

Consultation response

LSB: Are regulatory restrictions in practising rules for in-house lawyers justified?

Overview

1. **Reviewing the restrictions currently placed on in-house lawyers which go beyond the provisions of the Act is to be applauded as this (alongside other initiatives) may aid innovation and competition, and therefore help to address the high levels of unmet need. However, as the LSB formulate their policy recommendations, attention should be paid to the impact on end users, and focus should be put on the following areas:**
 - **Consumer confusion and how this should be addressed;**
 - **Ensuring there is compelling evidence and risk assessment; before policy decisions are made;**
 - **Ensuring consumers are able to access redress;**
 - **Whether or not a consumer pays for a service should not have an impact on the quality of the service they receive.**
2. **These remarks need to be seen in context. The Panel has consistently said that the current regulatory framework is a transitional arrangement. The current list of reserved activities, having been transferred in from what was in place before the Legal Services Act, is a result of historical accident and not based on any consumer protection rationale.**
3. **The Panel's preferred end point is that the regulatory framework should be based on a sound consumer protection rationale but we recognise that this sort of fundamental change is unlikely to happen in the short term. Therefore we support a review of the restrictions in practising rules for in-house lawyers as an interim measure.**

The proposals

4. The Legal Services Board (LSB) is concerned that any unnecessary restrictions on in-house lawyers may have the potential to impose costs and red-tape, frustrate innovation, and adversely affect access to justice. The LSB would like to see any restrictions clearly justified. This discussion paper analyses how current practising rules for in-house lawyers align with the minimum restrictions that are contained in Section 15 of the Legal Services Act 2007 (the Act). The LSB expects regulators placing restrictions on in-house lawyers over and above those prescribed by the Act to be able to demonstrate this is necessary in terms of risk. The absence of specific restrictions must also be justified with appropriate risk-assessment. The paper concerns those restrictions placed on in-house lawyers of non-authorised employers, that is to say those employers whose businesses do not provide reserved legal activities to the public. The LSB will use responses to the discussion paper to inform their review of in-house practising restrictions.

The Panel's response

5. The Panel has considered these issues using our consumer principles framework. What we want to achieve as a result of this consultation is:
 - **Access:** Consumers are able to access a wide range of legal services, and choose those that best suit their needs and circumstances

- **Choice:** Consumers have a wide choice of providers because regulation is proportionate to risk
- **Quality:** Consumers access good quality legal services which meet the minimum required standards
- **Information:** Consumers have the information they need to make good decisions and know their routes to redress, and the boundaries of regulation are not so complex as to be incomprehensible to consumers
- **Representation:** Consumers have a say in how legal services are provided
- **Redress:** Consumers have access to appropriate redress if something goes wrong.

6. In addition, we have applied our overall regulatory philosophy as stated in our work programme: *“We seek to find the right amount of regulation to enable consumers to truly benefit from open and fair markets. Both too much and too little regulation harms consumers. We want to remove unnecessary restrictions that impede innovation and increase the price of legal services. Yet consumers will have the confidence to drive competition only if they think regulation will protect them, so a strong and effective consumer protection framework is also needed”*.

Practising rules for in-house lawyers

Reserved activities

7. The Panel has consistently remarked on the fact that the current regulatory framework is a transitional arrangement. The reserved activities were passported in

to the current system. However, this list is a result of historical accident and is not based on any consumer protection rationale. Indeed in some cases reservation came about in order to protect the interests of the profession.

8. The Panel's preferred end point is that the regulatory framework should be based on a sound consumer protection rationale. As outlined in our response to the Ministry of Justice simplification review, there should be a system where consumers are able to access redress across all legal work and various extra layers of regulation apply depending on the legal activity, and based on considerations of risk. If the boundaries of reserved or regulated activities were appropriately drawn, then consumers should not need regulatory protection in unreserved areas. Our response to this LSB discussion paper should be seen in the context of these remarks.
 9. Having said that, we recognise that this sort of fundamental change is unlikely to happen in the short term. Therefore we have, in practice, a situation where currently some of the frontline regulators place restrictions on in-house lawyers providing unreserved legal services to consumers unconnected to their employer. This may be restricting consumer choice and stifling innovation. On the other hand, there may be consequences to in-house lawyers providing these services to individual consumers – for example in rare cases in-house lawyers may not need to be covered by professional indemnity insurance.
 10. As a Panel we are acutely aware of the high levels of unmet legal need which prevents large sections of the population from getting the expert help they need to resolve their legal problems. Every piece of unnecessary regulation imposes a cost that lawyers pass on to their clients and the accumulation of these costs may make these services unaffordable. Where innovation is stifled and choice is restricted consumers may be cut off from being able to access the services they need.
 11. Conversely, when consumers use a solicitor or a barrister (and we particularly highlight solicitors and barristers as the Solicitors Regulation Authority, SRA, and the Bar Standards Board, BSB, have the largest regulated communities and the services they provide are used most often by consumers) - they legitimately expect them to be regulated and assume that there will be protections in place. Separate research by the Panel and the SRA reveals that consumers assume all legal services are regulated. These strongly held beliefs will be difficult to overcome.
 12. On balance, a review of the restrictions placed on in-house lawyers is needed in light of the very high levels of unmet need. Greater competition and innovation in the market, and initiatives which support these goals, should ultimately lead to better outcomes for consumers. However, our final view of the preferred direction of travel depends on how the following issues are addressed.
- Consumer choice and confusion**
13. Because consumers assume all legal services are regulated and think they will be protected when using a lawyer we are concerned that where in-house lawyers are allowed to deliver unreserved legal services to consumers (in particular where they work

