LEGAL SERVICES CONSUMER PANEL

The consumer interest

Using consumer principles

January 2014

Consumer challenge

About Consumer Challenge

Our Consumer Challenge series is designed to create a space for fresh thinking where the Legal Services Consumer Panel can stimulate debate, question the received wisdom and propose new solutions to old policy issues. These documents do not necessarily represent the Panel's final policy position, but instead allow us to test ideas and spark discussion.

Other publications in the series:

- Legal Education and Training Review
- Third party complaints
- Empowering consumers – Phase One report to the Legal Services Board
- Risk and responsibility
- Breaking the maze: Simplifying legal services regulation

Contents

1 Introduction 4

2 The consumer principles 7

3 The seven principles 10

Access 10

Choice 11

Quality/Safety 12

Information 13

Fairness 14

Representation 15

Redress 16

The consumer principles checklist 17

Example: accreditation schemes 19

1 Introduction

A tool for thinking about the consumer interest

1.1. The purpose of this document is to provide a simple tool for regulators to help them think about the consumer interest in a structured way. It is based on a set of seven core principles that are commonly used by consumer organisations for working out how particular issues or policies are likely to affect consumers. We have adapted the principles to make them relevant in a legal services context.

1.2. A key part of the development of this document was collaboration with board members and staff at the Council for Licensed Conveyancers through a workshop and ongoing discussions and feedback. We wish to place on record our gratitude to the CLC for investing their time in this initiative and engaging constructively with us. This process has enabled us to refine the tool using real policy issues and given us confidence that it will be of real practical assistance to regulators. We ran a similar workshop with colleagues at the Legal Services Board and we are delighted that the LSB has agreed to incorporate the tool within their internal policy toolkit.

1.3. The tool is designed to help regulators deliver the regulatory objective in the Legal Services Act of promoting and protecting the interests of consumers, by identifying outcomes and issues related to this objective. Although, as will become clear later, the consumer interest is wide-ranging and other objectives are also relevant. These include improving access to justice, promoting competition and increasing public understanding of the citizen's legal rights and duties. In addition, the tool should be useful in helping regulators demonstrate progress against the consumer engagement aspects of the LSB's regulatory standards work.

1.4. One of the four planks of the regulatory standards framework is an emphasis on outcomes-focused regulation. The seven principles and the supporting guidance

are framed in terms of outcomes. As such they should be seen as aspirational or goals to work towards. However, we also recognise that over-regulation can harm consumers and for this reason the tool addresses opportunities to remove unnecessary restrictions as well as whether intervention might be needed. This reflects our regulatory philosophy, which can be summed up as the right and proportionate amount of regulation to enable consumers to truly benefit from open and fair markets. Further, the Panel is alive to the risk of creating burdens on regulators by suggesting 'yet another' process or checklist. We sincerely hope the tool will not be viewed in this way, but instead is seen as both genuinely helpful and consistent in its approach with modern notions of good regulatory practice.

1.5. The Panel has frequently urged the regulators to increase their level of consumer engagement. We have measured progress through our Consumer Impact Report and held two workshops to suggest ideas and share learning. Over the last two years there has been progress in the form of commitments in business plans, new research and collaboration over the forthcoming Legal Choices website. More needs to be done, but we recognise that the smaller regulators in particular face genuine resource constraints that hold them back from engaging with consumers as much as they would wish. Some have specifically asked us to do more to help them in this area and this is a challenge that we are keen to meet.

1.6. The seven consumer principles should be thought of as a set of reference points or prompts that can help identify key issues and ask questions that need to be looked into further. All regulators are bound to act in a manner which promotes and protects the consumer interest. This toolkit aims to help further define this interest so that in regulators' overall work, and in specific situations such as rule change applications to the LSB, the interests of consumers are properly taken into account.

1.7. They are best used at an early stage of policy development as a tool to aid thinking and instil a consumer-focused culture within organisations. They form a lens through which to view the particular interests of consumers alongside the other constituencies that regulators must consider. The tool is not exhaustive and it is possible that users will reach different views on an issue at the end of the process.

However, this reflects that the consumer interest is not always straightforward and can often involve making trade-offs and difficult judgement calls. While the tool will not provide all the answers, it should help colleagues to make a good start, balance objectives and be transparent about what has been considered.

