

Consultation response

Ministry of Justice: Triennial Review of LSB and OLC

Overview

1. **At the forefront of the review should be the underlying rationale for regulating legal services: the vulnerability of consumers and the serious consequences of legal work for consumers and society more widely.**
2. **The three main planks of the Legal Services Act – regulatory independence, the Legal Ombudsman and alternative business structures – are well in progress, but much more work remains before the reforms as a whole can be judged as a success. The early stages of the reforms combined with the changing external environment, means that major institutional reforms would be untimely.**
3. **The Legal Services Consumer Panel has made a real difference for consumers in our short history. Our work and impact demonstrate the clear benefits of retaining expert consumer panels embedded within sectoral regulators. There are also unique features within the legal services market that would make a transfer of our functions to Citizens Advice problematic. The Panel should be retained on a statutory footing, which safeguards our independence and gives us powers and responsibilities that ensure a strong consumer voice – a vital counterweight in a sector characterised by significant imbalances of power.**
4. **The Panel has a legitimate role to assist the approved regulators to carry out consumer engagement, but this does not displace their responsibility to have a direct dialogue with the public.**
5. **The Legal Services Board should be retained in its current form. We want it to focus on the big policy issues, but the use of its resources depend on how well the approved regulators demonstrate their ability to operate with less oversight. The time of the next triennial review is more appropriate for an assessment of whether the oversight model of regulation remains appropriate.**
6. **The Office for Legal Complaints should be retained in its current form. It has a vital role in offering consumers a means of redress, and we would like to see all legal services providers brought within its scope. We welcome recent steps by the Legal Ombudsman to bring a greater focus to its role of using the intelligence from complaints to raise standards, which should be brought together into a coherent strategy. For the future, the draft EU directive on alternative dispute resolution presents an opportunity to ensure more joined-up consumer redress to reflect the trend towards converged delivery of services across business sectors.**

The proposals

7. A triennial review is a Cabinet Office mandated process for reviewing the functions of non-departmental public bodies (NDPBs), the appropriateness of the body's delivery mechanism and its governance arrangements. The Cabinet Office has identified two principal aims for triennial reviews:
 - To provide a robust challenge of the continuing need for individual NDPBs – both their functions and their form; and
 - Where it is agreed that a particular body should remain as an NDPB, to review the control and governance arrangements in place to ensure that the public body is complying with recognised principles of good corporate governance.
8. Where the functions should continue and the NDPB should remain, and in light of the review findings, the Government will assess whether appropriate control and governance arrangements are in place to ensure that the body is operating in line with Government policy including good corporate governance, openness, transparency and accountability.
9. The Ministry of Justice is the sponsor department for the Legal Services Board (LSB) – the oversight regulator for the legal professions in England and Wales – and the Office for Legal Complaints (OLC), which operates the Legal Ombudsman. These bodies are subject to individual reviews, but which are being carried out in parallel.

The Panel's response

Being a consumer of legal services

10. It is easy, once regulatory institutions have been established, to forget or become complacent about the underlying rationale for regulating an economic sector. Legal services play an incredibly important role in the everyday lives of individuals, charities, businesses and a wide range of other consumers. They also impact on third parties who are indirectly affected, such as victims of crime or beneficiaries in a will. A lawyer's work can have significant personal and financial consequences some of which, such as loss of liberty, are irreversible.
11. Consumer vulnerability is an essential consideration. Everyone can be vulnerable when needing legal services given the information gaps and often emotional context, such as relationship breakdown or bereavement. In addition, risk factors related to a person's circumstances – such as illiteracy, illness or disability – can increase the likelihood of a consumer being at a disadvantage of suffering detriment. Lawyers also protect the rights of people in vulnerable situations, such as refugees, children or those with mental health needs.
12. The Panel considers that empowering consumers to drive competition between diverse providers offers the best chance of securing good outcomes for users of legal services. However, there are real limits to consumer power given the asymmetries of information that result from inherent features in this market – e.g. the technical nature of law, infrequent use, vulnerability

of some users and distress purchases. These factors prompt regulation of legal services to some degree in order to assure consumers about the quality of advice they can expect to receive and ensure access to redress should this not happen.

