competence. To require a higher standard for legal aid work than for the rest of the profession would be difficult to justify, and make it harder for LSC to rely on regulatory quality assurance. We do not propose any change to the requirement for mainstream contracts in the foreseeable future.

14. We acknowledge that, with Peer Review being used at the LSC's behest rather than as a universal requirement on legal aid practitioners, it would not be appropriate to pass these costs on to providers. Under the 2010 contract the LSC will continue to meet the expense of conducting such reviews on providers. We will keep how it is paid for under review, but are unlikely to change the mechanism whilst Peer Review is not required universally. Our long-term goal is for a regulator to take Peer Review forward as part of its assurance mechanism, as we agree with respondents that it is the best available direct measure of quality of advice. SRA's response indicated some sympathy with this view.

C) *Accreditation and reimbursement of costs*

15. AUK welcomed the emphasis on accreditation within the proposals, but was concerned that, because few accreditation schemes are open to non-solicitors, an over-reliance on accreditation could have a detrimental effect on Not for Profit agencies' ability to compete. ASA was concerned that LSC's proposal to phase out reimbursement of accreditation costs for legal aid providers would have a disproportionate impact on Immigration NfPs, operating in a field where all fee earners need to achieve some level of accreditation. The SRA response highlighted the characteristics they felt a robust scheme accreditation must have, including clear competency standards, objective assessment and regular reassessment.

16. TLS took rather a different view, and objected to the LSC raising a concern about practitioners who fail the Immigration accreditation (and so cannot undertake legal aid in the category) being free to undertake private client immigration work. They feared that the introduction of mandatory accreditation might create a barrier to individuals entering particular areas of law and could only be justified if there was "significant evidence to show that the existing schemes are inadequate to meet any regulatory need". TLS also felt that LSC should only cease to reimburse providers' accreditation costs if it also "dropped its compulsory accreditation requirements for legal aid practitioners or increased fees".

LSC Comment

17. The LSC maintains that as a major purchaser of legal services it is well placed to make observations about the market and to suggest ways in which regulation might better serve all purchasers of services. We will continue to work with both the SRA and TLS to maintain, improve and extend the current range of accreditation schemes, and discuss how best they can serve interests of consumers. Initially we will look to ensure that there is effective re-accreditation in place for all schemes.

18. We have taken on board the concerns about the proposal to cease the reimbursement scheme for accreditation, and discussed the issue at the QWG. We have undertaken to maintain the current scheme until the new 2010 LSC contracts come into force, and as a result of feedback are reconsidering our options for reimbursement arrangements after that date. We will put forward new proposals by early 2010.

D) *SQM Outsourcing in principle, in operation, and the mitigation of costs*

19. BDAC expressed their concern about costs moving from the LSC to providers during an economically challenging period, and sought reassurance about the LSC's plans to select an audit body, and how it would be managed and monitored to check it did a good job. Each of the representative bodies raised similar concerns, with ASA emphasising the need for a clear pricing structure to help organisations plan for the cost. Generally there was a concern that the NfP sector would find it hardest to adapt to the new arrangements.

20. Some respondents were concerned that the SQM would be devalued if it were placed on a par with other generic quality standards and lost market share amongst solicitors to Lexcel. The

ASA asked the LSC to support advice sector efforts to develop a new quality assurance standard at the specialist level.

21. Various responses debated whether the LSC should select a single provider to deliver audits, which would create a monopoly but make it easier to ensure consistency, or establish a small competitive market amongst audit bodies. The majority preferred the benefits that would come from selecting and closely managing one audit body, with AUK dissenting.
22. The issue of how to encourage providers to obtain their SQM audit at an early stage was touched on in the consultation responses but was debated at greater length at the QWG and subsequent meetings. ASA emphasised the importance of giving providers clear advance information about the 2013 contract to enable them to make an informed choice about their future in legal aid. TLS did not want to see any element of compulsion, insisting that it must be for individual organisations to decide when they could afford to take on the cost of an audit. Discussions at the QWG looked closely at the timetable for change and the implications for NfPs, and concluded that a delivery plan that relied heavily on early take up would be risky.
23. The opportunities for mitigation of the financial effects that the LSC identified were not seen by respondents as likely to offset the costs being transferred, although there was some welcome for the proposal to allow legal help to be delivered exclusively over the phone in particular circumstances. TLS agreed that the charge for smaller organisations should be lower than for large ones, but was doubtful about the supportability of the LSC's estimate of audit costs. The SRA highlighted the potential for overlap between the assurance given by regulation and by quality management systems, and suggested that this could offer opportunities for savings in the overall burden for regulated entities.

