

Approaches to quality

A consultation paper

Views on our approach are welcomed by Friday 1 June 2012

This consultation paper will be of particular interest to:

Approved regulators

Regulators of non-reserved legal services and associated services

Legal representative bodies

Other professional and trade bodies

Legal advisory organisations

Legal Voluntary Quality Scheme operators

Members of legal professions

Law schools/universities

Legal and regulatory academics

Government departments

NDPB's

Legal Services Consumer Panel

Third sector organisations (representing the interests of consumers or providers of legal services)

Other consumer groups

Legal Ombudsman

Professional Indemnity Insurance providers

Legal comparison website operators

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Chairman's foreword

In November 2010 the Legal Services Consumer Panel advised my Board about the understanding by consumers of what constitutes quality. Their finding was that consumers had expectations about the safeguards that regulation should provide in practice, but arguably the safeguards they thought were there did not exist.

Since then, the LSB has talked to legal academics and those experienced in dealing with similar regulatory issues in other sectors, as well as the regulators themselves. This exercise was not about new evidence about the quality of legal services, but to review existing and emerging research, and creating a methodology to underpin a proposed approach to quality.

Assessing risk and appropriate targeted responses in particular areas of the legal services market is of course ultimately the task of the front line regulators. As oversight regulator, our aim is to support them in this task, and to deliver frameworks or guidance for consistency and coherency across the whole market.

In determining an appropriate regulatory response to quality standards, we suggest that the regulators take account of the nature of the legal service being provided and the different types of consumers in the different areas of the legal services market. For example, some parts of the market, such as corporate and commercial firms, serve sophisticated repeat clients who have knowledge and resources to satisfy themselves about quality (and the means to deal with if the quality is not to an appropriate standard). In many other areas of the market, the nature of the services being provided means that consumers have much lower levels of knowledge about legal services, leaving them less well placed to make judgements about quality.

This means that the approach taken to quality will vary depending upon the nature of the service provided, the profile of the consumers, and the potential consequences of receiving a poor quality service. In this Consultation Paper "*Approaches to quality*", we describe a range of regulatory interventions to address quality risks. We believe that these regulatory tools can deliver the right consumer outcomes, either across the board, or, as targeted responses in specific areas of risk. Together they form a toolkit with a clear focus on ensuring quality of the workforce and quality in the advice and service to consumers.

The LSB has an important role to make sure that legal services regulation is strong, fair and effective. It cannot do this in an evolving market unless it is also both targeted and agile. Taking a 'less prescriptive, more incentive' stance, the proposed approach will yield positive benefits for consumers.

David Edmonds

Executive summary

1. The Legal Services Board (LSB) shares regulatory objectives with the regulators, including to encourage an independent, strong, diverse and effective legal profession, and to protect and promote the public interest and the interests of consumers. It is for each regulator to assure quality standards and effective legal services through its own regulatory arrangements. It is reasonable to expect that this will be achieved through a bespoke risk-based approach, tailored to their respective regulated cohort, but constrained within the bounds of the regulatory frameworks. The LSB will oversee this process, rather than assuring every potential regulatory issue itself.
2. The legal services market in England and Wales is in a state of evolution; consumerism, technology, globalisation and the broader social change within our society are all factors in driving the change. New regulatory challenges will continue to emerge. Innovation and opportunism may lead to legal services which pose unknown quality risks, especially if those services lie outside of the current regulatory frameworks. The test for the regulators now is to identify appropriate mechanisms to quality assure the individuals and entities, and thereby quality assure the services and activities delivered to the public, across the widening and diverse span of legal service provision.
3. A commonly accepted and understood concept of quality in legal services is however not easy to define. Best described as multi-faceted, there appear to be three dimensions which may exhibit potential for risk to consumers of legal services: technical competence, service competence (client care), and utility of advice (a service of quality). The magnitude of any such risk, and consumer willingness to accept risk (or expect its mitigation), will differ depending on the individual consumer and their history of use of legal services and on the legal activity required by the matter(s) at hand. Regulation within this fluid yet dynamic market therefore needs to be sufficiently flexible to accommodate this range of need whilst protecting the public interest.
4. This Consultation Paper provides an overview of quality risks within legal services, and suggests existing or alternate regulatory interventions which might be usefully deployed to better assure quality, summarised in the following table. The overriding approach is to achieve proportionality; to reduce regulatory intervention where possible to remove unnecessary barriers to delivering the regulatory objectives, but to act where necessary to support consumer and / or public interest outcomes. The aim is to move to liberalised and agile regulation rather than standardisation.

