

Sent by email only to s.mayson@ucl.ac.uk

20 December 2019



Dear Stephen,

Independent Review of Legal Services Regulation; Findings, Propositions and Consultation.

The Legal Services Consumer Panel (the Panel) welcomes the opportunity to comment on the Independent Review of Legal Services Regulation (Interim Report).

The Panel has considered the findings, propositions and consequential questions outlined in the paper, and we believe these are the pertinent issues that need to be addressed as soon as practicable. The Panel is already on record as highlighting fundamental flaws in the regulatory architecture, as well as the direction of travel for the next chapter. For example, we have highlighted our preference for regulation based on activity rather than title. And we have set out the success criteria that we would like to see inform the design principles of a new regime, indicating that our lead candidate for a future regulatory model is a single regulator for the legal services market.¹

Our focus in this response is to offer broad support for the direction of travel, and to raise questions for consideration, and reflection.

General reflections

Title and authorisation

The Panel agrees with the proposition that professional title should no longer be the only route to personal authorisation, even for high risk activities.

With regard to who should set the minimum standards for delivering authorised legal services, we are of the strong opinion that this is a regulatory function that cannot be delegated to professional bodies, whose primary objective is to represent the interests of the profession. Regulators, on the other hand, are obliged to regulate in the interest of consumers, while balancing other interests and objectives. Minimum standards for authorisation should therefore be set by the regulator. It also stands to reason that the regulator who has set the minimum standards should be charged with supervision and enforcement, and should be given the authority to remove authorisation if standards fall short of the requirements set.

¹ 2020 Legal Services: how Regulators should prepare for the future, LSCP, November 2014.

Scope of Regulation.

The Panel agrees with the finding that the current regulatory framework is overly complicated. We know that this exacerbates information asymmetry and contributes to higher confusion and cost for consumers, who ultimately pay for regulation. We see the merit in categorising activities into high, medium and low risk. However, one of the challenges of this form of categorisation is that it assumes that risks are static rather than dynamic. Cases that may be presented as being single issue can quickly become more complex. We would like to see the final report take account of this.

The Panel agrees with the proposition that all providers of legal services could be within the scope of regulation to varying degrees. The Panel agrees that the model of using 'before, during and after the event' regulation to reflect the significance of the activity - or indeed circumstance-can lead to improved and targeted consumer protection.

The Panel further agrees that any new framework should be future proof, so far as possible. We therefore support the proposal to ensure that application of new and developing technology to legal services is captured within the ambit of regulation. Regulation must be flexible and agile enough to respond to the needs of consumers, as well as to other aspects of a developing and changing market.

Regulatory Objectives

The Panel supports the tightening of the regulatory objectives. We recognise the risks and failings of the current multiple objectives and confusion over responsibility (for example, the current objective around public understanding of legal rights and responsibilities). It is our view that the sector needs a much clearer and more simplified set of objectives.

Legal Ombudsman's role

The consumer's ability to access redress depends on who they buy their legal services from, rather than the type of legal service they are buying. Should a consumer go to a regulated lawyer, such as a solicitor or barrister, the Legal Ombudsman is the avenue for redress for the various types of legal services they provide. However, to most people's surprise, there are in fact only a small number of legal activities which only regulated lawyers are permitted to provide, so that the same service could easily be bought from someone not covered by the Legal Ombudsman.

Giving the public general legal advice about fighting for custody of their children, claiming against an employer for unfair dismissal or carrying out some specific activities, such as making a will or preparing a power of attorney, can all be done by both regulated and unregulated providers leaving the unsuspecting consumer with no clear recourse to redress (if they choose the latter). We therefore agree that there needs to be an expansion of the Legal Ombudsman role, preferably covering all legal services, both regulated and unregulated. We also agree that the Legal Ombudsman should be

empowered to start investigations on its own initiative, particularly when the intelligence it gathers highlights systemic problems.

We are, however, concerned about the suggestion that the Legal Ombudsman should be permitted to investigate complaints about consumers initiated by providers. This suggestion is likely to lead to considerable undesirable consequences, some of which we can predict:

- Firstly, it will send the wrong message to consumers and the public about who the system is intended to protect, and it will erode trust and confidence in the sector.
- Secondly, we know from our tracker survey research that in legal services a high number of dissatisfied consumers do not complain (37%). Enabling providers to complain about consumers may further dissuade consumers from complaining, if they rightly or wrongly believe that this could lead to a counter complaint by the provider.
- Thirdly, consumers may feel bullied into accepting settlement offers that could be unfair for fear of a counter complaint.
- Fourthly, this suggestion completely disregards the power disparity between consumers and providers and gives providers even more power.
- Fifthly, while we accept that there may be vexatious consumers, most businesses build this into their approach to risk management and should have internal processes to deal with this.

Consumer voice

The Panel would like to see the final report highlight the importance of consumer engagement in ensuring that regulation delivers good consumer outcomes, including the supporting framework for this to happen.

The Competition and Markets Authority's assessment of the sector in 2016 confirmed that regulators have been slow to get to grip with issues around empowering consumers. This year's Tracker Survey² shows that 10 years on from the start of the current regulatory set-up:

- Consumers are shopping around more than they did, but overall the figure remains low with just over one in four actively comparing.
- 37% of consumers do nothing when dissatisfied with the service they receive.
- Public trust in lawyers is not improving.

The Panel believes there needs to be a clear duty on regulators to inform, consult and involve consumers in setting and applying their regulatory objectives. This goes to the heart of recognising the need to understand your customer, moving beyond traditional

² Tracker Survey 2019, LSCP.

consultation processes that can reinforce the 'professional knows best' mantra and moving to consumers as participants and not observers. Meaningful consumer engagement can never be an optional extra in a properly working market, and as with regulation, it should be outcome focused.

Alongside a robust duty to engage with consumers, there should be a consumer representation body independent of the regulator, and safeguards should be put in place to protect its independence. The consumer representation body should also be independent of providers.

Effective consumer engagement requires budget and resources: the consumer representation body should have a dedicated budget and be sufficiently funded to deliver its outcomes. The legal sector is well-resourced and strongly positioned to put its case to the regulator, so a dedicated and equipped consumer voice is needed to provide the consumer counterweight.

The consumer representation body should support the regulator to build consultation, involvement and informing of consumers into its own working practices. Its role is not to carry out consumer engagement on behalf of the regulator; the regulatory responsibility to engage consumers cannot be outsourced or delegated to the consumer representation body.

The Panel would like to congratulate you on a well-considered interim report, which has clearly been undertaken with extensive stakeholder engagement. We look forward to the final report.

Yours sincerely,

A handwritten signature in cursive script that reads "S Chambers".

Sarah Chambers

Chair

Legal Services Consumer Panel