for entities such as local authorities, Legal Advice Centres or charities, which consumers might reasonably expect to be regulated), there is the potential for a great deal of consumer confusion. These assumptions mean that consumers are not able to make an informed choice when selecting a lawyer. Information remedies may well help here, but we are cautious about this since simply putting large quantities of information in the public domain and expecting consumers to get on with it is likely to be ineffective. We suggest that any proposed information remedies should be thoroughly tested with consumers before being put into place. This is also about ensuring that rules do not restrict the choice for the consumer of going beyond the in-house lawyer where this is in the consumer's interests.

14. More generally, the regulatory and redress landscapes are becoming more fragmented over time. We would welcome a separate initiative across the approved regulators, learning from approaches in other sectors such as financial services, which would lead to a common approach designed to help consumers know when their provider is regulated and when they are not.

Compelling evidence and risk assessment

15. We see this area as the most important part of the discussion paper. The Panel has had cause to remark in a number of papers, and in particular in recent responses to various consultations carried out by the frontline regulators, on the poor evidence base on which consultations are being issued and policy decisions are being made. We asked for more research or information, and/or for impact assessments

to be carried out, for example, on the recent SRA consultations on the separate business rule and regulation of consumer credit activities, the recent CLC consultation on changes to the compensation fund operating framework, and the 2014 BSB consultation on entity regulation. In particular there has been a lack of impact assessment on the effect proposed changes will have on consumers of legal services.

16. We therefore consider that ideally a thorough risk-assessment should be undertaken by the regulators to assess whether the restrictions they place on in-house lawyers are appropriate or not. Where such a thorough impact assessment is not possible then at the very least there should be evidence shared of the careful consideration that has been given to the risks posed and a plan in place to monitor the impact of any rule change. In this context the LSB should be seen to hold the regulators to account, and ensure that decisions are being made based on strong evidence.

Redress

17. Currently solicitors employed in non-commercial advice organisations must have reasonably equivalent cover to what is required by the SRA Indemnity Insurance Rules and if they handle client money the SRA Accounts Rules apply. Barristers may also provide advice in Legal Advice Centres. It is the responsibility of barristers providing such services to ensure they are either adequately covered by their own insurance policy or under a policy taken out by the organisation where they are providing the services.

18. Although general consumer rights are important, they will not be able to substitute for all the protections that regulation brings, including preventative measures such as education and training, and remedial measures such as access to the Legal Ombudsman and to compensation funds.
19. Redress is therefore crucial because it allows individuals who have lost out unfairly to be compensated, and also because it has a deterrent effect on poor behaviour. We recommend that access to redress for all those who may use in-house lawyers is something to work towards.
 - Consumer confusion and how this should be addressed;
 - Ensuring there is compelling evidence and risk assessment; before policy decisions are made;
 - Ensuring consumers are able to access redress;
 - Whether or not a consumer pays for a service should not have an impact on the quality of the service they receive.

April 2015

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20. The SRA rules on in-house lawyers allow services to be provided to consumers in some cases without appropriate insurance or quality assurance if no fee is charged. The Panel is concerned by this distinction, which we see as artificial. Whether or not a consumer pays for a service should not have an impact on the quality of the service they receive. We note the SRA plans to re-examine its approach to in-house practice and the rules surrounding this, which we welcome.

Conclusions

21. Reviewing the restrictions currently placed on in-house lawyers which go beyond the provisions of the Act is to be applauded as this (alongside other initiatives) may aid innovation and competition, and therefore help to address the high levels of unmet need. However, as the LSB formulate their policy recommendations, attention should be paid to the impact on end users, and focus should be put on the following areas:

