

<b>To:</b>	Board	
<b>Date of Meeting:</b>	30 November 2011	<b>Item:</b> Paper (11)80

<b>Title:</b>	Quality Toolkit and Risk Assessment Framework
<b>Workstream(s):</b>	Workforce development
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<b>Status:</b>	Unclassified

<b>Summary:</b>
This paper provides an update on quality assurance, and outlines the LSB proposed approach to describing and evidencing regulatory interventions to remove or reduce quality risks for consumers of legal services. The paper proposes a further discussion or consultation document to refine the list or 'toolkit' of interventions, and to map their applicability to different consumer segments of the market.

<b>Risks and mitigations</b>	
<b>Financial:</b>	This paper makes reference to further research on quantifying current quality risks and the impact of defined interventions, which will have associated financial implications.
<b>FoIA:</b>	Not applicable
<b>Legal:</b>	Not applicable
<b>Reputational:</b>	Failure to adequately address quality concerns could cause reputational harm to LSB and Approved Regulators (particularly if there is a high profile failing).
<b>Resource:</b>	Resource is currently considered sufficient.

Consultation	Yes	No	Who / why?
<b>Board Members:</b>	✓		David Wolfe and Barbara Saunders
<b>Consumer Panel:</b>	✓		Discussion with Consumer Panel Manager
<b>Others:</b>	External members of the quality roundtable referred to within the text of this paper		

<b>Freedom of Information Act 2000 (Fol)</b>		
Para ref	Fol exemption and summary	Expires
N/A	N/A	N/A

**Recommendation(s):**

The Board is invited:

- (1) to note the update of work on quality assurance
- (2) to agree with the proposed approach and timeframe for delivery

## LEGAL SERVICES BOARD

<b>To:</b>	LSB Board	
<b>Date of Meeting:</b>	30 November 2011	<b>Item:</b> Paper (11)80

### Quality Toolkit and Risk Assessment Framework

#### Executive Summary

1. In March 2011, the Board agreed to a proposal to take forward work on quality assurance. This paper updates on progresses since then and seeks the Board's comments and agreement on the next steps.
2. The Board's starting position in March was:
  - that ARs should operate on a presumption of minimum quality standards across their regulated professions and not only in those areas of high risk
  - to emphasise the LSB's role in oversight to influence (but not to direct) ARs to promote minimum quality standards.
3. When the legal services market is segmented by type of service and type of consumer, the sophisticated consumer enjoys far greater protection from quality risks by virtue of their informed experience, knowledge and buying power than the individual consumer – the “natural person” is afforded. Hence we need to seek interventions which are particularly effective for this group, but which are equally applicable across all of the regulated providers.
4. The approach described in the paper aligns these with the three characteristics of quality in legal services; technical quality, utility of advice and client care.
5. Technical quality interventions might include:
  - outcomes focused CPD
  - evidenced / accredited quality marks
  - accreditation schemes / minimum competence assurance.
6. Client care interventions might include:
  - publicly available data on regulated standards
  - complaints outcomes data published (first tier, Ombudsman, FtP) and mapped to regulated standards
  - comparison websites and consumer 'help' or support information.
7. Utility of advice interventions might include:
  - publicly available data on regulated standards
  - complaints outcomes data published (first tier, Ombudsman, FtP) and mapped to regulated standards

- comparison websites and consumer 'help' or support information
8. Developing regulatory practice in these areas will be a significant challenge for ARs. It will crucially depend on:
- developing their ability to assess risks at a significantly more granular level than they currently do
  - ensuring that they understand the effect of their actions on incentives within the market to ensure that there is the maximum alignment between commercial imperatives and the broader consumer and public interest objectives they seek to achieve
  - developing their own consumer profile and "brand" to ensure consumer trust in and understanding of their interventions – and those of credible third parties.
9. Both the issues around quality per se and their fit within a broader move to outcome focused regulation are therefore major undertakings. Although our testing of some of these ideas at a workshop with ARs and academics on 2 November was reasonably well received, it is not clear that the scale of change is properly understood. We therefore propose that a discussion or consultation document is produced setting the issues out more clearly to both test the policy framework and, if anything more importantly, to seek to develop an approach to implementation that it is proportionate to the risks facing individual ARs and is aligned with related initiatives, in particular on regulatory effectiveness, the education and training review and current quality initiatives such as QASA. This in turn may lead to statutory guidance to regulators to underpin any final proposals.

### **Recommendation(s)**

The Board is invited:

- (1) to note the update of work on quality assurance
- (2) to agree with the proposed approach and timeframe for delivery.

## Approaches to Quality

### Background

10. In March 2011, the Board received paper (11)19 to share early thinking of the Executive on quality assurance, and a proposal for the development of an analytical framework for deciding appropriate regulatory interventions in relation to quality assurance. It was anticipated that this would be achieved by:
- developing a better understanding of quality risks in the legal services market
  - producing a “toolkit” identifying the regulatory tools or interventions that could be used to ensure minimum quality standards were achieved
  - developing a framework for assessing risks to quality to enable targeted responses.
11. The Board agreed the proposed strategy for taking forward this work.
12. It was also agreed that consecutively the LS Consumer Panel would undertake further work on existing voluntary quality schemes in legal services. This is the subject of a separate paper ((11)79).

