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Our Ref: CR316

12 March 2009

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Dear David and Chris,

The Legal Services Board: Draft Business Plan 2009/10 (Consultation response)

Introduction

The Legal Services Commission (LSC) is a non-departmental public body sponsored by the Ministry of Justice (MoJ). The LSC is the biggest single purchaser of legal services in England and Wales with an annual spend of £2.1 billion; we are responsible for commissioning civil and criminal legal aid and the development of community legal services.

The LSC welcomes the goals and objectives of the draft business plan and is reassured that within a period of fundamental change and expansion of the market, coupled with a relaxation in practice rights, regulation will be focused in the public interest. The existence of the LSB and the development of a consistent and all encompassing framework will result in improved clarity in regulation as opposed to the spaghetti junction that currently exists, which is not only confusing for consumers but, its unaccountability equally damages confidence. Inevitably, the LSB, in its oversight function will lead to shared and robust confidence in the justice system especially in the individuals and organisations charged with protecting our rights and freedoms as citizens. The LSC is of the opinion that central independent regulation will have a beneficial impact on the quality for the consumer because quality is affected by the way professions are regulated. Independent regulation will also benefit the profession as the representative bodies would be left to focus on representation of its members and all parties will benefit from specialism, effectiveness and independence.



CUSTOMER SERVICE EXCELLENCE



Response

The LSC has a responsibility for contracting and funding providers of publicly funded services and, for assuring quality services. The LSC's vision is to be **resolutely focused on clients, delivering positive outcomes and providing value for money**. The LSC is committed to ensuring that clients have access to quality legal services that meet their needs, and that providers deliver client focused quality services that represent value for money. The LSC also has a track record in ensuring that client services are tailored and accessed by the most vulnerable people in society. Work to further enhance this is currently being developed within our Strategy Directorate, with the publication of a client engagement strategy (that will support our Quality Strategy) to be published in Summer 2009.

The History

Although not through choice, the LSC has had to act as a quasi-regulator and develop its own systems for quality assurance and client care, to ensure that minimum standards for purchasing, met with clients' needs. Such standards include the Specialist Quality Mark (SQM), Quality Mark for the Bar and ultimately, Peer Review. Peer Review, the latest of the quality tools goes one step further than the other procedure based assessments, and directly assesses the quality of advice received. The LSC is keen to act less as a quasi-regulator and more as an intelligent commissioner of legal aid services. Indeed, the LSC do not intend to continue running Peer Review in the long term. Our future role will be to set quality standards, with the onus on the regulator and providers to demonstrate compliance.

The LSC found it necessary to take a lead role in developing; managing and promoting quality assurance in order to ensure that publicly funded clients receive quality assured services. The LSC undertook this, as it was not adequately covered by the sector themselves. Previously, legal aid funding was available to anyone regulated by TLS; however, there were major problems with a substantial minority of providers in terms of quality and expertise. Our analysis of the profession identified two key elements were missing from regulation by the profession namely, a lack of quality management systems and a lack of category specific knowledge requirements.

For example, International Standards Organisational (ISO) is considered a basic quality requirement both, in the public and private sector and is proven to deliver more efficient business practices, improve competition and improve standards. The legal professions are way behind other services in this respect. Although, TLS developed LEXCEL the take up from the profession was very low.

The lack of category specific knowledge, and a history of poor services, especially in immigration put clients at risk. This resulted in the development of an immigration accreditation scheme by the LSC (in conjunction with TLS) to ensure and improve quality. The LSC made this scheme mandatory for all legal aid practitioners.

The impetus for developing the Duty Solicitor Accreditation Scheme was again due to LSC concerns that there were no requirements in place for solicitors conducting this work, and the possible impact this could have on the quality of service received by clients at a police station. As a result the LSC developed and introduced the Duty Solicitor Accreditation Scheme. This was then followed by the process for accrediting Representatives at the Police Station, as legal executives were outside the Law Society's accreditation mechanisms.

A robust regulatory system should include quality assurance systems that can be relied on by private and publicly funded clients alike, which will be of particular benefit to the most vulnerable. At present, immigration law providers that have not met the LSC's minimum standards to conduct publicly funded work still see many private clients. A wider regulatory framework would help people make better-informed choices about where to get help, or even in some cases restrict non-assured organisations from doing certain kinds of work.

Confidence in regulation will enable the LSC to concentrate on its role as a procurer of legal services rather than be involved in the direct assurance of quality of providers. This should be a role for the regulator. The LSC believes that responsibility for delivering a high quality service sits with each and every provider. It is the role of the regulator to set and assure minimum standards, and the role of the LSC to define the standards it believes the market can deliver for its clients. The LSC would expect that regulation of quality addresses gaps identified as priority. This will equally apply to all regulators of legal services and not just TLS and is fundamental in regulating in the public interest.

The LSC considers that all sectors that offer legal services to the public, including those in the Not-for-Profit (NfP) sector should be regulated and is concerned that some NfP organisations tasked with delivering legal advice appear to be totally unregulated. We believe that it is in the interests of consumers and NfP providers that they are regulated equally where providing similar or identical services.

With this array of experience the LSC is very keen to work with the LSB and the legal service regulators in delivering the LSB objectives, which also ultimately include: *"...help for those whose income exceed legal aid thresholds but are unable to afford legal services; greater competition in service delivery; swift and effective redress for consumers if things go wrong; greater diversity in the professions; and certainty and confidence in the regulatory structures underpinning the market."*¹

Putting consumers and public interest at the heart of regulation

Regulation in this modern age should not be about monopolies or restricting access to a market but should have its ultimate aim on consumer protection and greater access to services. Consumer choice should inform the make – up of firms and define the range of services, leading to a market shaped by the consumer. The introduction of Alternative Business Structures (ABS) will see additional benefits of accessing services that are not perceived as intimidating or confusing like the traditional high street firm, or chambers, and may be a preferred choice for consumers. The LSC and regulators will need to work together to ensure that such services are marketed to consumers effectively to avoid 'information asymmetry' restricting consumer choice.

The LSB's medium term aim, for putting consumers and public interest at the heart of regulation, entirely supports the LSC's Quality Strategy, which is focused on clients shaping the market. Although there is a predominant focus on recognisable quality assurance outcomes, the strategy also introduces additional criteria that are more flexible and responsive to clients. These include a number of factors such as, access, complexity of problem or number of problems, distance to travel or 'one stop shop options'. This approach to purchasing will be supported by a client engagement and procurement strategy which will eventually enable us to flag providers of legal

¹ Edmonds, David: Scope of the LSB ambition, Counsel March 2009.

services, making it clear to consumers what type of services are on offer and at the same time improve standards and promote competition. The LSC's work around improving access to information about legal services and the types of services available links well with the LSB duties and we would welcome the opportunity to work collaboratively in this area.

Securing independent regulation

The ambition of the LSB to work in collaboration with the 9 regulators in securing independent regulation is to be applauded. However, in situations of non-compliance, we would be looking to the LSB to rapidly assert its authority, and revert to more formal measures where necessary. The LSC has recently received correspondence from Peter Williamson (Chairman SRA) describing the current set of circumstances, whereby The Law Society (TLS) has made the decision to remove ownership of all non-mandatory accreditation from the Solicitors Regulatory Authority (SRA). This cannot be deemed to be consistent with section 30 of the Legal Services Act, and equally cannot be compliant with paragraph 100 of the LSB's business plan, which states that *the role of the regulatory functions is not prejudiced by the role of the representative function*. It is somewhat surprising that the society has decided to embark on this course of action prior to receiving Lord Hunt's final review², as instructed by the Society themselves. This lack of independence in current practice causes the LSC some concern and is a clear example of where the LSB may be required to assert its authority more formally.

The focus of regulation should be to serve the consumer and public interest. A lack of independence (as demonstrated by the relationship of SRA and TLS) cannot adequately deliver this and is likely to result in the professions interest being put before that of the consumer.

The LSC has continually worked with the professional regulators to ensure that we can rely on assurance systems, when specifying the level of quality required³. The LSC would gladly support developments that increased the regulators' role in this field. It will be important for the professions and their regulators to take into account the needs of those purchasing legal services when developing quality assurance frameworks. To build on existing collaboration and to streamline the process, we would be happy to enable regulators to take ownership of the systems already developed (e.g. SQM and Peer Review).

Recommendation 5.3 of Lord Carters review⁴ sparked development of the Quality Assurance Scheme for Advocates (QAA), which, is currently being piloted (initially in for criminal defence work in the Crown Court but with the intention of extending it to all areas of LSC work after that). The scheme has been developed to dovetail with regulators' internal plans for the promotion of quality within the advocacy profession. A collaborative approach to the development of QAA has allowed the profession to lead the detail of much of the work, such as development of competences and levels of complexity. This should, in turn, enable a scheme that (while meeting the LSC's requirements) is owned by the profession and managed by their regulatory bodies, and which could thus be part of a wider QAA scheme which covered the work of all advocates and not just LSC work. The LSC hope that aspirations of regulatory management of the scheme will become a reality but, this cannot be a pre-requisite, and will not compromise operational roll out of the scheme. It is the LSC's future intention that eligibility and payments for advocates should be based on the QAA scheme quality, rather than the existing structures.