1.8. Using a set of consumer principles to shape policy does not replace the need to engage directly with consumers; it is one element of identifying the consumer interest. Research and policy analysis tools contribute in different ways, working together to produce a richer understanding of the issues. Research to reveal consumer experiences, needs and preferences helps to shape evidence-based policy and enhances legitimacy. Experts cannot second-guess how consumers think and behave in the real world. Yet the public may sometimes struggle to analyse critically detailed regulatory issues through a consumer interest lens and it is not practicable to test thinking with consumers on every issue. Therefore, the tool is not intended to be a substitute for direct engagement with the public, but rather should be viewed as a complement to it.

1.9. The remainder of this document explains the background to the principles and then sets out what each of them means. There is a supporting list of outcomes designed for regulators to pin to their walls. We have provided a worked through example – on the issue of accreditation schemes – to illustrate how the tool could be used in practice. A blank template can be downloaded from the Panel's website. Finally, the Panel makes an open offer to bring the tool to life by running training sessions for board members and staff at the regulators on site. Our experience is that this is a successful way of building a sound understanding of the consumer principles and making them work within each regulator's unique setting.

2 The consumer principles

About the principles

2.1. The Legal Services Act sets the Panel's boundaries, but it only takes us so far in determining what the consumer interest is on any given policy issue. Like many consumer organisations, we use a set of seven principles or tests to help us assess where the consumer interest lies, and then to develop and communicate our policies. In their original formulation, the principles are as follows:

- Access – can people get the goods and services they need or want?
- Choice – is there any?
- Safety – are the goods or services dangerous to health or welfare?
- Information – is it available, accurate and useful?
- Fairness – are some or all consumers unfairly discriminated against?
- Representation – do consumers have a say in how goods or services are provided?
- Redress – if things go wrong, is there a system for putting them right?

2.2. For the purposes of this toolkit, the Panel has retained the original seven principles above, but broadened 'safety' to embrace the wider concept of 'quality'. This seems more appropriate for legal services; indeed, ensuring high quality is often seen as the primary justification for regulation in this sector.

2.3. The origin of the principles can be traced to a speech by President Kennedy to the US Congress in 1962. The four principles in his speech were later expanded and elaborated on by the international consumer movement. A similar list to that above,

expressed as eight 'rights' rather than seven principles, form part of the United Nations Guidelines for Consumer Protection. While the principles were written in the 1970s, and for a predominantly goods rather than services economy, they are well-established and have stood the test of time well. The United Nations Conference on Trade and Development (UNCTAD) has started a process to update the Guidelines. Its implementation report concludes that "*the Guidelines remain a valid and relevant document for consumer protection policy and have inspired a significant number of national consumer protection laws*".[1]

2.4. Over the years the consumer principles have provided useful reference points for consumer representatives. Consumer Focus (now Consumer Futures) said that it uses these principles because it is important to have an agreed framework underpinning the way it approaches issues, so that it is consistent across subject areas, can extend previous thinking to new topics and is not driven by individual preference. Further, they said the principles allow it to develop policy positions transparently and also provide a straightforward way of explaining to stakeholders how they identify and analyse consumer issues, including when something is not a consumer policy topic, but rather a wider citizen or political issue.[2]

2.5. There are, of course, differences between the public and consumer interests and we accept that the former should always have primacy. For example, someone guilty of a crime may wish to escape justice, or a corporate client might ask its lawyer to behave unethically. There are also areas where members of the public have an interest, but which do not involve them acting as consumers. However, the dividing lines between citizen and consumer interests can be blurred, for example remuneration of lawyers doing legal aid work doesn't directly concern consumers,

[1] UNCTAD, Implementation report on the United Nations Guidelines on Consumer Protection (1985-2013), Note by the UNCTAD Secretariat, April 2013.
[2] Consumer Focus Board Paper, Underpinning our consumer policy analysis, 3 February 2009.

but a consumer representative has a legitimate interest in the possible knock-on implications that financial incentives may have on the quality of advice.

2.6. When different aspects of the consumer interest conflict, regulators should weigh up the principles and strike an appropriate balance them, as they must do when the regulatory objectives conflict. The Panel's own approach is to take a view as to what policies are most likely to improve the situation of consumers as a whole. Sometimes we may decide that the interests of one group of consumers, such as those in vulnerable positions, should outweigh those of the general population. For example, regulation requiring legal businesses to install loop systems benefits deaf and hard of hearing people, but consumer bodies consider this is worthwhile despite these costs being passed on to all legal services consumers.