### Understanding quality risks in the legal services market

13. In their report<sup>1</sup> “Quality in Legal Services” the Legal Services Consumer Panel advised that the quality of legal advice needs to be better understood and monitored.
14. The concept of quality in legal services is not easy to define. A study<sup>2</sup> commissioned by LSB sought to develop an outline framework based on segmenting parts of the supply of legal services that exhibit similar features – these segments being defined by the services offered and the sophistication of the consumers served, rather than traditional supplier-focused measures such as number of partners and turnover.
15. This framework has subsequently been tested in benchmarking one sector of the legal services market – city firms. The associated report<sup>3</sup> has begun to provide a clearer understanding of the potential quality risks; the consumers of this sector, often corporate bodies with an in-house legal department, and who are repeat purchasers, have a greater capacity to use knowledge and buying power to make informed decisions and therefore the firms are likely to pose relatively fewer regulatory risks. Although personal consumers were found to access services from this sector they were described as having significant wealth with relatively complex personal situations. Consequently these too were categorised as sophisticated consumers.

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<sup>1</sup> Quality in Legal Services. Legal Services Consumer Panel. November 2010

<sup>2</sup> A framework to monitor the legal services sector. Oxera Consulting, prepared for the Legal Services Board. September 2011

<sup>3</sup> Benchmarking the supply of legal services by city law firms. Charles River Associates, prepared for the Legal Services Board. August 2011

16. What isn't then clear from this benchmarking exercise are the risks which might be anticipated with a less sophisticated, infrequent or vulnerable personal consumer. It is believed that this cohort of 'natural persons' are exposed to a greater potential for market failure i.e. poor quality legal service, and therefore need greater consumer protection. This hypothesis requires further testing in the high street sector, and we are collaborating with the Ministry of Justice and Law Society to undertake research with solicitors firms during 2012. Whilst informed in part by the LSB Regulatory Information Review, a finer granularity of understanding is required to identify which groupings of natural persons are placed at most risk by which types of legal activities.
17. This latter consumer segment may also utilise legal services provided by special bodies; non-commercial organisations that conduct legal activities but have non-lawyer owners and managers. Often located within the not-for-profit sector the consumers are typically those from disadvantaged or socially excluded groups with a very wide range of problems, often without the ability to pay for the legal service they need<sup>4</sup>. Rapid exit from this sector, often in the aftermath of legal aid policy changes, as well as isolated instances of individual malpractice, suggests that we cannot rely on lazy assumptions about the "public spirit" of not for profit providers to deliver adequate consumer protection on its own.
18. The magnitude and type of quality risks to the personal consumer do become apparent within an overview of some of the published information<sup>5</sup> on the quality of legal advice (produced to assist round table discussions). The overview highlights that these consumers believe they are more able to judge service quality, (attributing good service to personable factors), than technical ability. The latter rather rests on a presumption of sufficient qualifications to practice and that there is little variation of technical expertise between providers.
19. The risks identified also resonate with those described within the theories of consumer harm elsewhere<sup>6</sup>:
  - **Consumers have a limited choice** they are disadvantaged by virtue of area of residence, employment status, or previous legal history. This limited choice can inflate margins on the range of services available to these consumers, resulting in further limitation due to lack of affordability.
  - **Consumers perceive they have limited choice** lack of awareness of alternative options and lack of understanding of available options can mean consumers struggle to compare the quality of services or compare and contrast between service providers, or, they are risk averse and prefer to stay with a known provider. This lack of substitution can lessen competitive pressures between providers.
  - **Providers do not compete effectively** a lack of competitive pressure does not force the least efficient providers to become more efficient or otherwise exit the market. This lack of competition can result in barriers to

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<sup>4</sup> Understanding the supply of legal services by 'special bodies'. Frontier Economics, a report prepared for the Legal Services Board. July 2011

<sup>5</sup> Quality in legal services: a literature review. Legal Services Board November 2011 ([http://www.legalservicesboard.org.uk/news\\_publications/latest\\_news/pdf/quality\\_of\\_the\\_legal\\_profession.pdf](http://www.legalservicesboard.org.uk/news_publications/latest_news/pdf/quality_of_the_legal_profession.pdf))

<sup>6</sup> Theories of harm and consumer detriment. Office of Fair Trading. April 2010

entry, expansion or diversification within the market and directly affect the elasticity of supply of legal services.

20. A further review<sup>7</sup> of published material similarly illustrates an inability of consumers of other (non-law) regulated professions to assess the technical ability, quality of the service, or advice utility they receive. Professional regulators of these cohorts deploy a variety of regulatory interventions to protect the public interest, some of which address quality risks, but consumers appear to be unaware of many of these.

