

# The regulatory objectives

Legal Services Act 2007

### Introduction

- 1. The Act obliges the LSB, the OLC and the approved regulators all to act, so far as is reasonably practicable, in a way that is both compatible with the eight regulatory objectives and most appropriate for meeting them. This mutual underpinning, far from binding those obliged to have due regard to an identical agenda, allows each organisation to develop an appropriate approach to meeting the unique challenges faced. The flexibility though does not extend to what the regulatory objectives mean: they mean what they mean and bind approved regulators and the LSB to a set of outcomes. The flexibility is for the precise route not the destination.
- 2. In our draft business plan for 2010/11, we set out our view of what the regulatory objectives mean. Whilst most respondents to the draft business plan did not focus on these, we did hold productive discussions either directly or indirectly with stakeholders. We concluded that we should publish these as a separate paper rather than attached to the business plan as they have a longer shelf life. So in this paper we seek to set out the regulatory objectives as we will apply them to both the approved regulators and ourselves in the joint endeavours ahead. In doing so, we have also borne in mind the additional obligations on the LSB and ARs: to have regard to the principles of better regulation and best regulatory practice; to assist in the maintenance and development of standards in relation to the regulation of lawyers and their education and training; and the need to manage our affairs in accordance with good corporate governance.
- 3. The regulatory objectives are not set out in any hierarchy in the Act. Indeed, any attempt to weight or rank them would be doomed to failure by the significant overlap and interplay between them. Rather we look at them as a collective whole as both framework and limits for the delivery of effective regulation by the ARs, redress by the OLC and oversight regulation by the LSB. We will test our policy making against the regulatory objectives and root our regulatory action in them. This means that we must balance them in the particular circumstances of the issue that is under consideration because no single course of action is likely to deliver each objective.

We will need to consider or risk assess current regulatory performance as a baseline for future action (or in some circumstances inaction) but will be transparent in our application of this.

# **RO1 Protecting and promoting the public interest**

- 4. 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. That is because the legal system is key to the resolution of disputes, the proper maintenance of legal relationships and process the rule of law, and indeed to democracy itself. Without public confidence, these structures would be rendered redundant.
- 5. The duty is to protect and promote to actively place the public interest higher than sectional interests of particular consumer or professional interests.
- 6. The LSB considers that the public interest is best served through a properly regulated legal services market compatible with the regulatory objectives contributing to properly maintaining confidence in the legal system. But that alone does not guarantee the public interest. In meeting the regulatory objectives, the LSB and approved regulators will face tensions between different objectives that allow for different courses of action.
- 7. We also consider that a commitment to transparency is particularly important in relation to promoting the public interest. We will operate in that way, setting out in consultation documents how our proposals help to deliver the regulatory objectives and we expect approved regulators to do the same.
- 8. The principle of separation of regulation and representation within the approved regulators is key to this objective. Technical compliance with the rules is an important foundation but nothing less than achieving and being able to demonstrate outcomes from them will increase public confidence and satisfy the public interest as

secured by this objective.

9. We intend that, over time, public and consumer confidence in the legal sector will rise, whether as measured by looking at complaints handling, faith in lawyers, or trust in regulation. The Legal Services Consumer Panel will be important in holding the regulatory framework to account for the consumer interest.

# RO2 Supporting the constitutional principles of the rule of law

- 10. It is the essence of civil society that the citizen is protected from the actions of the state and his/her neighbour by the rule of law: no one is above the law. We recognise that lawyers play a central role in securing the rule of law. In considering our entire work programme, we are acutely aware that we must not do anything to undermine the rule of law and that we should take any opportunities that present through our work to support it. Approved regulators will want to continue to do the same.
- 11. We must therefore remain resolutely independent of government. This independence also insulates approved regulators from state encroachment into the regulation of individual lawyers and their legal practice or the detailed relationship of lawyer and client/consumer and is consistent with the effective separation of executive and judiciary. This latter point pays due regard to our role in regulating a constitutionally important sector that provides our judiciary.
- 12. We will consider whether any of our proposals have implications for this objective and will expect the approved regulators to do the same. We are confident that the current and emerging regulatory framework does not, of itself, undermine the constitutional principles of the rule of law. In particular, we consider that the checks and balances in the appointment processes introduced during the passage of the Act ensures that the Board cannot become an agent of Government. More generally, we do not expect that, in practice, regulation will create risks in this context it would not meet the better regulation standard if it did so we do not expect to need to undertake detailed monitoring of this objective but we will not be complacent.