13. Sir David Clementi's review found a regulatory maze that was too close to the profession, complaint mechanisms that were not fit for purpose and restrictions on business models that stifled competition. The LSB and its stakeholders have put in place the reforms contained within the Legal Services Act which were designed to tackle these problems: rules to secure regulatory independence, the Legal Ombudsman and opening up the market through alternative business structures.
14. However, as revealed by the Panel's Consumer Impact Report – the first evaluation of the legal services reforms – there is much more to be done. We identified key areas where consumers have benefited from the reforms including improved codes of conduct, greater diversity among new lawyers and vital rules to ensure independent regulation. The research also showed the large majority of consumers were happy with the outcome of their legal work. But there were also areas of concern, such as implementation of rules requiring lay majorities on regulatory boards; rising claims on the solicitors' compensation fund; poor diversity at higher levels of the profession; and little consumer engagement by regulators. Above all, the report's major theme was that consumers lack power in their dealings with lawyers as they generally do not shop around, cannot find information about the quality of different providers, approach lawyers with trepidation and lack the confidence to complain. There was also a social divide: consumers in lower socio-economic groups had less market power, were less trusting of lawyers and were more likely to feel they had got poor value for money.
15. This picture of consumer power is in sharp contrast to trends in other sectors, e.g. levels of switching and use of comparison websites. Quite simply, just like medicine a decade ago, the prevailing culture remains one of 'lawyer knows best' and the sector has yet to accept the need for services to be designed around consumer needs or to engage actively with consumers in making decisions that affect their interests.
16. Another part of the context is the difficult economic climate resulting in increased needs in social welfare law alongside major policy initiatives on legal aid and costs reform. Alternative business structures and major changes in the way that regulation is being delivered are starting to bed down. The LSB and its partners have also embarked on major and necessary reform initiatives, e.g. reviews of the scope of regulation and of education and training.
17. It is this unique and complex context that the Triennial Review needs to take account of: the regulation of legal services remains necessary to protect consumers and others whose lives are impacted by the work of lawyers. Any review should recognise that significantly more work needs to be done before consumers will be able to fully enjoy the benefits of the Legal Services Act. This is a period when the market is in flux and major reform projects are underway. It is the wrong time for the Triennial Review to

recommend large institutional change. It is for a future review to question whether the regulatory architecture needs to be updated to reflect the changed market.

The effectiveness of the Legal Services Consumer Panel

18. One of the LSB's statutory functions is to appoint a Consumer Panel to represent the interests of consumers, so for this reason we fall within scope of this Triennial Review. The Ministry of Justice is aware of the separate review being conducted by the Department for Business, Innovation and Skills (BIS) on the future consumer advocacy landscape, which is due to report shortly. The BIS 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 Panel made a full response to the BIS consultation on this proposal and we summarise many of these points below.

About us

19. Our role is to provide independent advice to the LSB 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. We represent all consumers who lack buying power in their dealings with lawyers, including small business and small charities as well as individuals. The Panel membership must include people who use lawyers in connection with a business.

We are committed to focusing on consumer vulnerability and this is a constant thread across our work programme.

20. We are a policy advisory body. We are not able to provide advice to individual consumers or to intervene in individual cases. Our remit is confined to the LSB's jurisdiction, which includes the unregulated market. We are not able to comment on the administration of the courts or the scope of legal aid funding. Our operational budget for the year ending March 2011 was £48,000. This should be seen in context of the £25 billion consumer spending on legal services annually.
21. A major element of our work programme consists of providing advice to the LSB about their developing policies. Significantly, we are uniquely placed to carry out much 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 may respond to consultations by the approved regulators. In addition, we initiate our own projects based on evidence of consumer detriment.
22. 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. This external, diverse and consumer-led perspective is invaluable in helping the LSB to draw learning from other sectors that

face, or have successfully dealt with, similar challenges. The Panel is supported by a small secretariat from the LSB staff team.

Early impact of our work

23. The Panel started on 1 November 2009. Our overriding purpose is the goal of improving outcomes for consumers of legal services. In our short history we are proud to have made a difference for consumers in some key areas, such as:
- The boards of approved regulators must have a lay majority;
 - Solicitors have a duty in their new code of conduct to treat clients fairly;
 - The LSB's first-tier complaints handling rule, in particular the requirement for lawyers to notify consumers at the point of engagement about their right of access to the Legal Ombudsman;
 - The Legal Ombudsman's decision to publish the names of law firms subject to formal ombudsman decisions and other situations in the public interest;
 - The Consumer Impact Report was the first major assessment of the impact of the legal services reforms on consumers using a basket of indicators approach;
 - Our report on will-writing led the LSB to immediately begin a statutory investigation extended to probate and estate administration – the first step towards making these reserved activities; and
 - Our latest report on voluntary quality schemes is already having an impact, e.g. the Law Society is introducing lay consumer involvement in governance

arrangements and requiring members to be periodically reaccredited.

24. In addition, policy change is rarely achieved quickly so there are further impacts that we have still yet to see.

The benefits of embedded panels

25. Here we comment on the BIS proposals. 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 Panel's functions to Citizens Advice problematic.
26. Our location within the LSB allows us 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.
27. 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 to legal services regulation issues since the Legal Services Act was passed.