### **Regulating quality risks in the legal services market**

21. Assessing quality risk and deciding upon appropriate targeted regulation is the task of the ARs. Our role as an oversight regulator is to challenge and support the ARs by providing both an intellectual framework and a toolkit of practical interventions for assessing or addressing the issues, and to assess the outcome against delivery of the regulatory objectives.
22. We share a regulatory objective with the ARs, to encourage an independent, strong, diverse and effective legal profession. To deliver this objective it is not the role of LSB to assure and accredit every regulatory issue. Rather it is for each AR to assure safe and effective legal services through its regulatory arrangements. It is reasonable to expect that this will be achieved through a bespoke approach, tailored to their respective regulated cohort, but constrained within the bounds of the framework.
23. Regulation of the legal workforce has traditionally focused upon requirements for entry of individuals and entities, cyclical retention of a right to practise at generalist and specialist levels (which in truth usually equates to no more than payment of a retention fee), and dealing with failings of fitness to practise (FtP). These regulatory activities are underpinned by entry criteria (or barriers) and professional ethics and standards. They are not however underpinned with assessments of competence; this being the fundamental difference between being fit to practise and fit for purpose. It is only more recently that an additional focus has been placed upon the role of continuing professional development (CPD), re-validation and re-accreditation in assuring an individual remains fit for purpose. The gap that continues to remain is whether the individual or service is fit for purpose for the consumer segment(s) it serves.
24. The legal services market in England and Wales is in a state of rapid evolution; consumerism, technology, globalisation and the broader social change within our society are all factors in driving the change. New regulatory challenges will begin to emerge. Innovation and opportunism may lead to legal services which pose unknown quality risks, especially if those services lie outside of the current regulatory frameworks. The test for the regulators now is to identify appropriate mechanisms to both build the right incentives for quality into all their activities that have a market facing impact and, where more specific intervention is justified, to identify where and how best to focus specific quality assurance

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<sup>7</sup> Quality in other regulated professions. Legal Service Board November 2011 ([http://www.legalservicesboard.org.uk/news\\_publications/latest\\_news/pdf/quality\\_in\\_other\\_regulated\\_professions.pdf](http://www.legalservicesboard.org.uk/news_publications/latest_news/pdf/quality_in_other_regulated_professions.pdf))

initiatives as between individuals, entities or activities across the widening and diverse span of legal service provision.

25. Such changes may necessitate expanding the research evidence base and require a degree of flexibility and agility on the part of the approved regulators (ARs) if consumers and the public interest are to continue to be protected. This must also be set within the guiding principles of better regulation described in **Figure 1**:

**Figure 1 Quality assurance – suggested best regulatory practice**

Better regulation principle	Purpose
Proportionate	Reducing the burden, ensuring effective functioning in the market whilst protecting the consumer
Accountable	Cost benefit and a robust and compelling case to introduce, achieving the objective at the least cost and with the least coercion
Consistent	Remove existing regulation that unnecessarily impedes growth whilst seeking to modernise and improve compliance methods
Targeted	Empowering those who will be responsible for enforcement rather than providing a prescriptive set of factors
Transparent	Consulting with those affected and being clear about how effectiveness will be monitored

26. The various reviews of published material and studies referred to above demonstrate that different consumers have different starting points for different services. Rather than a broad-brush approach to regulation and the traditional supplier-focused measurements, a targeted approach to quality assurance requires categorisations that are more reflective of these differences. Market segmentation based upon the type of law, type of legal activity and type of consumer address this need. When considered together not only do these characteristics provide a breakdown of the legal services sector, but they also provide a focus upon outcomes.
27. A roundtable was held on 2 November to seek to understand how others (spanning legal and non-legal professional regulation) have identified risks posed to consumers by quality issues in their respective market, what evidence base there is for these, how the risks have been described, and appropriately and proportionately addressed through regulatory intervention. Questions and challenges to prompt the discussions are attached at **Annex A**. Broadly these fall in to three categories:
- before the event assurance – entry hurdles, training and accreditation, and assurance of competency
  - increased consumer empowerment – transparent / published data and tools to support choice