2.7. It should be apparent from the principles that the consumer interest is wide-ranging by encompassing issues, such as access and fairness, that go far wider than the concerns over choice and price that are most usually associated with consumers. Parliament wanted the legal services reforms to put consumers at the heart of regulation, reflecting the principle that end users are ultimately meant to benefit from regulation. However, in recent times there has been a backlash against the central role that consumer interests have played out in this arena. At the heart of these concerns is a perceived clash of values between the consumer interest and professionalism; a tension we do not accept is irreconcilable. Much concern stems from a misunderstanding of what motivates consumers and how they behave. For example, our research shows that consumers are not motivated mainly by price but instead prioritise quality and welcome lawyers' training regime and professional ethos. Nevertheless, the Panel recognises that it has a responsibility to define more clearly what the consumer interest actually means and we hope this tool does this.

3 The seven principles

Access

Accessing legal services may be necessary to defend a person's rights or liberty, achieve goals such as setting up a business or buying a home, or deal with the unexpected events that life throws up such as bereavement. Many consumers will require professional help to secure good outcomes when dealing with a legal issue. An expert will not always be needed and wherever possible legal processes should be simplified so people can help themselves. Good information about rights and responsibilities should be readily available in a form that can be easily understood.

The challenge is to identify and break down barriers that prevent consumers from accessing high quality legal services that are delivered in ways that meet their needs. Legal services can be expensive and affordability is often one major barrier to access. Other barriers may be physical (e.g. geography, disability), cultural (e.g. English not first language) or relate to service delivery (e.g. jargon). Competition can improve access, for example through cheaper and more user-friendly services. Yet particular groups of consumers may prove too expensive or inconvenient for the market to serve, while competition may remove some types of access barriers but not others. Equally, too much regulation may erect barriers to access by making legal services unaffordable for large parts of the population.

Consumers can access all the services they need. Different barriers to access in each situation and for each affected population group, and the underlying causes, are identified. There is an appropriate balance between competition and regulation. Regulation is not erecting unnecessary barriers to access.

Choice

Giving consumers meaningful choice encourages providers to compete by offering a range of services that are responsive to people's needs. Unless necessary to safeguard consumers, there should be no restrictions on who may provide legal services or how, nor should market actors place artificial constraints on choice. Consumers should be empowered to make informed choices, which in turn shape how the market operates. To do this, consumers need the knowledge and skills to choose a suitable option for their circumstances. This also means understanding the implications of their decisions, for example choosing between a regulated and unregulated provider. Reliable comparative information on the characteristics of different providers can help with this. A strong consumer protection framework is also essential for giving consumers the confidence to exercise choice. Regulators need to develop a good understanding of choice behaviour and be realistic about the extent to which consumers can and will drive competition.

Consumers have free choice. Consumers can choose from a range of services and providers. All entry barriers and restrictions facing providers are justified. Consumers can access reliable comparative information about providers in relation to price, quality and other characteristics. Consumers realise which services or providers are (un)regulated. Regulators understand how people make choices.

Quality/Safety

Legal services are often used at critical life moments so they should be delivered to a standard that leads to good outcomes. Quality means combining up-to-date knowledge and skills with good client care to deliver advice in a way that is useful. Because legal services can be technical and are rarely used, consumers may be unable to judge the technical quality of work, even after the event. This places a special emphasis on regulation preventing poor quality work through entry controls and then checks on practitioners and entities to ensure ongoing competence. Such monitoring should include lay input and finding out the consumer experience.

Market mechanisms, such as accreditation schemes and transparency around provider performance, can help consumers to identify suitably qualified providers. This includes transparency about providers subject to disciplinary action. Consumers also need confidence that regulation will protect them from other sorts of risks, such as insolvency and fraud, over which they have little control. While consumers should be encouraged to exercise personal responsibility and be given information to help them manage the risks under their control, it would be unfair to ask people to accept risks which they either do not know about or cannot manage.

Consumers are getting good quality outcomes. Services are being widely delivered to high standards in each dimension of quality. Quality is being monitored effectively. Good quality assurance systems are in place to ensure the initial and ongoing competence of providers. Quality systems are proportionate to the risks. Consumers have access to information that will help them identify good quality providers. Proxies for quality, such as accreditation schemes, are reliable. Risk is being appropriately allocated between consumers and providers.

Information

Consumers need good information for a range of purposes. It helps them know their rights and routes to redress. It enables them to identify when they have a legal need and the best strategy for dealing with this. Information on the characteristics and past performance of potential providers helps them to find the right professional help (if necessary) for their circumstances. Consumers also need to be able to make informed decisions at the start of their case and as it progresses in order to secure good outcomes. Good information is clear, succinct, accurate, timely and useful. Requiring providers to provide consumers with certain information can aid effective decision-making, but too much or complex information, misleading claims, small print and jargon can impede this. Giving consumers more information may not always be the best policy response and regulators should test proposed information remedies and existing requirements to assess whether they are effective.