- 13. We will carry out our duties in a manner consistent with the rule of law, and will ensure that our regulation is accessible, intelligible, clear and predictable. This means that we will not seek to articulate every duty, responsibility or activity on strictly legal terms or in inaccessible technical legal language.
- 14. Consumers will notice this in improvements in the way complaints are handled. There we will foster an approach of fairness at all levels of legal services as we consider that this is consistent with the rule of law, even though much of the resolution will take place through informal dispute resolution at service provider level or through the dispute resolution mechanism provided by the OLC.
- 15. For lawyers, we consider that this objective should shape how they behave and practise rather than how they organise their businesses. We do not accept that business structures in any way alter professional ethical obligations. We also believe that these ethical principles are so strong that they should not be threatened or undermined by the commercial context in which law is practiced. In particular therefore, we will be very cautious in entertaining arguments that alternative business structures in and of themselves threaten the rule of law. We must always be mindful of the difference between proper protection of the constitutional independence of the profession, for example in relation to its duties to the court, and illegitimate protection of specific business models

### **RO3** Improving access to justice

- 16. The access to justice duty is a strong one. It is a continuing duty to improve, which in our view recognises the shifting and increasing demands of consumers within a dynamic market.
- 17. Access to justice is the acting out of the rule of law in particular or individual circumstances. The tools to achieve that outcome range from informing the public about their rights, through routine transactional legal services and personalized

advice, through to action before tribunals and courts. The agents of delivery are wide and, of course, legal professionals are at the heart of this along with many other actors in legal services and the wider justice sector.

- 18. We consider that access to justice means more than a traditional sense of access to legal services. Justice is more than the resolution of disputes: it includes 'just' relationships underpinned by law. Those rights that in a minority of circumstances might end up being upheld in court cannot be separated out from other legal rights, responsibilities and relationships. The escalation of a relationship (contractual, private or with the state) through disagreement to legal dispute and to legal action and court resolution is all acted out in a legal framework of justice. Justice is under-pinned by legal knowledge, legislative frameworks, dispute resolution and the infrastructure of the legal services market and the court system as well as by the outcomes that consumers secure. Access to justice is the securing of 'just' outcomes rather than the process of dispute resolution.
- 19. Access too must be conceived widely in our view. It encompasses services delivered through any channel such as face-to-face, telephone or internet. We take a wide view of access to include those services not tailored to the individual such as information services on the web, in leaflets or any other form. Access encompasses services both individually tailored and those tailored to groups or provided to potential consumers. We do not define access only in terms of authorised persons but include access provided by the wider legal services industry, related professions and related advice bodies in the public, commercial and third sectors.
- 20. Access to justice is relevant to all consumers individuals, groups, companies and organisations from the smallest to the largest. It is not restricted by income, scale or importance to the client as it brings a sense of proportionality and fairness to all legal relationships, disputes and proceedings. Thus access to justice matters for small and large business alike, just as it does for the most vulnerable consumer.
- 21. We take this wide view of access because we consider that providers of legal services should not only be free to innovate and develop new approaches to meeting and satisfying consumer need/demand, but should have every incentive to do so and

that actual or potential barriers to such innovation should be removed, consistent with a reasonable and balanced approach to the achievement of the other objectives. Consumers should be empowered to access services in any way that suits them, confident that providers will meet their needs and preferences because justice is not served when people are disenfranchised from their rights by a system that they find incomprehensible, inaccessible or unaffordable.

