

Consultation response

BIS: Empowering and protecting consumers

Overview

1. **The driving principle behind reshaping the institutional landscape for consumer advocacy should be creating strong, expert and effective representation of consumer interests for the long-term. There are clear benefits to retaining expert consumer panels embedded within their sectoral regulators. In addition, there are unique features within the legal services market that would make a transfer of the Legal Services Consumer Panel's functions to Citizens Advice problematic.**
2. **The Panel supports proposals for Citizens Advice to take over responsibility for Consumer Direct and to take on national coordination of consumer education. This should include legal services within scope. Online technologies have great potential, but it is important to retain adequate face-to-face advice provision. It is crucial that intelligence from calls to Consumer Direct continues to be made available to the enforcement community while as much anonymised data as possible should be published so that researchers and others can use it.**
3. **It is important to find a suitable home for consumer codes. The application process should remain rigorous, but involve a more collaborative approach between the scheme operator and code sponsor. Our experience suggests that BSI would need to significantly adapt its model in order to offer a cost-effective scheme that could achieve wide industry take up, especially for small businesses.**
4. **Legal businesses operate across local authority boundaries so enforcement needs to be delivered in tune with how modern markets function. We are not convinced the proposals offer an effective solution to the local/central delivery debate. A national leadership body is needed with the concentrated expertise, clout, funding and risk appetite to tackle specific threats which local authorities are not equipped to deal with. It must be able to draw on more than soft influence, but instead have meaningful levers over local authorities, including powers of direction.**
5. **The Competition and Markets Authority should have responsibility for carrying out pure consumer market studies.**

The proposals

6. **The Consultation Paper ('the Paper') makes proposals on institutional changes for the provision of consumer information, advice, education, advocacy and enforcement.**
7. **The Panel's comments are limited to those proposals that have the potential to affect**

consumers of legal services. In so doing, we have drawn on the expertise and experience contained within the Panel about consumer policy more widely. We focus on:

- Giving the Citizens Advice service responsibility for publicly-funded national advice and education of consumers;
- Options for the future support of consumer codes;
- Strengthening consumer enforcement by improving the national leadership and coordination capability of Trading Standards and by clarifying its responsibility to tackle cross-boundary threats. Also to promote more effective partnership working and prioritisation of activity between Trading Standards and the proposed Competition and Markets Authority (CMA); and
- Making Citizens Advice the lead national, publicly-funded consumer advocate by taking on functions from Consumer Focus, and wherever possible other sectoral consumer bodies.

The Panel's response

Information, Advice and Education

8. The Panel fully endorses the aim to empower consumers to demand more of suppliers thus enabling them to play their part in driving competitive markets. This is only likely to happen in legal services if people understand their rights, know how to access legal services, can make reliable comparisons between competing offers and can shop with confidence.
9. The need to do more to empower consumers was the main theme of the Panel's Consumer Impact Report¹ – the first of our annual assessments of the legal

services reforms. Our research shows that consumers generally do not shop around for legal services, cannot find information about the quality of different providers, approach lawyers with trepidation and lack the confidence to complain. In addition, work by the Legal Services Research Centre has shown that many people are not aware that they need or would benefit from advice and do not know where to go or cannot navigate the 'advice maze'.²

10. One of the regulatory objectives in the Legal Services Act is: 'increasing public understanding of the citizen's legal rights and duties'. The main focus of legal services regulators has been opening up legal services to greater competition to stimulate market solutions to better connect consumers to services that might benefit them. In addition, Plenet – a network of organisations and individuals working in the field of public legal education – provides a space for practitioners and researchers to share information and ideas, to promote good practice in delivering public legal education and to improve awareness of the need for and value of this field.
11. The focus of the BIS proposals is the coordinated provision of consumer information, advice and education. Currently, in legal services these are delivered in the following ways:
 - Consumer Direct provides limited information materials on some aspects of legal services, such as making a will;
 - Most local authorities produce a range of information and coordinate consumer information and advice;

