

Legal Regulation Review

Call for evidence

1. Introduction

1. The Legal Services Commission (LSC) is a non-departmental public body sponsored by the Ministry of Justice (MoJ). The LSC is the biggest single purchaser of legal services in England and Wales with an annual spend of £2.1 billion. We are responsible for the delivery of civil and criminal legal aid and the development of community legal services.
2. The LSC welcomes the opportunity to feed into the Call for Evidence and outline our concerns and expectations with regard to the future of regulation in the context of the legal profession.

2. Overview

1. The LSC has the responsibility for contracting and funding providers of publicly funded services and, for assuring quality services. The LSC's vision is **resolutely focused on clients, delivering positive outcomes and providing value for money**. The LSC is committed to ensuring that clients have access to quality legal services that meet their needs, and that providers deliver client-focused quality services that represent value for money.
2. Our view is that regulation should:
 - Operate in the best interests of the client/public
 - Operate independently
 - Have the capability to support an open and competitive market providing best value
 - Include robust quality assurance systems that have the confidence of all consumers (private and publicly funded clients alike)
 - Promote access to a diverse legal profession
3. At present the current regulatory structure does not demonstrate the appropriate levels of independence required to best serve the consumer and public interest. The legal sector has also not traditionally assumed full responsibility for their own quality assurance, which has required the LSC in some areas to take a lead role in developing, maintaining and promoting quality assurance systems to ensure the protection of legal aid clients. Quality must be the responsibility of the provider, with the role of a responsible regulator to set and assure minimum standards. These are two key areas we discussed in the main body of our response.

3. General

1. The legal landscape is changing, and legal service regulation will need to be flexible to manage that change satisfactorily if it is to give confidence to the

purchaser and credibility to consumers. The increased competition that the Legal Service Act 2007 promotes is the enabler to support consumer demand in shaping the market. Such demand will see the opening up of the market for the delivery of services focused on consumer choice. The introduction of Alternative Business Structures (ABS) will have a profound impact on the market, part of which will be encouraging new entrants.

2. If ABSs are forthcoming, large brands or new partnerships will have to be adequately regulated to ensure fair competition, with active and targeted risk management adapted for the prevention of monopolies that have the potential of stifling the market or restricting access.
3. Traditional practices that restrict competition will need to be relaxed to ensure fair and open competition to all, and Codes of Conduct, although denoting quality will have to be revised to remove conflicts with the new regulatory framework.
4. The LSC is of the opinion that more work needs to be done in relation to understanding consumer expectations and choice. Legal services need to be brought into the 21st century offering a wider range of services and more flexible delivery methods that represent what the consumer wants. For example, in a recent survey by *Which?* 75 percent of adults welcomed the idea of having access to legal advice at supermarkets or high street banks, 6 out of 10 adults considered they would use these in the future. Greater flexibility has been shown by other professionals in areas such as medicine, where for example developments have been witnessed in General Practitioners surgeries with a large majority now opening for longer hours, including weekends, offering a variety of new and joined up services.
5. With this in mind we want to ensure that the future regulatory structure of legal services protects consumers whilst encouraging innovation, new entrants and diversity.

4. Detailed Response

Securing independent regulation

1. The LSC believes there must be clear separation of the regulatory function from any associated representative or professional body to ensure independence and the confidence of the consumers, procurers and providers and to avoid conflicts of interests.
2. The LSC is of the view that the current model of regulation by the SRA is not wholly independent of representative interests. For example, the Law Society's Chief Executive retains responsibility for services common to the representative Society and the SRA, including Finance, Human Resource and Information Technology. There cannot be true separation if the professional body still retains control of, makes decisions about, or plays a part in the workings of the regulator. This continued micro-management cannot be an acceptable form of separation and may be perceived to be regulation not in the public interest and / or regulation that appear to be influenced by representative interests.
3. This is a very inauspicious beginning to the new world of separate functions. In our view the current situation cannot be deemed to be consistent with section 30 of the Legal Services Act, and equally cannot be compliant with paragraph 100 of the LSB's business plan, which states that the role of the regulatory functions is

not prejudiced by the role of the representative function. This lack of independence in current practice causes the LSC some concern, and we would support the SRA in the principles they set out in their 'Governance Model'.