LSC Comment

24. Transferring some of the direct costs of quality assurance was never likely to be a step that providers would welcome. However, it remains the LSC's view that our current role in quality assurance is not compatible with our commissioning function, and moving the SQM onto an independent basis that allows other standards to be viable alternatives is an important step. We expect that many providers will continue to choose the SQM, but see no reason to require that all do when there are acceptable alternative ways to provide the same level of assurance.
25. Our experience of outsourcing the General Quality Mark gives a clear indication of the likely costs for SQM audits. There was little enthusiasm at the QWG for a survey of the profitability of legal aid providers, and this consultation has not yielded any other evidence that SQM audit costs of the order of £900-£1500 every three years will have a major impact. The LSC will therefore outsource the SQM as proposed, ensuring that there is a clear pricing structure to enable providers to plan for the cost.
26. We recognise the possibility of overlap between our quality requirements and those of regulators and umbrella bodies, and do not wish to place any unnecessary burden on providers. Where we are satisfied that another independently and regularly validated standard duplicates an aspect of the SQM, we will take steps to enable exemptions for those organisations through parts of the SQM. The less that auditors need to check, the lower the cost of the audit is likely to be. We are happy to work with the SRA to consider how regulation could deliver some of the assurance we require, and welcome input from NfPs and representative bodies on what other pre-existing assurance we can rely on. If the advice sector develops its own quality standard that meets our requirements but better suits the need of its constituents it would be a welcome step.
27. Some of the concerns raised by respondents about the outsourcing process for the SQM can be addressed easily. The process will certainly be competitive, conducted under EU procurement rules, and a low price, fixed for the duration of the contract will be one of the key

factors in determining the outcome. The LSC will monitor the robustness of assessment and consistency of the decision-making conducted under the outsourced contract, and the performance delivered. We appreciate the concern that this may be more difficult to do in the event that more than one provider is selected, and if it proves possible to obtain sufficient capacity from one high quality contractor we are likely to prefer this option. However, should more than one contractor be required in order to offer the capacity that is needed, we wish to retain the flexibility in the procurement process to allow us to do this.

28. The discussion at QWG regarding how to incentivise early take-up of audits was highly informative, and increased our appreciation of the reasons why some providers may prefer to wait until a relatively late stage before obtaining an audit. We do not propose to introduce any element of compulsion into the timetable to ease the administration of the audit process, such as requiring some regions or types of provider to obtain their audits earlier than others. Instead we will:

- Make the timetabling issue clear in the tender documents
- Invite bidders to show how they will incentivise early take up
- Ensure that we contract for enough capacity to manage a large volume of audits in the run-up to the 2013 bid round.
- Ensure that audit bodies make available clear information to providers about the latest date when they can book an audit and be confident that it will be completed in time for the bid round.

We believe that by taking these steps we will be able to successfully deliver the necessary volume of audits in time for 2013.

E) Equalities impacts

29. AUK were concerned that the high level of accreditation required of immigration practitioners meant the proposal to stop reimbursing accreditation costs would impact disproportionately on immigration providers and their clients, thereby having an indirect discriminatory effect. SRA asked that all of the measures the LSC was proposing within the discussion paper should be subject to a combined impact assessment to ensure that the overall cost would not have a disproportionate impact on any particular equalities group.

LSC Comment

30. LSC has taken account of the concerns raised about the proposal to stop reimbursing accreditation costs and is looking at how it can adapt its approach and reduce the potential impact on providers. This change combined with decision not to move towards charging for Peer Review means that the costs associated with SQM outsourcing, the subject of the original impact assessment, are now the sole change with a substantive impact on providers. We therefore believe that no new impact assessment is required.

Next Steps

| Date | Quality Action |
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| 2 November 2009 | <ul style="list-style-type: none"> • SQM Outsourcing Contract Notice issued and Pre-Qualification Questionnaire (PQQ) launched |
| 9 December 2009 | <ul style="list-style-type: none"> • PQQ deadline for submission |
| 15 January 2010 | <ul style="list-style-type: none"> • Invitation to Tender (ITT) issued to shortlisted applicants |
| 24 February 2010 | <ul style="list-style-type: none"> • ITT deadline for submission |
| 1 April 2010 | <ul style="list-style-type: none"> • Peer Review sampling approach implemented • Review of Accreditation reimbursement completed |
| 13 April 2010 | <ul style="list-style-type: none"> • Notification of successful bidder(s) for SQM Outsourcing Contract |
| 1 July 2010 | <ul style="list-style-type: none"> • Lexcel permitted as alternative to SQM for new Crime contracts |
| 1 October 2010 | <ul style="list-style-type: none"> • New Civil contract KPIs come into effect • New Contract Schedules come into effect |
| During 2010 contract 1 November 2010 Late 2012 | <ul style="list-style-type: none"> • Work with regulators and representative bodies to develop and improve accreditation schemes • Work with LSB to encourage wider adoption of quality assurance across the legal sector • Evaluate any new quality standards • Work with regulators and representative bodies to identify means of assurance that should passport through parts of the SQM • Monitor performance and quality of SQM audit provider(s) • SQM Outsourced audits commence • All bidders for 2013 contracts must have an audited quality standard they have paid for, at least to the preliminary “paper-based” stage |
| 2013 | <ul style="list-style-type: none"> • New LSC contracts are let, with revised terms building on 2010 developments |