- 22. Thus we do not define access in terms of the number of businesses providing a narrowly defined set of services or the number of lawyers regulated because we recognise that demand may be satisfied through other delivery channels or business structures than the traditional law firm. We have no preference regarding future types of business structure that is for investors, owners and consumers to decide. Our wide view of access to justice should not be taken to signal a lack of support for face to face services: for many consumers they will remain the favoured or most relevant option. But we should be clear that an effective market, where providers of services respond to informed and empowered consumers, will decide the make up and balance of services.
- 23. We will not offer a running commentary on the administration, operation or funding of the courts, tribunals or legal aid. But we recognise that all of these impact upon the legal services and the delivery of the regulatory objectives. Thus, whilst public services are of course a matter for Government not regulators, we will not shy away from offering advice, support, constructive challenge or other comment where we feel that this falls within our remit.
- 24. Our objective is to facilitate a market that improves access to justice. As the market develops, we cannot rule out that in some types of work, for some consumers there may be a reduction in the availability of some types of services. We do not automatically equate that with a reduction in access to justice but will listen to consumers to see if demand is not being met. We will seek to use regulation to maximise access to justice by targeting our interventions.
- 25. We will work with stakeholders to improve our understanding of the legal services market from a consumer perspective as well as a supply side analysis so

that we can measure how well consumer needs are met.

# **RO4 Protecting and promoting the interest of consumers**

26. The interests of consumers are best defined by consumers rather than by lawyers or regulators. Our obligation here is tough - it is to protect and promote. That requires strong action from us to ensure that the legal services market offers consumers the opportunity to make informed choices about quality, access and value.

27. We will improve our own understanding of consumer need in all its diversity and granularity. We expect approved regulators to follow this lead. This will help provide a platform for those that seek to deliver legal services to improve and develop services for clients.

28. We will work with the Consumer Panel, researchers, industry leaders, consumer groups and directly with consumers and the approved regulators to better identify and articulate consumer interest. Fundamentally, we are of the view that a competitive market will drive providers to better understand and meet the needs of their consumers. We will continue to develop our knowledge of consumer expectations and experience as the market develops so as to help shape future regulatory interventions.

29. The Act leads us to a wide definition of consumers<sup>1</sup> and we take that definition to encompass anyone who might have recourse to legal services because of a legal issue. It would be artificial and unhelpful to try to identify and exclude those individuals that might benefit from legal services but who have not contemplated their use. Thus, we include those who may be contemplating using legal services as consumers. By taking such a broad definition, we are ensuring that regulation focuses as much on those that could benefit from legal services but, for whatever reason, are unaware of this.

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<sup>&</sup>lt;sup>1</sup> See Legal Services Act 2007 s8(4)

- 30. Our focus will be on regulatory matters. With our current focus on independent regulation and complaints handling, consumers can be confident that we are putting in place the foundations for their protection. But we recognise that, whilst progress is already evident, it may take time for the opening up of the legal services market to bear fruit for consumers.
- 31. We are aware that some stakeholders contend that the removal of ownership and business structure restrictions bring new and unique risks to the consumer interest. Whilst we understand these arguments, we are clear that we must manage these risks in partnership with approved regulators and legal service providers rather than prevent change.

It is clear that many of the potential risks to consumers which are argued to arise from new business structures exist at present so we do not accept that new business structures pose a greater risk to consumers in and of themselves.

32. We do not think that sharpening regulators and legal service providers' focus on consumers in any way lessens the professional responsibilities of lawyers to give the best professional advice in each circumstance, even if that advice is not what the consumer wants to hear. Nor does it mean any lessening of lawyers' paramount duties to the court and the rule of law. However, we consider that it is as wrongheaded to pretend that there are no improvements to be made to the consumer experience of legal services as to imply that responsibilities to consumers somehow negate those to the wider public interest.