4. The LSC strongly believes that the focus of regulation should be to serve the consumer and public interest. A lack of independence cannot adequately deliver this and is likely to result in the profession's interests being put before that of the consumers.
5. Principles should therefore exist governing the separation of regulatory and representative functions in relation to all regulatory activity (including regulatory decisions, the formulation of policy, and the development of resources within agreed budgets). These must be discharged by a regulatory board appointed in fair and open competition as guardian of the public interest, not by anyone elected as a representative of the profession. Regulation should have real, not merely apparent separation from the Law Society Council and the Bar Council - this will enhance greater confidence amongst consumers, and ensure more effective oversight and scrutiny and ensure regulation of the legal profession demonstrates synergy with other professions such as the medical and financial service sectors.

Quality Assurance and informed choices

6. Quality is a multifaceted concept not solely based on the technical quality of advice. It should take into account the overall experience of the consumer. This encompasses many areas such as access to service, method of delivery, communication and quality of advice, and preferences may vary from person to person. There must be appropriate management systems that work to capture the whole client experience. For example the quality of communication, records management and supervision impacts on a clients experience.
7. As the largest single procurer of legal services in England and Wales, the LSC requires all legal services purchased to offer good value which includes quality, to consumers and the taxpayer.
8. To ensure that we are purchasing good value services we would expect regulators to provide a guarantee that legal services meet minimum quality standards. Procurers such as the LSC will then judge the appropriate quality of service the market can deliver for our clients at an acceptable cost.
9. Different consumers have a different capacity for knowledge of what constitutes a quality service. Recognition of a quality service can be a difficult concept for some consumers for example many of those in receipt of legal aid, but more widely any vulnerable client or those individuals who are infrequent consumers of legal services. In these circumstances it is likely to be the case that a consumers opinion in relation to the quality of service they have received cannot be realised until after the event.
10. For these reason the regulators and providers themselves should be able to openly market the services they offer and should be able to demonstrate the level in which they are operate. Lack of transparency here will lead to confusion for consumers, leading to opting for services regardless of quality which, in turn, negates the need or appetite for providers to improve quality standards above the minimum.

11. The Office of Fair Trading (OFT) is currently taking action against more than a dozen businesses that set up repayment plans for people struggling with debt. The watchdog stated that companies are deliberately misleading consumers by using website addresses similar to not for profit organisations. In actual fact, these companies were commercial business. This example adequately demonstrates the uncertainty that consumers are faced with and the steps required to ensure services are clear and transparent in regards to the services they offer and the level of quality to expect.
12. Confidence in regulation will enable the LSC to concentrate on its role as a procurer of legal services rather than be involved in the direct assurance of quality of providers. The LSC believes that responsibility for delivering a high quality service sits with each and every provider. It is the role of the regulator to set and assure minimum standards, and the role of the LSC to define the standards it believes the market can deliver for its clients. The LSC would like to see regulation of quality addresses gaps identified as priority (see examples below). This will equally apply to all regulators of legal services and not just TLS and is fundamental in regulating in the public interest.
13. In the past, the LSC in some areas has found it necessary to take a lead role in developing; managing and promoting quality assurance in order to ensure that publicly funded clients receive quality assured services. The LSC undertook this, as it was not adequately covered by the sector themselves. Previously, legal aid funding was available to anyone regulated by TLS; however, there was widespread concern over the quality and value provided by a substantial minority of providers in legal aid. Our sense was that this issue could also be applied outside the legal aid sector. We identified two key elements that were missing from regulation by the profession namely, a lack of quality management systems and a lack of category specific knowledge requirements. Examples of our interventions are outlined below.
14. For example, a modern quality management system such as the International Standards Organisational (ISO) brand is considered a basic quality requirement for most services and products both in the public and private sector and is proven to deliver more efficient business practices, improve competition and improve standards. The legal professions are behind other services in this respect and to fill this gap the LSC introduced the Specialist Quality Mark (SQM)(and its predecessor LAFQAS) and made holding a maintaining the standard as a legal aid contract requirement. Although TLS developed its own standard LEXCEL, this has never been compulsory for legal practitioners and the take up from the profession has been very low.
15. In immigration the lack of category specific knowledge, and a history of poor services putting clients at risk resulted in the development of a compulsory immigration accreditation scheme by the LSC (in conjunction with TLS) in 2004 to ensure and improve quality. TLS recognised the need for the scheme – and indeed administers it and the LSC made this scheme mandatory for all legal aid practitioners. However, it remains the case that a solicitor can fail all of the accreditation tests, and be refused a legal aid contract, and the next day still set themselves up as an immigration expert seeing private clients. It is not clear why minimum standards of competence should not be enforced for those seeing fee paying clients.
16. In criminal law the impetus for developing the Duty Solicitor Accreditation Scheme was again due to LSC concerns that there were no requirements in

place for solicitors conducting this work, and the possible impact this could have on the quality of service received by clients at a police station. As a result the LSC developed and introduced the Duty Solicitor Accreditation Scheme. The Law Society used passporting when introducing this scheme – with a promise that those passported would be evaluated within three years. However, after almost 8 years later this still has not occurred.