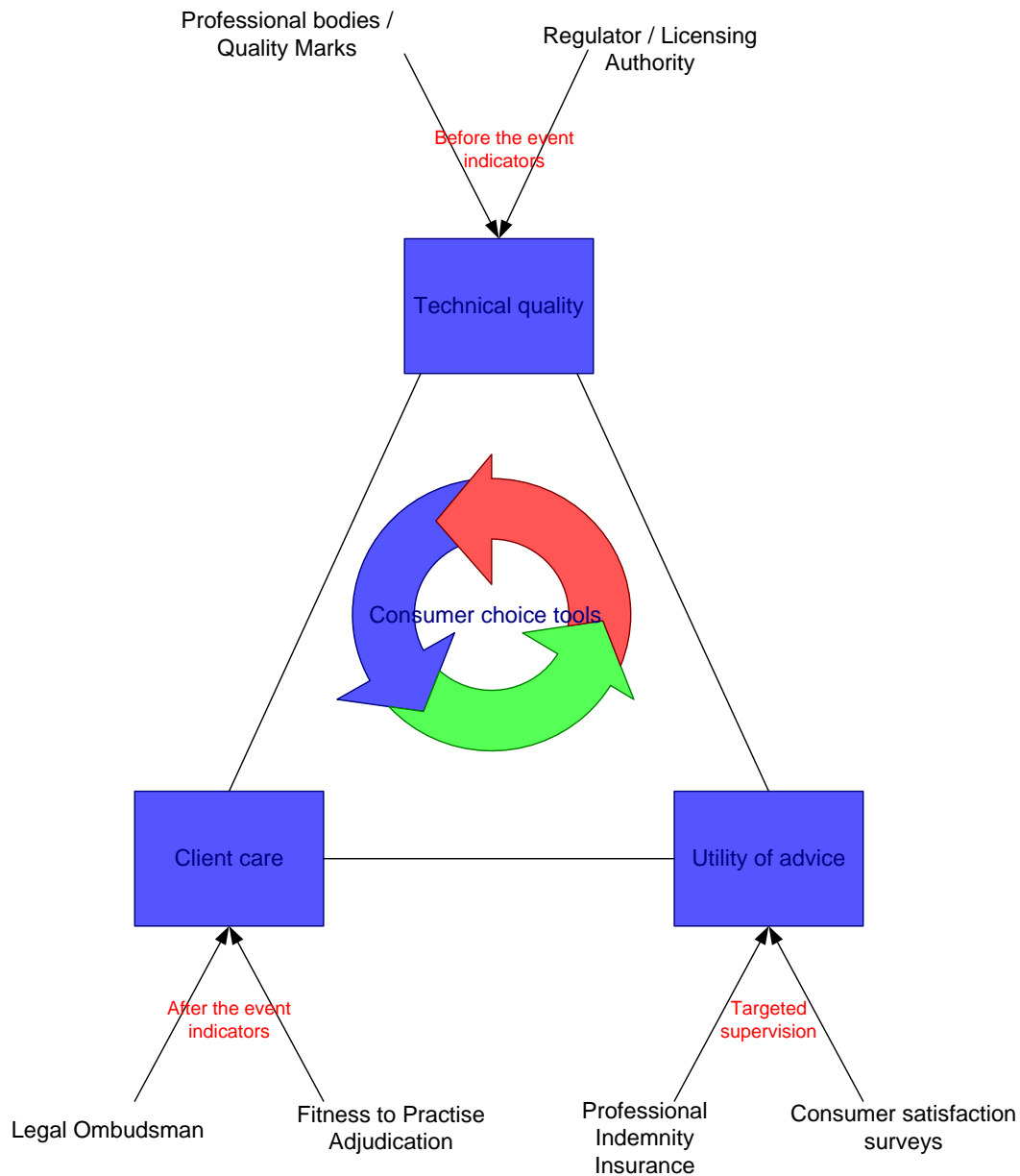


- targeted supervision – proportionate and risk-based by regulators or on behalf of regulators, but touching all who deliver a legal service (i.e. not reserved to lawyers).

### Regulatory interventions for quality assurance

28. The inter-relationship between the three characteristics of quality (originally described in Board paper (11) 19), is illustrated in **Diagram 1**.

**Diagram 1 The inter-relationship of technical quality, client care, and utility of advice**



The range of interventions for the reduction, mitigation or removal of quality risks in order to better quality assure the legal services workforce and the legal services it provides will need to touch upon each of these. To do so will require data, efficacy measures and evidence of outcomes either to prioritise future regulatory interventions or, where there is a direct correlation, to target them at known areas of quality risk.

29. Whilst the following paragraphs offer an initial outline view of the possible range of interventions, they must also be considered alongside the legal education and training review. If legal services are to effectively serve the consumer, then the legal workforce needs to have the right skills and knowledge, and a capability to constantly update both. It is to be hoped that the considerations toward the quality interventions will inform the education and training review, and that changes to the range of interventions will come about as a result of the review. This assumes that both will occur in concert as opposed to splendid isolation of one another.
30. **Technical quality** is believed to be assured through entry criteria, re-certification and progression criteria, and evidence of continual professional development (CPD). However, the former merely serves to provide a form of assurance of fitness to practise through acquisition of a qualification, whilst the latter provides little assurance other than box-ticking since it is based upon input measures and not outcomes that demonstrate a fitness for purpose.
31. The requirements for qualification have become the only 'before the event' quality assurance means utilised by regulators but this does not provide the consumer with sufficient information to judge whether an individual is competent and honest. Historically it was to erect a barrier to entry to protect the legal qualification from competition. But society and the market place have changed, bringing greater consumer demand and expectation, and competition from other non-lawyer providers.
32. Quality marks provided by professional bodies similarly reveal little about the competency of an individual or a firm, especially if the requirements necessary to achieve a quality mark are not publicised, nor validated. This is confirmed by an assessment of existing voluntary quality schemes undertaken by the Legal Services Consumer Panel<sup>8</sup> that no discernible proof exists (such as spot checks or mystery shopping) that schemes currently deliver on their quality claims. Yet whilst it appears no more than a stamp of attainment, it can and is required by some sophisticated consumers in their purchase specification, posing the question whether it is the sophisticated consumer or the regulator that is assuring quality standards.
33. It is imperative that the legal education and training review provides proposals to move the current "one size fits all" approach to technical quality to one that is more closely aligned to the changing market, and recognising the variety of legal services provided to the differing consumer segments. Understanding the likely demand for generalist and specialist lawyers and how the regulatory requirements for education and training will fit will be central to the success of the review.

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<sup>8</sup> Voluntary quality schemes in legal services. Legal Services Consumer Panel. November 2011