### **RO5** Promoting competition in the provision of services

- 33. The responsibility for approved regulators and the LSB in terms of competition is a proactive and positive duty. This is fundamentally about rivalry. Individual providers of legal services should compete for capital and consumers, so as to drive better performance for both sides.
- 34. Historically the legal sector has not faced the same competitive pressures as many other markets. The relationship between supply and price for example does

not on the face of it conform to what economists would expect in an open market. However, our responsibility does not lie with a measure of competitiveness or with a comparison with other markets (although both may be useful on occassion). Instead, we focus on competition as a key tool in improving qualitative experience for consumers.

- 35. A rigorous and robustly competitive market will encourage legal service providers to respond to consumer demand by providing new and innovative services and mechanisms for delivery and access. This will lead to the provision of 'better' information about legal services, greater choice and access. A successful market will be one where clients are empowered to make informed choices about quality, access and value between a plurality of legal service providers.
- 36. For legal service providers this brings an endorsement and development of the plurality of supply that has been emerging in recent years. Providers should be free to respond to commercial pressures confident that regulation will only restrict them where it is consistent with the regulatory objectives and better regulation principles. Thus regulation will support rather than hinder them when they deliver services in a way that is compatible with the regulatory objectives and stop them in their tracks when they undermine them.
- 37. Given the weight of public policy behind the promotion of competition, we will start our analysis from a presumption in favour of open competition rather than from a protection of the status quo. This is because the market has developed in a different regulatory framework and at a time when the regulatory objectives did not drive regulation. The LSB will expect to see compelling evidence from approved regulators to support any contention that a particular instance of restricting competition is not prejudicial to improving access to justice. In evaluating performance against this objective, we will consider the dynamism of the market. We will promote the need for research to develop a comprehensive understanding of the legal services market.
- 38. We will also work with approved regulators to ensure that no element of regulation acts as a barrier to entry to (or indeed exit from) the legal services market

unless it is justified in the light of all the regulatory objectives. We will challenge approved regulators to find other ways of managing risks (such as duties on regulated firms or consumer education) so as to eliminate as many barriers and restrictions as is compatible with the regulatory objectives. It is for those who seek to maintain restrictions to justify them rather than for those who argue for their removal to justify change. We expect all involved in regulation to learn through experience and not to avoid risks for fear of the unknown or of failure. We will not expect a zero failure regulatory regime in relation to individual firms and do not expect to see that approach adopted by approved regulators either.

# RO6 Encouraging an independent, strong, diverse and effective legal profession

39. Independent primarily means independent from government and other unwarranted influence. A client should be confident that his/her lawyer will advise and act without fear that the state will penalise through regulation. Similarly, a client should be confident that his/her lawyer will advise and act without being prejudiced by other factors or interests other than the overriding professional responsibility to the Court – their advice should be independent of inappropriate influence. (Similarly, lawyers should be confident that their independence as officers of the Court is not constrained by their relationship with their client). But we must all recognise that the overwhelming majority of legal services are delivered for profit: the regulatory objectives serve to protect consumers from lawyers acting in their own financial interests over those of the consumer. An independent profession serves to promote the principle that legal service providers should be free from inappropriate influence (financial or institutional) to act as an agent of the client, in their best interests. Regardless of the structure within which legal services are delivered, we expect lawyers to be mindful of the source of payment for their services (be it legal aid, after the event insurance, before the event insurance, third party funding or any other source) so that they can identify and manage the potential threat to their independence.

40. At its most basic, lawyers should be confident that taking action against the government would not impact upon regulation. But professional ethics also mean

that the content of legal advice – but not the organisational context in which it is delivered – should not be determined by the commercial incentives of the lawyer or from associational or relationship pressures: for example remunerative litigation should not be recommended to a client who has little or no realistic chance of success.