- The Citizens Advice Service's Advice Guide provides general information on the legal system including: courts of law; using a solicitor; help with legal costs; small claims; personal injuries; alternatives to court; police powers; and issues affecting prisoners. In addition, local bureaux provided advice on 301,252 legal problems in 2010/11.
 - If eligible for legal aid people can call the Community Legal Advice helpline about debt, education, family, welfare benefits and tax credits, employment and housing problems (those ineligible for legal aid are signposted elsewhere);
 - Some front-line regulators in legal services, such as the Solicitors Regulation Authority, provide basic information about using legal services; and
 - Commercial websites enabling consumers to compare legal services providers are beginning to emerge; some of these sites include educational materials.
12. Our impression is that the provision of consumer information, advice and education about *using legal services* in particular (as opposed to materials on legal rights) is disjointed and lacks coordination, whilst the available materials are quite basic and are not comprehensive in the range of subjects covered. Some of the best materials are being provided by the new breed of commercial websites described above, although their penetration is limited so far. Although this may change, particularly when alternative business structures come on stream, there is always likely to be a need for the independent provision of such materials. This is because some important legal problems will be of marginal interest to commercial providers
- and there may be some types of information for which it is inappropriate to rely on them to deliver.
13. The Panel therefore supports proposals for Citizens Advice to take over responsibility for Consumer Direct and to take on national coordination of consumer education. This should include legal services within scope recognising that Citizens Advice already operates in this area. The inclusion of legal services is important because problems that citizens face often include a legal element. The help needed to deal with these requires joined-up solutions to resolve issues that overlap the boundaries that result from multiple organisations operating in different policy spheres.
14. The Ministry of Justice proposes to retain the Community Legal Advice helpline in a revised form as part of its legal aid proposals. Consideration will need to be given to the interaction between this service and advice services delivered by Citizens Advice (which itself competes for contracts to deliver legal aid services).
15. The Panel sees the potential for technology to deliver helpful information to the public. As the experience of NHS Direct has demonstrated, it is possible to develop systems using algorithms to diagnose problems and offer tailored information that helps people to resolve their issue. Therefore, online provision can go beyond the provision of generic information. Nevertheless, it is important to maintain capacity to offer face-to-face advice for legal services. This recognises that legal problems can be complex or emotionally sensitive, and that some people, especially those in vulnerable circumstances, may

need more active guidance. Advisors may also need to see documentation in order to provide effective advice. There remains a significant minority of people who do not have internet access. Research also shows that many people prefer to access legal services in a face-to-face environment.³

16. The existing model is that Consumer Direct fields simple enquiries and passes more complex matters to Trading Standards. Trading Standards often intervenes on behalf of individual consumers to help reach a satisfactory solution including by assisting in court where necessary. It will be important to retain capacity within the new arrangements for this hand-holding role. The need for such support is important in legal services. Normally, consumers use lawyers to help them resolve disputes with businesses, so challenging poor service by a lawyer can be intimidating. The Legal Ombudsman offers a simple redress route, but there are many legal activities falling outside of its jurisdiction where consumers might require assistance.
17. We are pleased that the consultation recognises the need to capture intelligence on consumer detriment and to make this available to enforcers and policymakers. This dataset should be made available to the widest possible audience rather than in a password-protected site available to a select few (the need to protect personal data is recognised, but this should not prevent sharing anonymised information). The dataset should be made available in raw form entering fully the spirit of the *mydata* proposals that BIS envisages for empowering consumers in the marketplace.

Consumer codes

18. Will-writing is a one of the markets which has an OFT approved code so the future of the Consumer Codes Approval Scheme (CCAS) is of direct interest to legal services consumers. In fact, the vast majority of legal services are unregulated activities which may be offered by anyone. The Panel is likely to encourage credible self-regulatory initiatives in such markets when we do not consider that regulation would be a proportionate means of tackling consumer detriment. Self-regulation has a chequered history, but its use of industry expertise and flexibility to adapt to evolving markets means it is potentially well-suited to legal services depending on the circumstances.
19. The Panel shares the analysis of the strengths and weaknesses of CCAS. It is important that future arrangements continue to offer a rigorous application process. In particular, the unique strength of CCAS lies in the two-stage application process: the OFT's logo may only be used once the code sponsor demonstrates its members are meeting the code promises in practice. This is unlike other self-regulatory codes, which are based on written commitments alone. However, our experience (including from outside the legal services market) is also that the application process can be unnecessarily drawn-out. Moving forwards we would like a future scheme to operate on a more collaborative basis where code sponsors have clear expectations about what is expected of them and the scheme operator and code sponsor accept a shared responsibility for working towards an agreed timetable for code approval.