17. We are not advocating accreditation for all practitioners, but rather want assurance that quality services are provided to clients. Accreditation can in some situations act as a barrier to new entrants and reduce competition. The best guarantee for quality for the consumer is a wide sense of professional ethics and performance management at practitioner and firm level. However our experience shows that this cannot be relied upon on its own. Therefore the challenge for regulators will be to assure quality for the consumer without undermining the market, new entrants and innovation in service provision.
18. The LSC believes that a robust regulatory system should include quality assurance systems that can be relied on by private and publicly funded clients alike, which will be of particular benefit to the most vulnerable. We would expect a wider regulatory framework to help people make better-informed choices about where to get help, or even in some cases restrict non-assured organisations from doing certain kinds of work.
19. The LSC has continually worked with the professional regulators to ensure that we can rely on assurance systems, when specifying the level of quality required. The LSC would gladly support developments that increased the regulators and profession's role in this field. It will be important for the professions and their regulators to take into account the needs of those purchasing legal services when developing quality assurance frameworks. To build on existing collaboration and to streamline the process, we will be seeking to work with the regulators and the professions to take responsibility for the systems already developed (e.g. SQM and Peer Review).
20. It is important that any quality assurance framework should be able to transfer across all agencies procuring legal services. Traditionally, partners such as local authorities and charitable trusts have looked to and depended on the LSC for guidance in terms of quality assurance standards. Any new framework, and those regulating it, should likewise be able to instil confidence in statutory and other partners who are increasingly moving into the realm of commissioning legal advice services, but who may lack the confidence and understanding of what professional codes and standards might be appropriate. The role of the voluntary sector –funded to the tune of £80m by the LSC (and by sums which add up to considerably more by local authorities) to provide legal advice will need to be considered. Any gaps in the quality assurance or regulatory framework in respect of the voluntary and for –profit two sectors will be quickly highlighted and may lead to tensions or un-necessary hierarchies.
21. The Quality Assurance Scheme for Advocates (QAA), which, is currently being piloted (initially in for criminal defence work in the Crown Court but with the intention of extending it to all areas of LSC work after that), has been developed to apply to all advocates whether solicitor or barrister. The intention is to have a recognised scheme operating across all legal professions. The scheme has been developed to dovetail with regulators' internal plans for the promotion of quality within the advocacy profession.

22. A collaborative approach to the development of QAA has allowed the profession to lead the detail of much of the work, such as development of competences and levels of complexity. This should, in turn, enable a scheme that (while meeting the LSC's requirements) is owned by the profession and managed by their regulatory bodies, and which could thus be part of a wider QAA scheme which covered the work of all advocates and not just LSC work. It is the LSC's future intention that eligibility and payments for advocates should be based on the QAA scheme quality, rather than the existing structures.

Consumer shaped market

23. Consumer choice should inform the make – up of firms and define the range of services, leading to a market shaped by the consumer. Regulation should support this. The LSC's quality strategy focuses on recognisable quality assurance outcomes and also introduces additional criteria that are more flexible and responsive to clients. These include a number of factors such as, access, complexity of problem or number of problems, distance to travel or 'one stop shop options'. This supports the notion that for consumers quality can be a multifaceted concept. It is also important to collate client feedback on services received, in order to continually evaluate, and stimulate ongoing improvements resulting in services operating at, and exceeding minimum standards.
24. Clients should also be given clear and consistent information to allow them to choose between providers. This should include the results of regulatory assessments, as well as outcomes, and the LSC will be keen to work with TLS and others to help make this information available to inform client choice. This approach reflects by the Legal Services Board vision, set out in their business plan of 'empowered consumers receiving the right quality of service at the right price.'