Technological advances mean that providers now hold increasing amounts of personal information. This offers benefits in terms of more personalised services and free content, but also creates data protection and privacy risks. The sensitive information lawyers may handle makes this especially important in legal services. Consumers should not be coerced into handing over personal information for commercial purposes in order to be granted access to legal services.

Consumers' rights are simple to understand and easy to find. Regulatory data on the identity and performance of providers is available in suitable formats. Consumers have the right level and quality of information to make effective decisions at all stages of their matter. Any mandatory information requirements are adequate, complied with and working effectively. There are effective safeguards against the misuse of personal information.

Fairness

While the Access principle is about availability of services, fairness relates to the treatment of consumers by providers when using services. The rule of law demands that people should not be unfairly discriminated against due to their personal circumstances. Equalities laws make it illegal to treat a person less favourably due to a protected characteristic and require providers to make reasonable adjustments for disabled people. In addition, a British Standard on inclusive service provision (BS18477) identifies the complex and dynamic nature of consumer vulnerability. Instead of defining consumers in specific groups as always vulnerable, it 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. Vulnerability is transient – people can be vulnerable at some times, but not at others. Moreover, those providing or regulating services play an important role, potentially contributing to, or increasing the risk of, consumer vulnerability and detriment.

There is now an emphasis on 'fair' behaviour for all consumers by providers, as seen in the Consumer Protection Regulations, regulatory initiatives and the fair and reasonable test applied by ombudsmen in their decisions. Fairness covers all aspects of the customer-provider relationship. It is not just about avoiding specific unfair practices that exploit imbalances of power or behavioural economics models of bias in consumer decision-making, but also fostering a culture where fairness is placed at the heart of the business model.

'Risk factors' potentially creating consumer vulnerability are identified. Evidence of discriminatory or unfair practice targeted at specific population groups is compiled. Any cross-subsidisation across groups of consumers is justified. Consumer vulnerability is understood and given sufficient priority by decision-makers. Relevant special interest groups are adequately consulted. Unfair trading practices are being monitored and intelligence is shared. There is a business culture where providers put the interests of consumers first.

Representation

Legal services can change lives, so it's really important that consumers have a say in how these are provided. Regulators need to listen to the views and experiences of consumers, in order to design protections that take proper account of their needs and preferences. It is important not to treat consumers as one homogenous group but to recognise their diversity and segment accordingly. A range of consultative and research techniques can be used to ensure there is genuine two-way dialogue. Expert consumer representatives and organisations have an important role to work out what change is needed to benefit consumers and to give voice to their interests. Regulators should aim to consult consumers directly and via their representatives. Understanding the consumer interest should permeate the entire organisation including at board level – having board members with expertise in consumer affairs would assist with this.

Increasingly, new technologies enable consumers to pool resources and provide direct feedback that leads to change. Despite this, consumers often lack buying power in their dealings with lawyers – they have little knowledge about the law, use legal services infrequently and often at times of distress. It is also difficult for them to mobilise and find a collective voice, unlike providers who can organise through professional associations. Lawyers therefore will naturally often have the loudest voice on issues, so regulators must work even harder to understand the views and interests of consumers and give proper consideration to these.

There are good mechanisms for consumers to have a say in how services are delivered. Intelligence provided by consumers is informing risk-based regulation. Regulators are listening to consumers through dialogue and research. Regulators seek the views of expert consumer representatives. Consumer organisations are adequately resourced and backed by strong powers. Regulators understand how to interpret the consumer interest. Regulators work openly and transparently so they can be held accountable for their performance.

Redress

There are no rights without redress. If consumers cannot enforce their rights, there is little incentive for providers to follow the rules. As well as simply being unfair, this undermines competition, since consumers may lack the confidence to participate in markets, while unscrupulous or careless providers can gain an unfair advantage. Consumers need to know what their rights are and have access to independent and effective systems for obtaining redress, which as far as possible restore them to the position they were in before the problem occurred. Providers should have a positive attitude towards complaints and deal with them swiftly and fairly. At the second-tier stage, redress schemes should be able to accept all reasonable complaints and offer quick, fair and effective redress.

Regulators cannot prevent every mistake and nor should they try, as this would stifle innovation. However, regulators should creative incentives that minimise poor quality or unfair trading practices in the first place. This includes penalties available to regulators being sufficient to deter bad practice and exceed the overall gains from providers' wrongdoing. Disciplinary mechanisms should work effectively and transparently to underpin consumer confidence. Consumers also want assurance that mistakes are learned from, in order to prevent others losing out in future.