20. It is important to choose an appropriate home for consumer codes should BIS remain of the view that the CMA's primary role should be as a competition authority. The decision criteria should include the organisation's purposes, its capacity to handle applications and supervise code sponsors, the suitability of the body's proposed processes for operating the schemes and public awareness.
21. The ideal location for CCAS is not obvious. There is obvious synergy between CCAS and BSI's standards work. The Kitemark also has strong public recognition. However, our experience suggests that BSI would need to significantly adapt its model in order to offer a cost-effective option that could achieve wide industry take up, especially in sectors with many small businesses (as is the case in legal services). It would also need to reflect the better regulation trend away from setting prescriptive standards towards outcomes-focused regulation; this shift is a feature of legal services regulation. Which? is another candidate to operate consumer codes as it has strong public recognition, but this would be problematic in legal services as it provides paid-for legal services. Another possibility is Citizens Advice, although it lacks regulatory experience and it may be the case that consumer codes are one more extra responsibility too many at a time of major organisational change.
22. If a suitable replacement for CCAS is not found, sectoral regulators may decide to initiate their own accreditation schemes. However, this would not be ideal as it would not be possible to standardise scheme criteria across economic sectors; this would

create the risk of inconsistent standards and consumer confusion.

Consumer advocacy

23. The consultation paper expresses the wish to make Citizens Advice the lead national, publicly-funded consumer advocate by taking on functions from Consumer Focus, and wherever possible other sectoral consumer bodies. The Legal Services Consumer Panel is not publicly-funded and we have received written confirmation from BIS that there are no plans to move us to Citizens Advice. Indeed, such a move would require new primary legislation. Nevertheless, this consultation exercise presents an important opportunity to record the benefits of retaining expert consumer panels embedded within their sectoral regulators. In addition, there are unique features within the legal services market that would make a transfer of our functions to Citizens Advice problematic.
24. It is beyond the Panel's remit to comment on which organisation(s) should do what work in the future. The most important thing is to ensure arrangements that enable strong, expert and effective representation of consumer interests for the long-term. Although the Panel is directly affected by the proposals, our approach is the same as for every other proposal that we consider: what solution would best meet the needs of legal services consumers. Our strong view, which is shared by the Legal Services Board (LSB), is that there should continue to be a dedicated expert panel embedded within the LSB. Of course, the Panel is committed to continue working closely with other consumer bodies in whatever revised institutional landscape emerges.

Background about the Panel

25. The Legal Services Act 2007 requires the LSB to appoint a Consumer Panel to represent the interests of consumers in England and Wales. The Panel is not a separate legal entity, but is embedded within the LSB. We started work in November 2009.
26. The Panel consists of seven lay people who were appointed following open competition by the LSB with the approval of the Lord Chancellor. They bring rich expertise from a range of professional backgrounds and user perspectives, including the third sector, local government, trade unions, small business and consumer affairs. Their external perspective is invaluable in helping the LSB to draw learning from other sectors that are facing, or have successfully dealt with, similar challenges. The Panel is supported by a small secretariat from the LSB staff team and its activities are funded by the LSB.
27. Our mission is to ensure the regulation of legal services is shaped around the needs of consumers by influencing decision-makers and the behaviour of providers. The Panel investigates issues that affect consumers and influences the regulation of legal services. The vast majority of our work consists in providing advice to the LSB about their developing policies. Much of this work takes place informally behind the scenes, but the LSB may make a formal request for our advice as it has on referral fees, quality assurance and will writing. The Panel also provides advice to the Legal Ombudsman and approved regulators (the bodies responsible for day-to-day delivery

of regulation). In addition, the Panel has some scope for own-initiative projects.

