



The Law Society

Law Society response to the Legal Services Board draft business plan 2010/11.

The Law Society welcomes the opportunity to comment on the Legal Services Board's draft business plan for 2010/11.

The Legal Services Board starts work at a time when the quality of work provided by the regulated sector is already very high. The recently published Ministry of Justice research, "Baseline survey to assess the impact of legal services reform" demonstrates that 91% of users felt they received a good service. Around 95% of customers agreed with the statement that their lawyer explained things in a way which they could understand, acted in a professional manner, and was approachable. Over 90% of customers were either very satisfied or satisfied with the outcome of their matter. The findings of the Ministry of Justice survey reinforced those of the LSB's research published in December 2009. It was unfortunate that the LSB's own press release gave a misleading impression of the findings. That sort of spin is counter productive so far as LSB building a reputation for reliability is concerned.

The LSB's proper role is a supervisory one rather than a leading one. It is frontline regulators who have the front-line responsibility (as well as the relevant experience and expertise) for regulating the legal services market. The LSB draft business plan does not always appear to fully respect this principle.

The regulatory context

Approved Regulators (AR) must act in accordance with the regulatory objectives, as required by the Act. These eight principles are the foundation on which all legal regulatory activity should be based. The objectives spell out the considerations which legal regulators, and the oversight regulator, must bear in mind. Some of the objectives may come into conflict from time to time. When this happens, frontline regulators should make reasoned and balanced judgements which take into account the long term interest of clients and the public.

The LSB should only use their direct regulatory powers if they judge that an approved regulator has made a decision which is clearly unreasonable in relation to the regulatory objectives as a whole. LSB should not intervene merely because they may disagree with an approved regulator's decision.

Putting consumers and public interest at the heart of regulation

Consumer interests are best served when the market enables would-be purchasers to make an informed choice between competing providers of goods or services.

On 30 December the LSB published research which YouGov conducted into legal consumer experience. The press release chose to highlight the fact that 68% of consumers have 'little or no' knowledge of what lawyers do and "despite legal support needs arising at the most vulnerable times, only 14% 'shop around' for the right lawyer". The survey found that 45% find their lawyer through recommendation and 20% approach the same lawyer they have used previously. In times of distress and vulnerability clients often want the assurance that they will receive an appropriate professional service. Lord Hunt in his report on the regulation of legal services described the lawyer's role as being that of a "trusted advisor". The fact that 77% of respondents said they did not shop around because they did not want to, or feel the need to, backs up this view. It is not clear why LSB should assume there is something wrong with that.

Solicitors – and other lawyers - provide specialist and tailored services to those who are often at a particular stressful time. The LSB should recognise that a solicitor's duty to their client has a rather different emphasis to the relationship between a supermarket and its customers.

In 2009 there were a total of 10,362 SRA regulated firms in England and Wales. The legal market which solicitors operate in is wide, varied, and dynamic and in most areas contains a lot of choice. There are however a few exceptions to this in certain rural areas and certain legal aid related markets. It is the duty of all those who fall under the auspices of the Act to ensure that in these areas an appropriate level of access to justice is maintained.

The business plan defines "consumers" very widely as being anyone who might have recourse to legal services because of a legal issue. It does not venture what categories these consumers may fall in or how best to collect these disparate views.

The LSB have yet to make the distinction between customers and clients, and the different duties providers have towards the respective groups. Without having understanding of the distinction between these groups the LSB will find it hard to judge its success against the regulatory objectives.

Widening access to the legal market

The Law Society supports widening access to the legal market. We have for many years supported the development of ABS and continue to assist the LSB and SRA in implementing the Act.

We support the business plan's statement that the "baton of (ABS) activity" will be passed onto ARs during this next period. ARs have the leading role in this area, as elsewhere. It is important for the LSB to listen to advice which is given by those who are at the forefront of implementation.

The way in which ABS are introduced will be crucial to maintaining respect and trust in the legal profession. ABS are a major development in the legal services market and it is important that they are introduced appropriately rather than according to an arbitrary timetable. It was Sir David Clementi who emphasised in this context that it may be necessary to "walk before you can run". It is critical that appropriate public

and consumer safeguards are put in place, and that regulators are clear about how they will risk assess and scrutinise new business models.

It is important that the LSB know what the problems may be and what they want to achieve before the ABS rules are finalised. The LSB's research into the trends and developments in the legal services market, and how it may respond to the introduction of ABS, may be complemented by research which is being conducted by ARs. For example, the Society has commissioned research on the impact ABS may have on access to justice, particularly in rural areas.