28. 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 essential statutory responsibilities, for example we are a mandatory consultee for certain processes and we have powers to trigger investigations in certain areas.
29. The Panel admires the advice and policy work of Citizens Advice including in areas of legal policy such as legal aid. However, there would be a conflict of interest should Citizens Advice advise the LSB since it is a representative body for Citizens Advice Bureaux, which are major providers of legal services. A current live issue illustrates this point. The LSB is soon to consult on how non-commercial bodies such as bureaux should be regulated in future. The consumer interest might require tougher regulation of bureaux, such as bringing them within the Legal Ombudsman's scope. It would be impossible for Citizens Advice to represent the interests of consumers to the LSB when it itself is a provider, regulated under a framework which is ultimately designed by the LSB.

Regulated Industries Unit

30. One proposal under consideration is to create a Regulated Industries Unit located in Citizens Advice or elsewhere. This is envisaged to cover economic regulation issues. The Panel operates in the professional services sphere yet the sorts of consumer issues involved in economic regulation are very different. These markets are highly complex and deal with issues, such as infrastructure projects, networks and competition policy, which are not present in the legal services market. The type of analysis and technical skill-set required to engage on these issues differs from those necessary in the legal sector. The synergies between energy, water, transport and other economic regulation markets do not hold true for legal services.
31. There is arguably greater similarity between the Panel and the Financial Services Authority as both deal with professional services issues, although on a very different scale. We note that the proposed legislation in this area will retain a consumer panel within the new regulatory structure.

Issues raised in the workshops

32. The Panel wishes to briefly comment on two issues raised during the stakeholder workshops: our statutory footing; and the Panel's role and visibility around consumer engagement.

Statutory basis

33. We consider it crucial to maintain the Panel on a statutory footing. The statutory footing is what best preserves our independence. It means that we can represent the interests

of consumers without fear or favour. In the absence of this, the LSB could in theory terminate a consumer panel at any time or restrict its resources, and this would naturally impact on the Panel's positioning on specific issues, especially if it wished to be critical of the LSB. The statutory basis also reflects the intended standing of the consumer interest in the reforms and recognises that individual consumers cannot mobilise to represent their own interests as lawyers can through their professional associations. With a statutory basis also come statutory powers and responsibilities, which the Act carefully designed to ensure a strong voice for consumers in implementing the reforms. Removing the Panel's statutory basis would significantly unbalance the scales.

34. The value of our statutory independence is often hidden as we influence the LSB's thinking before it is ready to test this with stakeholders. However, we have had some public disagreements, such as our differing positions on the Solicitors Regulation Authority's (SRA) separate business rule. Our statutory basis gives us added confidence to voice our dissent. We also consider that our early influencing role has pushed the LSB to go further than it might otherwise have done, e.g. in accepting the need for lay majorities on regulatory boards and the scope of the first-tier complaints-handling rule.

Consumer engagement

35. The approved regulators' performance on consumer engagement is weak – in the current financial year, only the SRA has commissioned consumer research. This

reflects the transition these organisations are making from professional bodies to regulators, but it may also be a reflection of the lack of interest traditionally displayed by lawyers in engaging with their clients.

36. The workshops raised some interesting issues in relation to consumer engagement in terms of the role and visibility of the Panel and that of the approved regulators. We see consumer engagement as offering many benefits: as a tool to help spot emerging issues, by improving the quality of decision-making through learning from the ideas and insight that consumers contribute, and by enabling a proper balance between consumer and producer interests. There are some genuine challenges for the sector, not least for smaller regulators with limited resources, but consumer engagement is an essential part of being a credible regulator.
37. One interpretation of comments made at the workshops was that the Panel should do consumer engagement for them. The Panel's statutory role is to advise the LSB; we do not have the resources to provide advice to the other bodies, although we respond to consultations when we can as we recognise that we will often be the only consumer contributor. Furthermore, it would be a grave mistake for the approved regulators to displace their responsibility for engaging with consumers to us. It is they who make policy decisions that impact on consumers, so it is vital they have a real understanding of consumer attitudes and behaviour; this will often require them to have a direct dialogue with the public.

38. The Panel does have a legitimate role to facilitate better consumer engagement among the approved regulators. In August 2010 we held a workshop on this issue, which has led to some of the approved regulators developing plans for an online public engagement tool. We have also worked jointly in commissioning research, for example with the SRA on will-writing and deaf and hard of hearing consumers, and with the Legal Ombudsman on publishing complaint decisions. We are keen and committed to collaborate further with the approved regulators in this area, and in doing so increase our visibility, but this must be in an enabling role.