Clarity and consistency of regulation

25. To foster and maintain consumer confidence, and ensure effective operation of the regulatory framework, there must be clarity surrounding the responsibilities and accountabilities of individual regulators.
26. The existence of the LSB and The Independent Office of Legal Complaints (IOLC) should drive the development of a consistent and all encompassing framework. This should result in improved clarity in regulation as opposed to the regulatory maze that currently exists, which is not only confusing for consumers but, its unaccountability equally damages confidence. This is particularly true in instances where consumers have been unhappy with the service they have received and wish to seek redress. The LSC often here anecdotal evidence about the poor quality or inappropriate behaviour of providers, which in turn results in a lack of confidence that clients feel they can have from the service.
27. The LSC regularly receives correspondence from clients wishing to complain about their solicitors who are confused as to where to turn and who to complain to. This lack of clarity may lead some consumers to not pursue instances when they have been affected by poor service. The IOLC will need to address issues of accessibility and transparency and will need to communicate its reasonable expectations of what it can control and, what it cannot. This information should be clear and targeted at consumers.

28. It is hoped that the dual role of the LSB and IOLC will result in a regulatory system that will lead to shared and robust confidence in the justice system especially in the individuals and organisations charged with protecting our rights and freedoms as citizens. The consumer should feel confident that in the event they complain about a service provider, the regulator will take appropriate and meaningful action.
29. There should also be a high degree of consistency between regulators. Commonality of regulation eliminates duplication and reduces the administration burden on providers. It will also open the market to members of different regulators if they provide the same guarantees relating to provider performance and risk management.
30. Ensuring commonality will further aid consumer confidence by demonstrating a consistent framework so that no matter which organisation (and their associated regulator) a consumer chooses they can expect the same level of service and guarantees of protection.

Model of Regulation

31. The LSC are sympathetic to the idea of regulation based on outcomes and principles and can see how it is effective in other areas such as finance. However, outcomes based around ensuring the protection of the consumer are difficult to define in legal services, for example, in categories such as crime and family, what would be an outcome measure of success? Outcome based regulation alone may not be in the clients best interest, and a more global approach to risk management, including targeting and identifying high risk individuals and entities is highly recommended.
32. Our experience has shown that a combination of good processes and good supervision are key to ensuring consumers receive a good service and are adequately protected. In addition, preventative enforcement against individuals / entities to be found in breach of regulations should be in place. This should impact on practice rights as well as accreditation status and records should be maintained in order to have confidence that breaches are managed and do not re-occur.
33. The LSC has no preference in relation to choice of regulator. Priority for the LSC is the requirement that regulation from the BSB, SRA or any new regulator that is permitted under the act has a focus and commitment to driving quality for the client without acting as a barrier to entry or limits the market. Competition between regulators may create the right balance between quality assurance and open access. However we recognise the very real risk that competition may create a 'race to the bottom' with regulators setting lower standards or offering lighter touch approaches to attract members. The oversight regulator will need to play a crucial role to ensure that this does not become a reality.

Promotion of access to a diverse legal profession

34. The legal profession, and especially the self-employed bar will no doubt have to look hard at some of the practices that presently have the impact of restricting diversity and equality within the profession. There is activity already taking place, in which the LSC is closely involved in relation to better access to the profession. For, example, the LSC runs a £3m per year scheme providing 150 training grants per year to new entrants to the solicitor's profession. However it is

equally as important to remove any barriers to progression within the profession, offering more remunerative work and ultimately more diverse representation at a judicial level. This is essential if the profession is to mirror the communities it serves.

35. The QAA Project Team has worked closely with the Equalities and Diversity team at the Bar Council to produce a data survey to enable production of a final Impact Assessment in order to screen policy proposal and better understand the impacts on certain individuals and minority groups the scheme may have. This data enabled us to analyse the profile of providers that received income from publicly funded work, with BME and women very well represented compared to the profession as a whole. This is good where it represents commitment to the work but it also raises questions whether individuals are pigeon holed in low paid types of work, resulting in restrictions to their practices.
36. The data survey was closely followed by a series of focus groups for self – employed women and BME advocates as an attempt to help us understand the reasons behind the data survey findings. Attendees were asked to identify any barriers to progression they had experienced and issues that helped or hindered their practices. The results identified a number of key areas that could be targeted to reduce these barriers. One attendee suggested that compulsory equality and diversity training for all clerks could be a simple but effective way of highlighting issues and improving access to instructions. The full focus group report will be published and submitted to the ‘Panel on Fair Access to the Professions’ whom have recently issued an open call for evidence. It is hoped that issues that cannot be addressed by any QAA scheme will be thoroughly considered as part of the Milburn review.

I hope you will find this response useful. If you have any queries about its contents, please do not hesitate to contact Louise Sowden, Project Manager for Quality Assurance Scheme for Advocates, at louise.sowden@legalservices.gov.uk.

Yours sincerely

Carolyn Regan
Chief Executive
Legal Services Commission

Cc. Louise Sowden