Consultation response

Legal Services Board: Approaches to quality

Overview

1. **Quality legal services combine up-to-date knowledge and skills with good client care to deliver advice in a way that is useful. Existing data on these three dimensions of quality show:**

   - **There is an absence of evidence on the technical quality of advice but a series of studies - on wills, probate and advocacy - are concerning;**
   - **Overall satisfaction with service is high, but elements relating to empathy, ongoing communication and timeliness are less good; and**
   - **There are high levels of satisfaction with outcomes, although there is variation across practise areas.**

2. **Regulators should primarily focus their efforts on the technical elements of advice reflecting that consumers lack the expertise to judge this. This should consist of an activity-based authorisation regime at entry level, combined with CPD and revalidation and an effective sanctioning regime to assure ongoing competence. The Panel's submission to the Legal Education and Training Review sets out our preferred approach in more detail.**

3. **There is more scope to harness consumer power to promote the service and utility aspects of quality by opening up information about the performance of providers and by facilitating credible 'choice tools'. Reputational regulation should be powerful in legal services due to the strong influence of personal recommendation on choice and the role of peer pressure. However, there are currently low levels of consumer power while much potentially useful data is either not published or even recorded.**

4. **It is not in the interests of consumers to receive misleading information but the dangers of transparency are often exaggerated and can be successfully managed by providing appropriate contextual information. Policymakers' starting point should be a presumption in favour of transparency.**

5. **We are against any greater risk which consumers are unable to manage being transferred to them.**

6. **Entities should be required to identify quality risks and demonstrate they have the right controls to mitigate these. There is potential merit in earned recognition policies whereby entities demonstrating good controls are regulated with a lighter touch, freeing up resources for regulators to focus on higher quality-risk entities.**

The proposals

7. The consultation paper provides an overview of quality risks within legal services, and suggests existing or alternate regulatory interventions which might be usefully deployed to assure better quality. The overriding approach seeks to achieve proportionality; and to reduce regulatory intervention where possible to remove unnecessary barriers to delivering the regulatory objectives, but to act where necessary to support consumer and/or public interest outcomes. The declared aim is to move to liberalised and agile regulation rather than standardisation.

The Panel's response

Q1. In your experience, when consumers do not receive quality legal services, what has usually gone wrong? Where problems exist, are these largely to do with technical incompetence, poor client care, the service proving to be less useful than expected by the client – or something else?

8. The Panel shares the definition of quality used in the consultation paper, which we first adopted in our report, *Quality in legal services*, produced in November 2010. In summary, quality combines up-to-date knowledge and skills with good client care to deliver advice in a way that is useful. In addition to good quality, advice should be delivered in an ethical way.

9. Below we examine evidence about the three dimensions of quality in turn.

Technical competence

10. As we argued in response to the Legal Education and Training Review (LETR) call for evidence, there is insufficient evidence about the technical quality of legal advice due to the limited number of studies and a lack of transparency by public agencies holding such data. Moreover, complaints data would produce a misleading picture of standards due to consumers' inability to assess technical competence, sometimes even after the event. This is illustrated by our work on will-writing: 84% of recent users said they were happy with the quality of their will, but one in five wills prepared by solicitors and will-writers were failed by expert assessors.

11. In addition to our will-writing evidence, the limited available data suggests there are quality problems elsewhere, for example:

- Professor Moorhead's study of a pilot of a quality assurance scheme for criminal advocacy found that while most advocates performed well at the simplest and most serious accreditation levels, the performance of level 2 candidates (lesser Crown court trials) was noticeably lower, with nearly 50% failure rates in the cross examination, examination in chief and multiple choice assessments;

- Two reports in 2012 by HMCPSI have found the court performance of Crown Prosecution Service advocates has shown an overall decline over two years. In the bulk of cases, where defendants pleaded not guilty, CPS

advocates were often ill-prepared and failed to challenge prejudicial evidence;

- In the case of legal aid, 12% of peer reviewed case files between April 2009 – January 2011 were graded 'below competence' or 'failure in performance' rising to 38% of employment providers and 27% of mental health providers; and

- One-third of applications received by the Probate Service are sent back due to sloppy errors on the forms.

Customer service

12. The Panel's annual Tracker Survey provides robust data on satisfaction with customer service. Overall levels of satisfaction in the 2012 survey were 80% - the same as 2011 levels. There are some marked differences between areas of law, e.g. will-writing yields 93% satisfaction while personal injury is only 70%. Furthermore, it is interesting to observe where consumers declare themselves as very satisfied, which is where the sector should be aiming. Overall, 42% of recent users were very satisfied with the service received (with similar differences being found as for overall satisfaction across areas of law).

13. When asked to focus on those individual aspects of customer service which research has shown are most important to people, consumers were less happy with each element than for overall service. Empathy (71%), ongoing communication (72%) and timeliness (72%) were the worst aspects of service. It is also important to consider the service provided before the client is engaged. Our Tracker Survey suggests only 70% satisfaction with the transparency of the offer.

14. Complaints data is a more valid source of evidence of poor customer service as this is more observable than technical quality. The Legal Ombudsman's early data suggests that issues relating to costs, communication and timeliness are the most common causes of complaints. Of course, this is only the tip of the iceberg as information about first-tier complaints is not yet available.

Utility

15. The utility of advice is the hardest element to measure. Our understanding of this term is whether the advice is delivered in such a way that it can effectively be acted upon. This is broader than the outcome that advice leads to, as the public interest may warrant an outcome, such as a conviction, which is not in the client's self-interest. Nevertheless, one proxy of this is user satisfaction with the advice outcomes. The Panel's Tracker Survey shows 85% satisfaction measures across the sample. The nature of the work may partly explain differences across legal activities – process-driven services have higher outcome satisfaction ratings than contested work where there are winners and losers.

16. The Legal Services Commission records success rates, or 'outcomes that are a substantive benefit to their clients'. Overall data shows success rates of 89%. However, this should be treated with caution as reporting conventions may not always give a true representation.

Q2. Would it be helpful if the regulators approached issues of quality by looking separately at different segments of the legal services market? Which segments do you perceive as being of greatest risk to consumers?

17. We agree that the Oxera framework provides a useful starting point, although there are risks when attaching broad labels to groups of consumers who are not homogenous in make-up. One attraction of the framework is that it encourages analysis in multiple dimensions; certainly, quality risks should be examined both in terms of who is providing and receiving the service.

18. On the user side, the Panel has chosen to prioritise consumers who lack buying power in their dealings with lawyers. This embraces small businesses and charities, in addition to individuals. All of these groups' ability to assess quality is limited due to a range of factors including: the technical nature of law; their infrequent use of legal services; these often being purchased at distress moments; and the vulnerability of some users.

19. On the last point, one of the Panel's priorities for 2012-13 is to encourage the sector to adopt the new British Standard on inclusive services (BS 18477). This makes clear that all consumers are different, with a wide range of needs, abilities and personal circumstances. These differences can put some consumers in a position of vulnerability or disadvantage during certain transactions and communications, potentially putting them at risk from financial loss, exploitation or other detriment. The standard identifies 'risk factors' related to a person's circumstances – such as bereavement, illiteracy, illness or disability – which could increase the likelihood of a consumer being at a disadvantage or suffering detriment. The standard also makes clear that organisations and markets differ in the way that they provide services and interact with consumers. Organisations' policies and processes can contribute to, or increase the risk of, consumer vulnerability.

20. The consultation paper refers to 'theories of harm' analysis. The Panel would support this, but urge a wide definition of consumer detriment which recognises personal as well as economic harm. For example, our work on estate administration has shown the potential financial consequences from large legal bills or loss of inheritance, but also the very real human consequences – stress and health problems at a time of grief; and triggering relationship breakdown.

21. The consultation asks which of the dimensions of quality regulators should primarily focus on. It should be clear from our earlier remarks that regulators should focus primarily on the technical elements as the consumer's lack of ability to judge this means competitive forces in this sphere will be limited. We also consider that regulators can boost service quality, but primarily through enhancing transparency around the performance of providers to enable consumers to use their buying power in the market. We say more about this in answer to Question 6.

Q3. How can regulators ensure that regulatory action to promote quality outcomes does not hinder (and where possible encourages) innovation?

22. Regulation of quality is essential in legal services for the reasons – related to asymmetries of information and serious consequences for consumers – outlined earlier. Regulation also protects high quality law firms from being undercut by poor quality rivals. Overregulation of quality is not in the consumer interest, since it can limit choice, dampen innovation and raise prices. Therefore, finding the right regulatory mix should be a shared aim.

23. The Panel's submission to the LETR has called for radical reforms and suggests some areas where regulation could be made more flexible without reducing quality. Some of the points we made were:

- The existing training content is not linked to either the reserved activities or the nature of work undertaken by most lawyers in practice. For example, the mandatory will-writing elements are minimal so it makes no logical sense for someone wishing to set up a will-writing business to have to undergo the full training regime applied to solicitors;
- Rather, an activity-based authorisation regime should be introduced so that the entry barriers mirror the quality risks and provide flexible employment options;
- A shift towards entity-based regulation while preserving individual responsibility – this would give employers greater freedom to innovate in securing an appropriately trained and supervised workforce within the confines of an appropriate authorisation regime; and
- Enable diverse pathways into the legal workforce including non-degree routes, building on existing models such as for chartered legal executives.

24. Other aspects of regulatory approach can also enable innovation around quality. For example, outcomes-focused regulation provides firms with greater freedom to design their businesses but the need to provide high quality advice remains. There may also be scope to explore earned recognition policies, which allow a lighter touch inspection regime for businesses that can demonstrate good internal quality controls. Consumer research in the food arena has shown support for this principle subject to the proper regulatory oversight.

25. Nevertheless, the LSB's project on the boundaries of regulation suggests the need for greater oversight of quality for some legal activities. There is now a strong evidence base for regulating will-writing, probate and estate administration. It is very possible that evidence will suggest the need to widen the regulatory net into other areas. Furthermore, we agree it is right for non-commercial providers to be regulated, although we have yet to reach a view on the appropriate regulatory regime.

26. Regulators can also seek to harness consumer power to promote innovation in the market, with the liberalisation reforms providing the ideal hook for this. Again, however, we address issues around promoting transparency of provider performance in Question 6. Regulators can

also facilitate 'choice tools' developed by the market to help consumers identify good quality lawyers. In 2011-12, the Panel looked in detail at accreditation schemes and comparison websites. These tools have the potential to help people make more informed choices, but both face credibility issues which regulators can assist these providers to deal with. This is discussed further in response to Question 5.

27. In 2012-13, the LSB will be asking the Panel's advice on the extent to which the respective parts of the regulatory system do currently, and should, help consumers to choose and use legal services. This project will enable us to bring these strands of thought together and help inform the quality assurance toolkit.

Q4. What balance between entry controls, ongoing risk assessment and targeted supervision is likely to be most effective in tackling the risks to quality that are identified?

28. The potentially severe nature of consumer detriment means it is desirable to seek to prevent problems before-the-event not rely on redress mechanisms afterwards. The Legal Ombudsman provides an important backstop for consumers and has a deterrent effect on lawyers' behaviour. However, there are some things, such as loss of liberty, which this organisation can never fully reverse by awarding a remedy.

29. The appropriate balance between entry controls, ongoing risk assessment and targeted supervision should partly depend on the legal activity. As a rule of thumb, the entry standards should be highest where the quality risks are highest. For example, dealing with an estate is an administrative process that is frequently successfully done by lay persons. We consider that the risks of poor quality due to *technical knowledge* are low and so it follows that qualifications should not be an authorisation requirement. There are lots of errors, but these appear due to sloppiness on forms. By contrast, the evidence suggests technical mistakes are responsible for some badly prepared wills and so providers should have to demonstrate their competence before being authorised to practise will-writing.

30. As said above, the Panel would like to see greater transparency to enable consumers to make more informed choices and so discipline the market through their buying power. However, for infrequent users at least, there are very real limitations in the extent to which they can do this effectively due to their lack of legal expertise. We are against any greater risk which consumers are unable to manage being transferred to them. In 2012-13, the Panel will explore this theme further as part of our broader project on financial protection by conducting research with consumers.

31. In the area of targeted supervision, we have previously discussed earned recognition policies as having the potential to free up limited regulatory resources to focus on the highest risk areas. For example, our report on voluntary quality schemes suggested that membership of a recognised scheme could be a useful risk indicator. Any move in this direction must carry legitimacy. The Food Standards Agency's research provides a useful guide, indicating that consumer support is conditional on the regulatory oversight model sitting on top.

This made clear that businesses could not be entirely self-policing, with key aspects of a regime focusing on independence of schemes to minimise potential risk of abuse by powerful businesses; continuing involvement of regulators to provide accountability and additional guidance to businesses; and information sharing with regulatory agencies.

Q5. Quality can also be affected by external incentives and drivers. Some examples include voluntary schemes (for example the Association of Personal Injury Lawyers (APIL) Accreditation), consumer education and competition in the market place. How far do you think these external factors can be effective in tackling the risks to quality that exist? Which external factors do you think are most powerful?

32. This question is framed in relation to the technical dimension of quality.

33. The Panel has examined accreditation schemes in some detail in our report, *Voluntary quality schemes*. In summary, we found that only 5% of consumers currently use such schemes to help them choose lawyers. By contrast, large purchasers such as lenders, insurers and the Legal Services Commission take more notice and the benefits can be expected to filter down to individual users. As recognised in the consultation document, issues with similar schemes in other sectors means there are trust problems to overcome before they are likely to become a stronger influence on consumer choice. Our analysis of schemes against good practice standards identified a mixed picture, but we have been encouraged by the response of some scheme operators to our report.