Improving services by resolving complaints effectively

The Law Society actively promotes good in-house complaints handling. We have produced a practice note which encourages firms to have an accessible, objective and responsive first-tier complaints handling service. The Society hopes to have an open dialogue with the OLC to ensure that this note continues to be relevant for Ombudsman purposes. The Society is also investigating how to develop further proactive support for firms, based on the model of our 2009 client care consultancy.

We welcome the creation of the OLC and share their ambition for the creation of a first class ombudsman scheme which serves, and has the confidence of, both clients and lawyers.

Developing excellence in legal services regulation

The Society does not believe the assumption that competition between regulators will drive-up standards of regulatory performance is well founded. The assumption would be likely to be justified only if both ARs and LSB had perfect knowledge, so that they could immediately intervene where law firms deliberately sought out an ineffective regulator. It is worth remembering that the direct consumers of a regulator's activity are the entities who are providing a service, not the clients who are buying the service. Entities and clients do not always have the same interests, hence the need for regulation in the first place. If entities are able to force regulators towards offering a less robust regulatory regime then client interests will be diluted. If the LSB possesses any evidence which supports the assumption that competition between regulators drives-up standards it should share this publicly. In a situation where regulators compete, there is a real risk of developing a form of Gresham's Law, in which bad regulation drives good regulation out.

The Society agrees that front-line regulators require the freedom and flexibility to decide what the best regulatory arrangements are and how best to achieve the goals which were laid out in the Act. The SRA is free to approach the many regulatory challenges it faces without constraint from the representative function. The Society believes that this philosophy should also apply to the LSB. While it is legitimate for the LSB to set aspirational time-lines, regulators should not be forced to go faster than they believe is realistically possible in order to meet arbitrary deadlines. It is far preferable for front-line regulators to decide how best to regulate in a manner which is appropriate to the needs of the public, consumers and the profession, provided they comply with the regulatory objectives.

Securing Independent Regulation

The Law Society is committed to the key principles of the Act. This includes the need to separate regulatory decision making from representative interests. The Society

and the SRA Board are at present liaising on the response to LSB's Internal Governance Rules.

Improving access to justice

The Society is pleased that the Plan makes clear that the LSB have a strong duty to consider access to justice issues. We are happy to work with the LSB, and other interested parties, to gather evidence and understanding of the barriers to access that exist in the legal services market place. If developments lead to the erosion of access to justice in some areas, it may be difficult to subsequently rectify the situation.

It is important that the LSB has an evidence based indication of how major initiatives, in particular the introduction of ABS, will affect access to justice. Even where an initiative may improve access to justice in certain areas, neither LSB nor front-line regulators can properly ignore the potential risk of some clients not being able to receive a suitable service. All individuals require access to competent and independent advice on legal issues which affect them. This advice should be provided in a way that gives the client confidence in their adviser. Although some clients will be happy to get their advice exclusively on-line or by phone others may not. All people, especially vulnerable clients, should have the choice to receive face-to-face advice. The Ministry of Justice research highlighted the fact that many clients have a strong preference for face-to-face advice.

The LSB defines access to justice as being that "Consumers should be empowered to access services in any way that suites 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". This definition could be interpreted as laying the blame of any deficiency in access to justice primarily with legal service providers. There is no jurisdiction in the developed world where effective access to justice can be secured without adequate public funding for the less well off.

The LSB should recognise that access to justice is not necessarily always the same as access to legal services. While it is true that in many instances actual transactional advice can be provided through the internet and/or the telephone there are a number of situations where the client can only receive the best advice if face-to-face contact with a lawyer is possible. The LSB should ensure that where a client feels that they need to receive face-to-face advice this should be available. Access to justice – and to legal services professionals - should be driven by what each client needs, not by the LSB's model of what the public ought to want.

Developing a workforce for a changing market

The Society is pleased that the LSB will seek to co-ordinate activity concerning workforce diversity. We welcomed the report, "Unleashing Aspiration: the Final Report of the Panel on Fair Access to the Professions". We have long recognised the importance of ensuring fair access to the profession, including from a social mobility perspective. It is important that the profession is representative of the broad client base that it serves.

The Society is happy to be an active participant on the LSB's Professions Regulatory Diversity Forum. Through this forum we will discuss how best to co-ordinate our current work on diversity with work being conducted by the LSB and other ARs.