The Legal Services Board

39. The Panel considers that the LSB should be retained in its current form. We have already highlighted the continued need for regulation of legal services. At a time when the market and its regulation is in flux, the LSB acts as a vital lynchpin, for example by monitoring market developments, providing the evidence base to support change and brigading a wide range of actors to move forward on a common agenda.
40. As discussed above, although the LSB has implemented the three major planks of the Act – rules on regulatory independence, creating the Legal Ombudsman and introducing the framework to support alternative business structures – more work remains before these can be judged as a success. Moreover, the Panel's Consumer Impact Report has revealed there are wider challenges to address, such as around diversity and empowering consumers. Indeed, as the LSB enters its next phase, we would like to see an increased focus on

the big policy issues. However, the LSB has limited resources and the extent to which it is able to shift its focus largely depends on the extent to which the approved regulators prove able to succeed with less oversight.

41. The LSB's commitment to evidence-based policy making has also been valuable. This has been necessary to build the case for change in individual areas, e.g. will-writing, but more generally it has also served as an exemplar to the approved regulators.
42. In the workshops some stakeholders criticised the LSB for micro-managing; this has also been a theme of some public comments. We would reject this criticism and argue instead that the LSB has been restrained in the reach of its activities and, in some instances, in its response to the failings of the approved regulators to implement changes and work together successfully. An example is the LSB's regulatory independence rules. At the outset the LSB made clear that its level of intervention would depend on how the approved regulators went about ensuring independent regulation in practice. That the LSB has invested significant resource in monitoring compliance is a reflection of the inability of some representative arms of the approved regulators to accept the principle of independent regulation. Moreover, the Act has impeded the LSB in making quicker progress due to the onerous consultation requirements that it must undergo before sanctioning the approved regulators. A case in point is that the SRA's board will not have a lay majority until 2013 – six years after the Legal Services Act was passed.
43. There are legitimate questions as to whether the oversight model of regulation

offers the best solution for the market. However, this is not the appropriate time to overhaul the model of regulation in the sector. The alternative business structure reforms have only just been put in place and we need to see how the market re-shapes before making decisions about the most appropriate form of regulatory supervision to place on top. Secondly, two major reviews – on the scope of regulation and the education and training of lawyers – will also influence the optimum regulatory architecture for the future. Thirdly, the approved regulators are also undergoing a major transformation from trade associations to independent modern regulators; they need time to implement these changes and prove their ability to regulate effectively before removal of an oversight regulator is countenanced.

44. Nevertheless, it is appropriate for the Ministry of Justice to have one eye on the next triennial review, when more radical options, including a single direct regulator for the entire profession can be more seriously considered. The following factors will also be more relevant at the time of the next Review:

- The fusion of the different arms of the legal profession, which can be expected to increase further in a more keenly competitive market place and following the education and training review;
- The outcomes of the scope of regulation review, including which legal activities are brought within scope and the shift away from regulation of the individual to that focused on entities and activities;

- The ability of the approved regulators to work successfully together on issues that cut across the individual branches of the profession – Quality Assurance Scheme for Advocates and the education and training review being good litmus tests;
- Whether the approved regulators truly separate regulation and representation;
- Experience of regulatory competition;
- The ability of the smaller approved regulators to respond to the challenges identified by the Smedley Review; and
- Issues around cost and complexity.

The Office for Legal Complaints

45. The OLC should also be retained in its current form. The Legal Ombudsman only started work in October 2010 and it is too early to make a reasoned assessment about its individual functions or operations.
46. Clearly, it performs a vital role in offering consumers a means of redress. As well as compensating people when they suffer harm due to the actions of a lawyer, the prospect of redress acts as a deterrent against poor practice and provides a more level playing field in the market as a whole. Indeed, the Panel's policy is that all legal services providers should be brought within the Legal Ombudsman's jurisdiction – such matters go beyond the scope of the triennial review. We hope the Ministry of Justice will support efforts to bring additional activities within the Legal Ombudsman's remit.

47. Ombudsman schemes have twin roles: to resolve disputes and help raise standards in their industry sectors by feeding back the intelligence from complaints. The OLC's draft forward strategy and business plan promises a greater focus on this second role and contains some welcome specific ideas, such as thematic reports, data mining and seminars. The Panel has said that we would like the organisation to bring these ideas together into a clearly defined and coherent strategy with timescales.

48. As with the LSB, the Ministry of Justice should have one eye on the next triennial review at which time it may become more appropriate to consider alternative delivery options. In particular, the draft EU Directive on alternative dispute resolution presents an opportunity for the UK to ensure more joined-up consumer redress to reflect the trend towards converged delivery of services across business sectors. Consumers are increasingly purchasing services in one-stop shops, but redress schemes remain delivered in regulatory silos. Alternative business structures put legal services in the vanguard of these developments, so there is an opportunity for the sector to take a leadership role. Delivery options are various, ranging from use of IT solutions to create a single portal for consumers through to the full-scale merger of ombudsman schemes.

March 2012