34. Consequently given these requirements it seems reasonable to suggest that the ARs integrate the risks in to their respective regulatory strategies, and assess alongside their other regulatory activities. The resulting outcome would demonstrate a technical quality reflective of the recommendations of the legal and education review, the routes to and maintenance of qualification, and the routine demonstration of competence. For example, the Quality Assurance Scheme (for criminal) Advocates (QASA) provides one such tool which the ARs may, in time and with outcome evidence from the nascent scheme, want to consider for extension to others.
35. It will also be for the ARs to seek to demonstrate why particular legal activities require certain interventions and why others do not; either because they are not needed or because sufficient mechanisms already exist. Segmenting services and consumers of those services will provide a much more targeted and proportional approach. Sophisticated consumers can assess risk and determine their degree of acceptance of it or requirements for its mitigation. It is unlikely that the personal, natural person, consumer is able to mirror this, and the ARs interventions could therefore be centred upon these less empowered users.
36. Technical quality interventions therefore might include:
- outcomes focused CPD
  - evidenced / accredited quality marks
  - accreditation schemes / minimum competency assurance
37. **Client care** is not proactively quality assured; rather it is a reactive process triggered by consumer complaint or fitness to practise investigation and is therefore an 'after the event' indicator. However, the outcomes of these events may be critical learning episodes and either in isolation or collectively point to a failing in educational or professional standards determined by the regulator.
38. Since matters of client care may be directed via various complaints handling routes, including at the first stage to the provider firm, then for an informed and complete view of matters arising to be identified, it will be necessary for certain data about complaints to be published across the range of bodies; at firm level, Legal Ombudsman and ARs. It will then be for the ARs to map the collated data against their respective educational and professional standards and determine whether targeted regulation or changes to standards and regulation are necessary. This approach gains support from the Legal Ombudsman who in their strategy for 2012-15<sup>9</sup> describe an enhanced research function to mine complaints and outcomes data and present the data in useful and accessible ways to stakeholders, including ARs.
39. There might also be opportunity for ARs to introduce a route of 'earned recognition', defined by the Department of Business, Innovation & Skills (BIS)<sup>10</sup> as being where a firm demonstrates an in-house voluntary quality assurance scheme. The virtuous circle of learning from adverse events and complaints is demonstrated in practise. Assuming the scheme is validated as a reliable risk

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<sup>9</sup> Final consultation draft Strategy 2012-2015, Business Plan 2012-2013. Legal Ombudsman. October 2011

<sup>10</sup> Better Choices: Better Deals – Consumers powering growth. Department for Business Innovation & Skills April 2011

indicator the benefits are two-fold; the AR makes fewer interventions with the firm, and the AR gains insight into the underlying evidence for educational and training changes or review of professional standards. Comparing the output from a range of firms afforded earned recognition then begins to provide a view which might be extrapolated to a service-wide evidence base. However, it remains to be seen whether the number of firms offering individual consumer facing services in volume increases to the level necessary to enable the maximum benefit to be derived from this kind of system.

40. Comparing data from different sources has also become an accepted norm in price comparison and 'search and match' websites. Such sites have begun to emerge listing legal services both in relatively crude price terms (inasmuch as instant quotes or fixed-fees are not a common feature of legal services), and to identify solicitors to meet the users described need. In a report for the Law Society<sup>11</sup>, price comparison sites are recognised as interactive aids and decision tools, and an important part of consumer choice. Despite this view, the sites are also criticised for commoditising routine legal services. The report does however suggest that additions to assist consumers in the initial screening process of available alternatives, to afford a more in-depth comparison between legal service providers is the way forward in an increasingly technological and global legal market.
41. To support consumers in navigating the various information sources, an initiative recently announced by BIS may prove a useful adjunct. 'Midata' is a voluntary programme which over time will give consumers increasing access to their personal data in a portable, electronic format. Individuals will then be able to use this data to gain insights into their own behaviour, make more informed choices about products and services, and manage their lives more efficiently.
42. To gain the maximum benefit from all of the developments referred to above consumers may therefore require assistance in understanding the different types of law that can be undertaken, and how in light of these the costs and success rates can be placed in context of their use of those legal services. In effect this offers a regulatory intervention that explains and contextualises performance data.
43. Client care interventions therefore might include:
  - publicly available data on regulated standards
  - complaints outcomes data published (first tier, Ombudsman, FtP) and mapped to regulated standards
  - comparison websites and consumer 'help' or support information
44. **Utility of advice** may become an 'after the event' indicator where a claim against an individual's or firm's indemnity insurance is made, and is likely to already be incorporated within the complaints data referred to in earlier paragraphs. However, Professional Indemnity Insurance (PII) information can also be used to describe the characteristics of high quality and conversely low quality practise. This information can be used to develop risk profiles or

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<sup>11</sup> Applying the comparison web site model to legal services. The Law Society November 2011

predictors of poor practise allowing regulatory intervention to be much more effectively targeted.

45. A range of tools might be used to supervise the firms deemed to present a risk to consumers, and persistent poor quality would be dealt with through existing compliance and enforcement strategies.
46. Whilst the use of PII data might provide objective measures of quality, there are other more subjective measures. Mystery shopper or customer satisfaction feedback mechanisms not only provide 'after the event' information about quality, but provide a co-regulatory role for the consumer. Wielding this power, the consumer role is a powerful disincentive to poor quality.
47. We know that a range of consumers exist and who utilise a range of legal services. The earlier referenced Oxera framework will provide a suitable tool to segment the market for type of consumer and types of service used, and enable a comparison of the customer feedback to again inform a more targeted approach for supervision by the regulators.
48. This framework might also be utilised to provide outcomes data (utility of advice) about legal services to drive quality improvement through reputational incentive. Currently there are web-based and hard copy directories published about legal services providing some degree of comprehension of the marketplace and the quality of service provided within that market. Some of these publications are more independent than others. Ranking of firms by outcomes can be a powerful incentive to improve by increasing ranking to overtake competitors, but loses strength when unduly influenced by the very service providers it purports to rate.
49. A truly independent reviewer of legal services outcomes, analogous to Dr Foster in the healthcare sector, could describe and publish outcomes data by firm. Whilst this could form a reference source for consumers in selecting a legal service provider, a report that describes and rates the service outcomes can be instrumental in driving improvement to achieve or secure a good quality reputation. If a trusted source, it is reasonable to suggest that this resource becomes a legitimate trigger for targeted regulatory intervention. It is for debate as to whether ARs or the LSB should seek to commission such a source or whether our emphasis should continue to be on a significant increase in transparency across the sector, relying on the incentives provided by "open data" in other sectors to inspire use of the data by third parties.
50. Utility of Advice interventions therefore might include:
  - risk profiling and predictors of high risk practise
  - consumer satisfaction feedback / consumer co-regulation
  - Oxera framework to segment market for customer feedback / develop a trusted source of comparative data for targeted intervention.