The benefits of embedded panels

28. Consumer panels embedded within regulators operate very differently to campaigning organisations such as Consumer Focus and Citizens Advice. The Panel is an advisory body, representing the consumer interest to the regulator; it does not perform a lobbying role nor offer advice or guidance to consumers.
29. The Panel's location within the LSB allows it to input at the earliest stages of policy formulation before the LSB is ready to test its thinking in public. This is the stage at which officials are most receptive to new ideas and change of direction, whereas external bodies normally provide input during the public consultation stage when there may already be a preferred approach. Such early engagement is only made possible by the confidentiality of the process and the trust developed through close working relationships with colleagues.
30. A permanent and discrete Panel allows the LSB to access expert consumer insight on tap. The Panel does not face competing demands on its time to the extent inevitably confronted by organisations that must respond to an economy-wide policy agenda with finite resources. Indeed, there is no guarantee that additional money will be provided to Citizens Advice to conduct work on legal services regulation. The national consumer bodies have given limited input on legal services regulation issues since the Legal Services Act was passed.

31. The Panel is a vital part of the accountability of legal services regulation, ensuring proper consumer scrutiny of the LSB's deliberations. The legal services reforms were designed to put consumers at the heart of regulation. The legal sector is well-resourced and strongly positioned to put its case to the regulator, so a discrete consumer voice provides the client counterweight. The Legal Services Act recognises this by giving us a series of statutory responsibilities. Certain bodies have duties to consult us, such as the LSB and the OFT. The Act also gives the Panel powers to make representations to the LSB on any issue and to publish its advice to the LSB. We also have powers to trigger investigations, for instance into the scope of reserved activities and the Legal Ombudsman's jurisdiction.
32. It is unclear whether these statutory powers and duties accorded to the Panel could be transferred to Citizens Advice, which operates as an independent charity accountable only to its beneficiaries and with no requirement to appoint representatives of users of legal services to its trustee board. Thus the carefully crafted features of the Legal Services Act designed to ensure effective representation of consumers' interests risk becoming unbalanced should the Panel's functions be transferred to a charitable body.
- The special case of legal services**
33. We note the Government is not minded to merge the Financial Services Consumer Panel (FSCP) with Citizens Advice. There are close parallels between us and the FSCP as we both have a statutory duty to advise the regulator in areas of professional services. Neither the LSB nor Financial Services Authority are economic regulators. In addition, there are unique features of the arrangements in legal services that make it a special case.
34. The Panel represents a wider range of consumers than panels in other sectors, including small business and charities. This aspect of the Panel's work was explicitly recognised during debates on the Legal Services Act. In fact, the legislation requires the Panel's membership to include those who use legal services as part of a business activity.
35. The introduction of alternative business structures, and other major reviews such as into the training of lawyers and the future regulatory landscape, makes this a transformative period in the sector. The issues which we deal with are often highly specialised demanding a strong, expert, discrete and articulate consumer input. The regulatory bodies are also new to their role and are making the transition from trade associations to independent regulators. It will take time for the sector to develop the degree of regulatory maturity experienced in other markets. The weak consumer engagement arrangements of the approved regulators are one manifestation of this level of maturity, which has resulted in an additional call for the Panel's input.
36. There would be a conflict of interest if Citizens Advice advised the LSB and Legal Ombudsman. Citizens Advice Bureaux (CABx) are a major provider of legal services. Many CABx have contracts with the Legal Service Commission to deliver

legal advice and casework in defined categories of law – principally debt, benefits/social security, housing, employment and immigration. Some CABx employ solicitors engaged in the conduct of litigation whilst others are involved in the delivery of pro-bono services by lawyers and offer advice services in County Courts. The vast majority of bureaux offer advice and representation services in Tribunals.

37. In future the network is likely to be subject to oversight regulation by the LSB, and fall under the Legal Ombudsman’s jurisdiction, under the ABS licensing regime. This trend is likely to continue as the Legal Services Commission is increasingly requiring that the delivery of some social welfare law services should require the employment of an authorised solicitor. This creates a serious and unavoidable conflict of interest. It would be impossible for Citizens Advice to represent clients views to the LSB when it itself is a provider, regulated by the LSB and thus lobbying it as a provider. This problem has been publicly recognised by the LSB Chairman⁴ and by the Chief Legal Ombudsman.⁵

Enforcement

38. Lawyers are subject to general consumer law just as much as other businesses. As previously indicated, most legal activities are not subject to sector-specific regulation. In these circumstances, consumers rely on public authorities to promote compliance and deal with infringements of general law. This is of interest to the better regulation agenda as an enforcement gap strengthens the case to regulate new legal activities.