34. We await the response of regulators to the wider issues in the report. For example, we highlighted that membership of schemes was becoming mandatory to access parts of the conveyancing market and warned this could harm competition. This serves to illustrate the point that quality initiatives can have positive and negative effects: action to boost the credibility of schemes should promote consumer trust, but intervention also risks unintended consequences.

35. The Panel plans to examine the role of consumer education in our project on choosing and using lawyers. However, it is likely this will be more powerful in respect of the service dimension of quality. We are sceptical that it is possible to educate consumers on the technical aspects of quality, due to the expertise required and because legal services are used rarely. Even so, our early impression is that there is a dearth of good quality materials relating to legal advice. Regulators cannot build a policy around consumer education when good quality information materials are not currently available for consumers.

36. We support initiatives around transparency of provider performance – the third element of the question. However, we address this in response to Question 6.

37. Overall, therefore, we consider that market mechanisms have limited ability to tackle technical quality risks. Rather the emphasis should be on activity-based authorisation to safeguard quality before-the-event. In addition, our submission to the LETR suggests major reform to the existing model incorporating post-authorisation alongside entry checks, i.e. revalidation and reformed CPD. This need not result in a tendency to

meet minimum requirements to avoid sanction, as the LSB's consultation document fears. For example, 'benefit models' of CPD seek to achieve a cultural shift whereby lawyers take ownership of their own development programmes instead of being told what to do by their regulator.

Q6. Another possible tool for improving quality is giving consumers access to information about the performance of different legal services providers. How far do you think this could help to ensure quality services? How far is this happening already?

38. This question is framed in relation to the customer service dimension of quality.

39. The Panel sees great potential for regulators to harness consumer power in this way. This should be powerful in legal services due to the strong influence of recommendation on consumer choice. In addition, the role of peer pressure and sense of profession means that the desire to maintain a good reputation can be expected to exert a positive influence on lawyers' behaviour. It is striking that most complaints about lawyers involve avoidable service failures, such as delay and communication breakdown. Publishing data on service quality would inform choice and provide a strong incentive for lawyers to maintain good standards of service.

40. There is also consumer demand for such information. The Legal Ombudsman and the Panel tested this through qualitative research in relation to complaints data. Most people considered that lawyers who had been subject to complaints which had been upheld by the Legal Ombudsman should be named. Consumers saw that this would encourage firms to improve their service, enhance solicitor accountability and also help consumers both to identify firms providing less satisfactory service and to assist in finding "good" solicitors.

41. Even so, it only needs some consumers (or indeed their advisors, be they the voluntary sector or the press) to use the information for it to have an impact as it forces firms to make service improvements that benefit all users. The Financial Services Authority made this point when discussing their approach to publishing complaints data: "*If firms change their behaviour in light of complaint publication, the benefits to the consumer may be realised independently of consumers' use of the available information. To change firms' behaviour it is not necessary that the information is important to a large proportion of consumers; it may be enough either that a sizeable minority of active consumers use the information, or that firms feel that the publication of unfavourable complaint numbers will damage their reputation*".

42. Despite our enthusiasm for this, there are currently low levels of consumer empowerment. The Panel's first Consumer Impact Report took as its main theme low levels of consumer empowerment evidenced by low shopping around, lack of knowledge and lack of confidence around complaining. We pointed out that consumers were being held back from exercising their buying power due to information about individual providers' performance being unavailable. The Legal Ombudsman's decision to publish complaints data is a positive step and there

is now greater openness in the wider justice system, for example the Open Justice website. However, some data remains withheld, such as peer review scores for legal aid providers, while there is an absence of recorded data, for example the identities of the one-third of lawyers who are responsible for rejected probate forms.

43. There is a clear trend towards greater transparency in the operation of public and private institutions. Opening up provider performance data is at the heart of the Government's consumer empowerment strategy. The legal sector should embrace this agenda to maximise competitiveness.

Q7. What do you believe are the greatest benefits of such transparency? What are the downsides and how can these be minimised?

44. This question is framed in relation to the utility dimension of quality, although we see the same issues applying with respect to the other two aspects of quality.

45. We have described the benefits of transparency around provider performance above: more informed choice; meeting public demand and Government expectations on access to information; enhancing accountability for lawyers; and creating strong incentives for fair dealing. In addition, the Panel considers that people have a right to know whether the provider with whom they are thinking of engaging to help them resolve their important legal matter has a poor performance record.