## **Broader Context**

51. Developing regulatory practice in these areas will be a significant challenge for ARs. It will crucially depend on three factors:
  - developing their ability to assess risks at a significantly more granular level than they currently do

- ensuring that they understand the effect of their actions on incentives within the market to ensure that there is the maximum alignment between commercial imperatives and the broader consumer and public interest objectives they seek to achieve
  - developing their own consumer profile and “brand” to ensure consumer trust in and understanding of their interventions – and those of credible third parties.
52. On the first, ARs have not historically sought to modulate either their rule-making or their practical interventions by consumer group or by type of law. There will therefore be a challenge for them in doing this in a way that does not inadvertently lead to the development of interventions that may be seen as “micro management”.
53. The second challenge is related. In the longer-term, the best incentives for quality are provided by market signals which provide the right incentives for providers to achieve and maintain the right measures of quality, rather than through specific QA initiatives alone. ARs will need to think through more thoroughly than they do at present how to achieve the right balance between their general approach and specific interventions.
54. Finally, it is clear that the effectiveness of many of the interventions depend on consumer knowledge and trust of the “brand” making the interventions. Neither the ARs (nor the LSB) have any appreciable public profile at the moment – the Law Society and Bar Council are the only bodies with any appreciable name recognition. Activity to boost profile may well therefore be a necessary concomitant of interventions on quality.

### **Proposed approach and timeline**

55. It is worth repeating here that in describing the obligations contained within the Legal Services Act that *“the public interest includes our collective stake as citizens in the rule of law and in society achieving the appropriate balance of rights and responsibilities. It is not static, but will always be based upon deserved public confidence in the legal system”*. This public interest is best served by regulatory interventions to maintain confidence but which are sufficiently flexible to allow for different courses of action by the individual ARs.
56. Both the issues around quality per se and their fit within a broader move to outcome focussed regulation are therefore major undertakings. Although our testing of some of these ideas at a workshop with ARs and academics on 2 November was reasonably well received, it is not clear that the scale of change is properly understood. We therefore propose that a discussion or consultation document is produced setting the issues out more clearly to both test the policy framework and, if anything more importantly, to seek to develop an approach to implementation that it is proportionate to the risks facing individual ARs and is aligned with related initiatives, in particular on regulatory effectiveness, the education and training review and current quality initiatives such as QASA.

57. This will be scheduled during Q4 2011/12, and completed by end Q4 to coincide with the first phase report of the education and training review.
58. The proposed regulatory interventions will be published by the end of Q1 2012/13. At that stage, we will be better placed to assess whether this is an area that might lend itself to a separate, specific initiative by ARs - which might require a response, requiring an implementation and monitoring plan by, say, the end of 2012, focused on their specific risk – or whether we seek an approach more tightly aligned with our other work, particularly on regulatory effectiveness. In either event, the LSB issuing s162 guidance to influence and achieve these actions may be one appropriate lever for intervention.
59. A further paper will be drafted for Board approval early in Q1 2012/13 on this and related issues.

14.11.11

## Roundtable on regulatory interventions to drive quality – pre-amble

### Background

The legal services market in England and Wales is in a state of rapid evolution; regulation, consumerism, technology and the broader social change within our society are all factors in driving the change.

The workforce within the legal services market needs to react as flexibly as possible within the constraints of the regulatory framework, whilst maintaining and improving consumer protections. Simultaneously, the regulators need to shift to outcomes-focused regulation, with better risk management and enforcement within a more liberalised, and even globalised, market. However, this is not at the expense of their specific duty to ensure the workforce has the rights skills and knowledge, including the capacity to constantly update both skills and knowledge.

Students, employers and, above all, the public deserve to be given the certainty they need that the building blocks are in place to assure the legal workforce of the future and that the legal services market is going to meet the changing demands of justice in an increasingly demanding future. We already know that there is a mismatch between consumer expectations of regulation and the safeguards that regulation provides in practice. *(DN: Legal Services Consumer Panel report circulated to roundtable delegates with invitation to attend)*

The spectrum of legal services is widening, both in the way they are reaching across international boundaries, and in the increasing delivery in partnership with other professional services. Business models are becoming more diverse at a time when regulation is to be less burdensome. Regulatory interventions therefore need to be proportionate and better targeted whilst providing high levels of assurance. Not only assurance about the technical competency of the workforce, but of the services they provide with well-serviced legal advice that is useful to the consumer.

What can we do to challenge and support the Approved Regulators (ARs) to assess quality risks in client care and utility to best target regulatory interventions? *(DN: the delegates will receive a copy of our two literature searches prior to attendance at the event and which contain the descriptors of the 3 aspects of quality; technical, service & utility)*

To begin to answer this question, this roundtable event seeks to understand how others have identified risks posed to consumers by quality issues in their respective market, what the evidence base for these is, how these risks have been described, and appropriately and proportionately addressed through regulatory intervention. With further consideration of existing strategies and interventions it is the LSB's intention to propose a framework to the ARs for assessing and addressing quality issues across the legal services market.