- 41. Strong means that the profession is able to speak authoritatively on matters of relevance and is fully informed of consumer need and how to meet it. Its voice on law reform and the wider justice system should not be weakened through regulation. We consider that if approved regulators fully separate representative functions from their regulatory roles their professional voices will be heard more clearly.
- 42. A legal professional that did not fully understand consumer expectations and needs would be a weak player in the legal market. We will work with approved regulators to ensure that they support their regulated community in understanding demand side issues.
- 43. A diverse legal profession is one that reflects and is representative of the full spectrum of the population it serves so as to harness the broadest possible range of talent in the meeting of the regulatory objectives. We consider that for public interest reasons and good business sense as much as for meeting this regulatory objective that the legal industry should reflect the population it serves. At entry, retention and progression we will support approved regulators in ensuring that there are no artificial barriers or discriminatory hurdles to legal careers caused by regulation. We will promote equality and diversity through our regulatory framework and we expect approved regulators to do the same.
- 44. An effective legal profession is one that is able to meet the changing needs of consumers and contribute to the meeting of the regulatory objectives. The profession's effectiveness is as much defined by consumers' expectations in it as it is by the professions and covers quality, access and value. We consider that quality comes from having appropriate education, training and quality assurance mechanisms as well as a consumer driven, competitive market.

45. We consider that these competencies are best considered across the whole legal sector or industry as well as at the firm or individual level. The professional principles (RO8) govern the behaviour of individual authorised persons and therefore underpin this objective. To restrict this only to lawyers would be to exclude the significant proportion of those involved in delivering legal services that are not members of the profession. We therefore take a wide view of this objective in order to promote a sector-wide compliance.

# RO7 Increasing public understanding of the citizen's legal rights and duties

- 46. Clarity and transparency about rights and responsibilities can reduce complaints and conflict, and increase confidence. Empowered consumers making informed choices drive providers of legal services to deliver the range of quality, access and value that clients should feel confident to demand. We therefore place considerable store on delivering this regulatory objective and note the broad and continuous nature of the obligation.
- 47. The consumption of most legal services by most consumers, be they an individual or a business, is infrequent and often distressed. It is beyond ambition to expect consumers to know their legal rights and duties in all situations when there is so little of life that exists outside of a legal framework. But we can encourage, with approved regulators and legal service providers, a better understanding by consumers of "rights and responsibilities" and for them to be confident about where to turn to identify them and their application in a particular situation.
- 48. We also consider that knowledge of rights and duties goes hand in hand with consumer capacity and confidence to access services that help them to understand, exercise or fulfil rights and / or duties.
- 49. Consumers can expect to see reliable sources of information and support about rights and responsibilities, delivered through a range of channels and often at low or no cost.

50. Lawyers can expect this to increase the potential volume for the overall legal services market and can equally expect many clients to be increasingly demanding.

# RO8 Promoting and maintaining adherence (by authorised persons) to the professional principles

- 51. The professional principles are given a detailed meaning in the Act that requires little expansion.
- 52. This very firmly places a responsibility on individual authorised persons to act in a manner that is consistent with the status of belonging to a profession. As the LSB oversees a more proportionate and focused regulatory regime, the legal services market will ensure that individuals that exercise control of new legal services providers will act within the professional principles: changes to the regulation of ownership and control will not be allowed to be accompanied by a reduction in professional standards. Similarly, whilst the Act focuses on authorised persons, our view is that the supervisory role that lawyers play in legal services means that these professional principles should be cascaded through the whole workforce.
- 53. Though the vast majority of lawyers already act in a manner consistent with the professional principles we recognise however that effective regulation must include the effective identification and targeting of intervention on those that present the greatest risk, regardless of their professional background, or indeed the ownership or structure of legal service providers.
- 54. For consumers and lawyers alike, this regulatory objective provides a pillar of certainty in a changing market. If consumers are able to rely upon lawyers consistent adherence to these principles and lawyers hold on to them firmly as they respond to a changing environment we can be confident that consumers are coming first.