Therefore, the Panel has a strong stake in ensuring an effective enforcement regime.

39. This consultation does not deal with private law remedies available to consumers. The Panel’s recent investigation into will-writing services identified sales practices outlawed by the Consumer Protection Regulations, but which consumers cannot pursue of their own volition due to the absence of a private right of action. We have shared our evidence with the Law Commission as part of their consultation on this issue. Issues of substantive law reform lie outside of the Panel’s remit, but we note that the absence of private redress remedies puts a heavier reliance on public authorities to fill the gap at a time when resources for taking enforcement action are increasingly limited.
40. We recognise from our work that unregulated legal businesses operate across local authority boundaries, hence the need for enforcement to operate in ways which reflect and deal with this reality whilst retaining local democratic accountability. In this context, we welcome steps to improve the prioritisation and coordination of consumer enforcement work in England and Wales, but we share the concerns of other consumer commentators who have urged consideration of more radical change. This is a longstanding issue, but budgetary pressures make it urgent to reach a new settlement for delivering Trading Standards which is sustainable in funding terms and works in tune with how modern markets function.
41. We are unconvinced that proposals for the Trading Standards Policy Board (TSPB) in their current form will offer an effective solution to the local/central delivery debate.

What is needed is a national leadership body with the teeth to target resources at threats spanning local boundaries, wherever such legal businesses are based. Trading Standards should remain a local service choosing local priorities, but supplemented by a mobile central resource which has the concentrated expertise, clout, funding and risk appetite to identify and tackle specific threats which local authorities are not equipped to address. This requires a body with real powers to make decisions and coordinate activity. TSPB must be able to draw on more than soft influence to mobilise the Trading Standards community, but instead have meaningful levers, including powers of direction over local authorities. The TSPB should also have proper lines of accountability, involving consumer and public interest representatives in addition to local government input.

42. Trading Standards must juggle a large number of priorities and make difficult decisions about what not to address. This would be true whatever level of resource was made available. Institutional reform could make resources go further, especially through the amalgamation of very small services which lack the capacity to deliver effective enforcement against large companies headquartered in their area. Even so, there is a minimum level of resourcing required to allow Trading Standards to operate effectively. We are realistic in appreciating that legal services will often be a second-order priority compared to other fair trading issues, but it is nevertheless deserving of attention. Our concern is that deep funding cuts will mean legal services are neglected leaving

consumers exposed to rogue operators. The level of detriment that could result and the impact on consumer confidence would make savings from reducing funding for Trading Standards a false economy.

43. The proposed consumer enforcement function of the CMA is broadly supported. In relation to market studies, the Panel shares the view that it can be hard to disentangle consumer and competition issues, as the OFT's recent caseload demonstrates. This is certainly true in legal services and we consider it important to retain the ability to carry out such a unified analysis. It will be important that the CMA has a culture which supports an integrated approach. This is best achieved by the CMA having responsibility for 'pure' consumer market studies as well as competition cases. We are also concerned that Citizens Advice, as a campaigning organisation, will lack the authority to elicit a formal Government response to market studies as the OFT is currently able to do. The OFT's market studies are also impressive for their depth, which relies on a significant budget and staff expertise; such capacity would need to be developed within Citizens Advice.

September 2011

¹ Legal Services Consumer Panel, *Consumer Impact Report 2011*, June 2011.

² Legal Services Research Centre, *Causes of Action: Civil Law and Social Justice*, 2006.

³ See: <http://www.legalfutures.co.uk/legal-services-act/legal-services-board/public-still-want-face-to-face-legal-advice-in-key-areas-lsb-research-finds>

⁴ <http://www.legalfutures.co.uk/legal-services-act/legal-services-board/edmonds-citizens-advice-needs-to-overcome-conflict-issue-to-become-adviser-to-lsb>

⁵ <http://www.legalfutures.co.uk/legal-services-act/legal-ombudsman/ombudsman-adds-voice-to-concerns-over-plan-to-scrap-consumer-panel>