## **Closing the virtuous circle – learning from outcomes**

### **Question 1**

Can ARs, with others (e.g. Legal Ombudsman, PI Insurers), both better inform consumer choice, and, drive quality risks out of the system by publishing the wealth of information about complaints, fitness to practise outcomes, claims and redress? Is quality then better assured through data analysis and the outcome utilised to inform changes to professional standards and performance?

The Approved Regulators (ARs) have traditionally regulated technical quality inasmuch as they control entry to a profession, progression through a profession and removal from the profession where fitness to practise (FtP) is found to be impaired. In this way they, like Ombudsmen and professional indemnity insurers, hold outcomes information. If the information relating to these ‘after the event’ matters was to be made more transparent, the output could be analysed to complete a virtuous circle of learning to drive up quality and professional development; for example through ARs applying the learning of outcomes from FtP hearings to future educational and training courses or to professional standards.

Are claims against professional indemnity insurance reliable indicators of poor or failing technical or utility quality? Trend data must exist on what a high (cost or volume) claiming practice looks like since premiums are calculated weighted by risk. Can characteristics of high claiming practice be defined and be used by ARs to assess against for targeted intervention?

Similarly, complaints handled by the Legal Ombudsman. What is the nature of the complaint, are there any trends in type of complaint, and how do the findings or outcomes influence future practice?

Making performance and complaints data more transparent is a good way of encouraging legal service providers to improve their performance. As the data build, they can be utilised to inform ARs decisions on where to focus either for additional guidance for consumers, or for their own enforcement activities.

The financial services sector releases some of these data – for example publishing firm-level complaints data every 6 months. The health sector also releases some data – for example by the regulators publishing annual fitness to practise data. What examples exist from within the legal services market?

To achieve the proposal above, ARs, Ombudsmen and the PII providers need to provide data in a way to facilitate it being combined, either together, or with other indicative or proxy data, for example price comparison. Transparency also encourages trust (by the consumer) and promotes compliance with regulations (by the legal services provider).

### **Summary of intervention**

- Transparency of data on outcomes
- Predictive characteristics
- Feedback in to standards and training

## Choice in the legal services market

### Question 2

If we work on the presumption that the data are published, and that they are widely available to consumers, ARs & professional bodies, and researchers, does each of these cohorts become sufficiently empowered and informed such that their resulting actions then positively drive quality assurance and influence consumers choice from the market?

Market outcome data are another source which can influence consumer choice and drive both quality assurance and service developments. This is well evidenced in the health sector where individual surgeons' operation success rates are routinely published. These differ from the ratings websites used more commonly for example in the insurance sector in that the success rates are based upon hard clinical evidence rather than the subjectivity of users views. However, that is not to promote one format over the other, rather that both might serve useful purposes in informing choice and informing need for regulatory intervention due to poor quality. The Legal Services Consumer Panel and the Law Society are separately beginning to look at the role of comparison sites.

We know there is no one unique indicator or direct measure of quality, and so we need to rely upon multiple aspects. Research commissioned by LSB from Oxera describes lists of indicators which might prove useful, including Market Functioning Indicators A2.3 (cf. choice of surgeon) and Market Outcome Indicators A2.10 (cf. star ratings). (*DN: delegates will receive a copy of the Oxera research prior to attending the roundtable.*) The collection of consumer survey data can be a significant complement to the more detailed and qualitative analytical approach proposed earlier.

What other information does a personal or corporate consumer require or rely upon when choosing a legal service? Price and price differentials will certainly influence some, but how do they learn what a higher cost provides additionally over a lower cost? Is the cost differential in any way reflective of a variance in quality? What about the choice between city brand vs. high street generic, or specialist vs. generalist? Are there other selection criteria a consumer might use; for example relating to the 'style' adopted by the lawyer (litigation or mediation). Are there examples of any detailed selection criteria being applied in the financial or health sectors when consumers choose financial advisers or health practitioners? What role do the regulators play in assuring these aspects of service provision? Of course this does assume that the consumer knows what services and characteristics of those services they want, and some, particularly personal consumers, may not. How does this cohort navigate a market unfamiliar to them, cope with the asymmetry of information between them and a lawyer, and know whether that lawyer is suitably competent for their needs? The LSB has commissioned research to benchmark the household consumer use of legal services.

### Summary of interventions

- Market outcome data
- Development of comparative websites
- Informing choice

## Competition in the changing legal services market

### Question 3

Will the introduction of ABS or the diversification of service provision through other professional providers drive competition? Will services provided by not-for-profit organisations be in greater demand during the economic downturn, increasing competition with high street firms? Technology is shrinking the world and legal services are not immune to globalisation, both on-shore and off-shore trade, but what is the impact of this expanding and competitive market, and how do consumers identify *bona fide* good quality legal services?

In many commercial markets awards and other indicators have long been used to denote or promote the quality of the service; for example kite-marking or quality marks. The achievement (and retention) of such marks is claimed to indicate an investment in quality improvement – in marketing terms setting one provider ‘above’ another and therefore differentiating them from the provider who has not achieved the mark. Do clients (personal and corporate) make the currently existing quality marks a requirement in their choice assessment; it is certainly an approach adopted by government procurement or selection processes (e.g. ISO compliance), and in theory could add to quality ranking or provider comparison for consumers to refer to.