Market rules protect consumers against the risks of poor practice they might face in the market. It is easy for consumers to understand their rights and routes to redress. Providers' internal complaints procedures are working well. Consumers can access independent and effective redress mechanisms. Providers have the right incentives to follow the rules. Regulators have an adequate range of sanctions at their disposal. Monitoring and enforcement data is publically available. Good feedback loops are in place to extract the learning from complaints to deliver service improvements.

The consumer principles checklist

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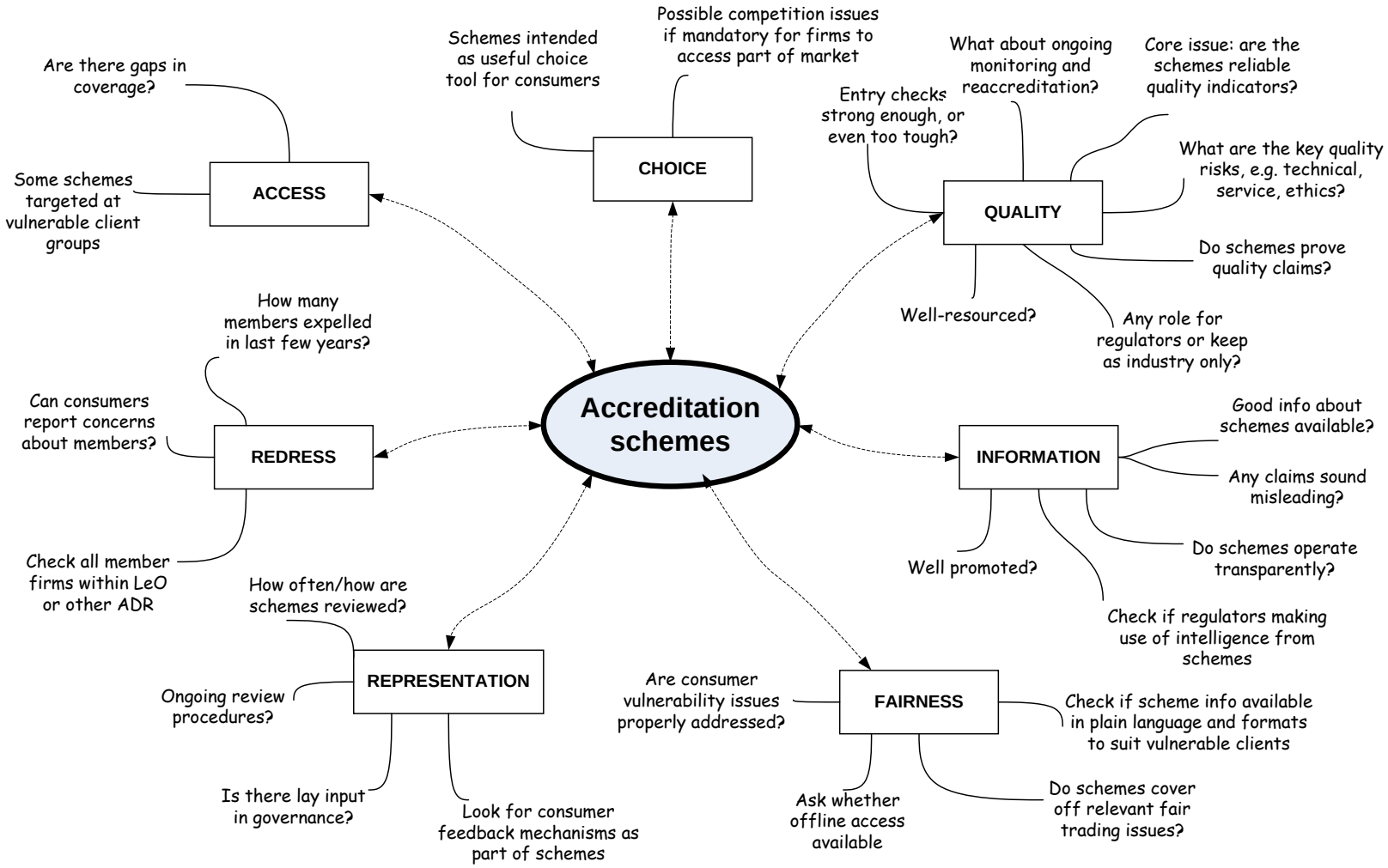
Example: accreditation schemes



The Legal Services Consumer Panel was established under the Legal Services Act 2007 to provide independent advice to the Legal Services Board about the interests of consumers of legal services in England and Wales. We investigate issues that affect consumers and use this information to influence decisions about the regulation of legal services.

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