46. The potential downsides, if any, will depend on the nature of the information. Complaints data is successfully published in a range of sectors without problems, despite industry suggesting this would be problematic and open to abuse. We can see that publication of success rates, for example in criminal trials, needs more careful consideration since the data could mask relevant factors or create perverse consequences. The Panel recognises the risks of unintended consequences. Indeed, it is not in the interests of consumers to receive misleading information as this could lead to poor choices. Nevertheless, it is likely that these risks can be managed, for example by providing useful contextual information. This is certainly the learning from other sectors, including health and education. Objections must be evidence based and the starting point should be a presumption in favour of transparency.

47. Regulators must not fall into the trap of not publishing performance data because it might be misinterpreted by some consumers. Perfect information is an impossible aim; rather policy-makers should have regard to the likely overall effect. Lord Hunt pointed this out in his review into whether the Financial Ombudsman Service should publish complaints data: "*Economic theory tells us that the availability of accurate information to consumers helps to make markets as a whole work more effectively, irrespective of whether every piece of information is understood perfectly by each and every individua*l". He went on to say: "*My analysis underlines the need to get publication right, but let me be clear: I do not think the arguments against any publication at all are remotely convincing. In my considered view, the reputational risk of being perceived to be withholding data would exceed any danger of possible misinterpretation in the short-term*".

48. There is a cost to collecting information, although for the most part our concern is with publishing existing data. Even so, the LSB should be aware of false economies. For example, it appears that one-third of probate applications are sent back to providers for corrections despite the scale of the problem being the same as a decade ago. The administrative costs involved, and the delay for beneficiaries, might have been averted if there had been transparency over which lawyers were making these mistakes.

Q8. The table below (Figure 3) gives some examples of how risks to quality can be mitigated and actions that can be taken by regulators to ensure this happens. Can you suggest any other actions that can be taken?

49. Figure 3 is quite a comprehensive list of interventions, although in some places the suggested intervention may not be the right mitigation for the quality risk. For example, we consider that ability to practice should be assessed as part of a post-authorisation competency regime rather than through voluntary accreditation schemes. Moreover, in reality regulators are likely to apply a mix of measures to mitigate the risk, whereas the table as presented prescribes specific solutions against specific risks.

50. The table could have a stronger focus on the possibilities of entity-based regulation. We would expect regulators to prompt entities to identify the quality risks and demonstrate they have the appropriate controls in place to mitigate these. Since these will vary depending on the market segment, i.e. the nature of activities and the type of consumer, regulators should not be overly prescriptive but place the onus on entities to demonstrate compliance against quality outcomes. The evidence used might be systemic measures, such as file reviews or membership of accreditation schemes. This evidence might in turn justify use of tools, such as earned recognition policies, in relation to lower risk entities.

51. It is also important not to over-rely on one type of intervention. For example, while comparison websites should help with 'matching the consumer and their needs to the right legal service/provider', it may be some time before they are widely used and have overcome credibility issues. The key is to find the right mix of interventions, which in this case might be relevant and accurate consumer information supported by good quality choice tools.

Q9. Which of the possible interventions by regulators do you think likely to have a significant impact upon quality outcomes?

52. There is no simple answer as the right intervention, if any, will depend on a range of factors, with a non-exhaustive list including the type of legal activity, type of consumer, type of possible detriment and type of quality risk. In general terms, we consider that technical aspects of quality are best tackled through the authorisation regime, both at entry level and to assure ongoing competence through CPD and revalidation mechanisms and the sanctioning regime. Service and utility dimensions of quality are best tackled through transparency of performance data to harness competitive forces, with other risk-based approaches such as earned recognition also being part of the mix.

Q10. To what extent should the LSB prescribe regulatory action by approved regulators to address quality risks?

53. Early in the consultation document, the LSB quotes the Yarrow and Decker report which suggests that quality risks are the strongest justification for regulation. It surely follows that quality assurance should be a high priority for the LSB and that the LSB should assure itself that the approved regulators are treating this with sufficient priority and have effective mechanisms in place.

54. The regulators operate in different contexts so a toolkit approach is appropriate. The LSB should hold the approved regulators to account for their performance against the finalised toolkit. Of course the LSB should act in a way consistent with the principles of oversight regulation. However, it should be prescriptive should approved regulators fail to put basic mechanisms in place. For example, our Consumer Impact Report reveals varying practices around publication of disciplinary proceedings which are not justified by market differences. In these sorts of situations, we would expect the LSB to require consistency of approach.

55. We appreciate that the approved regulators face major differences in resource and that some quality assurance mechanisms can be resource intensive. However, all regulators must demonstrate their ability to manage quality risks. Resource constraints also make it more important for regulators to harness consumer power so the market helps to do its work for them.

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