Quality awards or marks work if there is an initial accreditation and subsequent cyclical re-accreditation process, to demonstrate that the individual or service is and remains competent to retain the particular mark. Without re-accreditation the mark is no more than the equivalent of a boy scout’s badge; demonstrating attainment rather than continuity of achievement, always assuming the initial accreditation is of proven quality in itself. The re-accreditation methodology also needs to be sufficiently robust to accurately test competence and not merely be a rubber stamping exercise. We hope these necessary characteristics will quickly become recognised within the Quality Scheme for Advocates (QASA). Similar approaches could be taken to diversification of provision at commercial and not-for-profit level, including those provided remotely. However, being a global phenomenon there are significant challenges when accrediting a web-based service.

When web-based pharmacy sites emerged some years ago the professional regulator attempted to provide consumer assurance by an official logo linked to the premises registration of the pharmacy and containing a hyperlink to the relevant entry in the register. Despite substantial development work, it soon became apparent how easily this could be falsified. Although still in existence, better success was achieved by providing useful tips to consumers on buying medicines over the internet and how to avoid counterfeit products. Has anything similar been produced to guide consumers in identifying *bona fide* or good quality services in other competitive markets?

Could the same tips be applied to assist consumers when confronted with choices including services provided via other well-known brands, for example WH Smith, baby Bounty packs. What do we know about the associated quality conferred on the service by brand loyalty?

### Summary of interventions

- Quality marks
- Accreditation and re-accreditation
- Top tips for consumers

## Promoting trust in the legal services market

### Question 4

In a changing market what do employers and consumers rely upon to identify those who adhere to good standards of the professional principles, and how is this information quality assured? How does the information reflect changes, particularly where an individual fails or demonstrates disregard for the professional principles?

Up until now, regulators have regulated suitably qualified professionals and professional entities. Most provide a list, “The Register”, of the individual professionals and addresses of the entities, and which is searchable by the consumer. However, it tells the consumer little if anything about the quality of the individual or the service that can be anticipated. How might this be developed to provide information about type of qualification, the generalism and specialism practised, the accreditation of competence in these practice areas, and outcomes from fitness to practice (FtP) matters?

In the health sector, date of entry, licensing and re-licensing, annotation to reflect specialisms and periods of approval for the specialism, cyclical CPD or re-validation, and FtP proven matters are all recorded in the register to varying degrees of detail. CHRE is keen to extend this final annotation to include information about the actual matter(s) and the sanction placed upon the individual practitioner, although this remains the subject of ongoing debate.

CHRE is similarly keen to harmonise sanctions and the language of regulation across the health regulators to assist patients and the public understanding since the regulators currently have separate taxonomies determined by their respective legislative regulations. In the past this has led to individuals involved in the same incident, but holding different professional registrations, receiving different sanctions despite being equally culpable. Consumer trust in the regulators may be challenged, particularly where this is seen to be a profession self-serving and therefore biased in its approach.

“Which” and other consumer focused groups and publications have long used mystery shopping techniques to pick up failings in quality of services or products. It is also a technique used by business to customer facing organisations to test their own style and accuracy of response. Not only does this test the quality, but it can provide a powerful disincentive for poor quality.

### Summary of interventions

- Developing the register
- Harmonising language and sanctions
- Mystery shopping

## Changing the style of regulation

### Question 5

Quality assurance can obviously be achieved using existing regulatory interventions within the current status quo, but, could greater benefits be realised if undertaken using a different style of regulation?

How might the various interventions to assure quality described so far be aggregated to produce a quality scheme at firm level? If promoted in this way, it would meet the aspirations of Dept for Business Innovation & Skills (BIS) toward “earned recognition” – the less frequent need for regulatory intervention where firms can demonstrate local voluntary quality assurance. Whilst obviously more applicable to the SRA is there a wider opportunity across legal services? The benefit of greater transparency yet less burdensome regulation could be an attractive option to some. If consumer opinion or ratings were placed alongside the entity-level quality assurance data, does this deliver even more reliable measures of quality assurance?

There has been criticism of ‘trip adviser’ type sources due to the proclivity of the service provider to add positive ratings purporting to come from clients. Whether some form of moderation is required, for example in the same way online blogs or ‘wiki’ formats are reviewed before publication, is open to debate. However, providing a role for the consumer in regulating with other means than their feet warrants further consideration.

There is certainly a need for other sources of reference for consumers besides the current official professional register. This listing is not the panacea for monitoring all adherence and thereby good quality of practice. A professional might be struck off of their register for significant FtP matters, but still remain practising within the area without further regulatory intervention. For example a nurse or a solicitor might be struck off but continue working as a healthcare assistant or a paralegal without the admonishing regulator (or any other professional regulator) having knowledge or powers to act. One view might be for regulators to introduce registers for these allied professions, either as voluntary registers for the respective cohorts to join through choice, or by delegating to the employer or lead registered professional. Examples of these already exist but are not as yet widespread across the legal services sector.

This notion might also be worthy of further consideration and developed to include the new owners in ABS provision. What indicators or regulatory interventions might be utilised to assure service and utility quality focusing upon the proficiency of ownership?

### Summary of interventions

- Voluntary quality assurance
- Co-regulation
- Shared or delegated regulation