² Rt Hon Lord Hunt OF Wirral MBE (2009), *An Independent Review of Law Firms*.

³ Quality Assurance Scheme for Advocates, Recommendation 5.3 Lord Carter Review

⁴ Lord Carter of Coles (2006) Legal Aid: A market – based approach to reform

Aside from quality, the LSC considers that principles should also exist governing the separation of regulatory and representative functions in relation to all regulatory activity (including regulatory decisions, the formulation of policy, and the development of resources within agreed budgets). These must be discharged by a regulatory board appointed in fair and open competition as guardian of the public interest, not by anyone elected as a representative of the profession. Independent regulation should be out of reach for TLS and the BC; this will enhance greater confidence amongst consumers, and ensure more effective oversight and scrutiny and ensure regulation of the legal profession demonstrates synergy with other professions such as the medical and financial service sectors.

Widening access to the legal market

An open and competitive market allows new models for legal services to develop. The LSC is interested in what arrangements are made to cover non-lawyers including solicitors, barristers, NfPs, ABS's, LDP's and merged entities.

As the largest single procurer of legal services in England and Wales and indeed the world, the LSC welcomes increased competition and hopes that by supporting regulators to promote quality and modernise services to reflect consumer demand and choice, we will be able to purchase increasingly innovative and high quality legal services. Such services will be marketed in a clear and concise user-friendly dialogue, ensuring the consumer is well informed and aware of how to access services that meet their individual requirements. It is also essential that client feedback be sought on such services in order to continually evaluate and improve standards above minimum requirements and expectations.

Regulation must be capable of supporting this type of open and competitive market. Regulators must assure the public, purchasers and the profession of the standards the legal profession meets. These standards should support purchasers to buy the best value for clients and seek to drive standards above basic levels. In this context, allowing regulators to define their response to the risk of quality, as 'identification and management of the odd rotten apple' will not suffice.

Promoting access to a diverse legal profession

The legal profession, and especially the self-employed bar will have to adapt some of its practices that presently have the impact of restricting diversity and equality within the profession. Alongside, all the activity taking place in relation to better access to the profession the LSC is equally keen to remove any barriers to progression within the profession, offering more remunerative work and ultimately more diverse representation at a judicial level. This is essential if we are to mirror the communities we serve.

The QAA Project Team has worked closely with the Equalities and Diversity team at the Bar Council to produce a data survey to enable production of a final Impact Assessment in order to screen policy proposal and better understand the impacts on certain individuals and minority groups the scheme may have. This data enabled us to analyse the profile of providers that received income from publicly funded work, with BME and women very well represented compared to the profession as a whole. This is good where it represents commitment to the work but it also raises questions whether individuals are pigeon holed in low paid types of work, resulting in restrictions to their practices.

The data survey was closely followed by a series of focus groups for self – employed women and BME advocates as an attempt to help us understand the reasons behind the data survey findings. Attendees were asked to identify any barriers to progression they had experienced and issues that helped or hindered their practices. The results identified a number of key areas that could be targeted to reduce these barriers. One attendee suggested that compulsory equality and diversity training for all clerks could be a simple but effective way of highlighting issues and improving access to instructions. The full focus group report will be published and submitted to the 'Panel on Fair Access to the Professions' whom have recently issued an open call for evidence. It is hoped that issues that cannot be addressed by any QAA scheme will be thoroughly considered as part of the Milburn review.

The Equality and Diversity team at the LSC, in recognising the increased responsibility on organisations to attract a diverse range of persons into the profession have launched their 'Aspire Programme'. The Aspire programme is a 'one to one' mentoring process whereby students have a one-hour mentoring session with a trained mentor for eight weeks. The indescribable effect of having a working person to talk to and guide you to the right direction can mean a vast change in behaviour and greatly increase motivation. The programme recruits students from disadvantaged backgrounds and aims to support them and aid with confidence building, interview skills and assertive communication. A similar process could be considered by regulators to attract and encourage new entrants from diverse backgrounds. Public legal education about access and knowledge of legal rights is a shared statutory duty that may need clarification across Government; so further work on improving access to all should also be a shared responsibility to ensure the greatest benefit.

Finally, it is essential that the LSB considers carefully the needs of Wales with its Devolved Government and new Welsh Law. As a public body it will also require its own Welsh Language Scheme.

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

Yours


Carolyn Regan
Chief Executive

cc Louise Sowden