Examples of quality risks and suggested regulatory interventions

Quality risk mitigation	Regulatory interventions
Demonstrating basic / initial skills and knowledge necessary to be fit to practise	Entry and authorisation requirements
Demonstrating contemporary knowledge and awareness of practice	Outcomes focused / assessed CPD / authorisation
Demonstrating contemporary competency and ability to practice	Accreditation schemes / minimum competency assurance
Assured quality or competency of defined aspects of service provision	Evidenced / accredited quality marks
Identifying patterns or pockets of practice at the two extremes of the normal distribution curve; targeted regulation	Trend data e.g. complaints, market outcome data
Removing sub-standard competency or behaviours not acceptable for public protection	Fitness to practise investigation and sanctions at individual and firm level
Informing professional development, standards and ethics	Closing the virtuous circle – feeding the learning from outcomes in to standards and training
Matching the consumer and their needs to the right legal service and the right legal service provider	Comparison websites and consumer 'help' or choice support information
Targeted regulation; informing professional development, standards and ethics	Risk profiling / predictive characteristics of high risk practice (failing or innovative practice)
Quality assurance and service development triggers, co-regulation	Consumer satisfaction feedback / consumer co-regulation
Targeted regulation, earned recognition / self-regulation	Oxera framework to segment market for customer feedback / develop a trusted source of comparative data for targeted intervention

Introduction

5. The legal services market in England and Wales is in a state of evolution; regulation, consumerism, technology and the broader social change within our society are all factors in driving the change. The public deserve to be given the certainty they need that the building blocks are in place to assure the skills of the legal workforce of the future and that the legal services market is going to meet the changing demands of justice in an increasingly demanding future.
6. The spectrum of legal services is widening, both in the way they are reaching across international boundaries, and in the increasing delivery in partnership with other professional services. Business models are becoming more diverse at a time when regulation is to be less burdensome. Regulatory interventions therefore need to be proportionate and better targeted whilst providing high levels of assurance. Not only assurance about the technical competency of the workforce, but also of the services they provide with well-serviced legal advice that is useful to the consumer.
7. This in itself may require a fundamental shift by regulators, since assurance of technical competency has historically, and continues to be, focused upon educational attainment and requirements for entry and retention within the profession. Whilst these might be held out as protecting quality, it is difficult to accept that they serve as proxy indicators for all aspects of quality assurance such as demonstrating continued competency. A continued focus upon barriers to entry, and indeed the scale of barrier this presents, hinders competition in the legal services market. Nor does it afford the agility necessitated of professional regulation in an evolving market where traditional descriptors such as number of partners are becoming out-dated and need to be swiftly replaced by more appropriate descriptors, for example through market segmentation describing the type of legal activity and type of consumer.
8. Similarly, the workforce within the legal services market needs to react as flexibly as possible within the constraints of the regulatory framework, whilst maintaining and improving consumer protections. Simultaneously, the regulators need to shift to outcomes-focused regulation, utilising the full panoply of regulatory interventions with better risk management and enforcement within a globalised market. However, this is not at the expense of their specific duty to ensure the workforce has the right skills and knowledge, including the capacity to constantly update and demonstrate competency in those skills and knowledge.
9. The more consumers are able to choose and use legal services with confidence, the less that prescriptive and restrictive regulation is required and the more the regulatory objectives are secured.
10. The LSB's intended approach to regulation for quality is to ensure that it is proportionate; reduced where possible to remove unnecessary barriers to delivering the regulatory objectives, and only imposed where necessary to support consumer and / or public interest outcomes.

11. However, there is not a 'one size fits all' approach to securing appropriate quality of legal services. Different consumers want, and need, different levels of quality in different circumstances and the most appropriate regulatory intervention will vary from case to case.
12. This consultation paper seeks to describe some of the different levels and characteristics of quality, and the regulatory interventions which might be or are used to both incentivise their acquisition and assure their maintenance. The aim is to identify not only the most proportionate and effective regulatory interventions, but also their appropriate and timely deployment.
13. In moving away from a standardised approach or mandating specific regulatory interventions this paper seeks to determine how liberalised or agile regulation might be. Likened to a toolkit, the crux of the proposed approach is to seek to assess which outcomes-focused interventions (tools) should be in the toolbox and justify why, and risk assess their application.
14. The vision contained within the paper is based on our expectation that a liberalised legal services market plus appropriate regulation is most likely to deliver the regulatory objectives. Oversight regulation will therefore seek both to encourage competition while ensuring that regulation reacts and develops to protect against emerging risks.

Understanding quality risks in the legal services market

15. In their report¹ "*Quality in Legal Services*" the Legal Services Consumer Panel advised that the quality of legal advice needs to be better understood and monitored.
16. Quality in legal services has previously been described as multi-faceted². The three most common dimensions with potential for risk are:
 - a. Technical competence
 - b. Service competence – client care, and
 - c. Utility of advice - a service of quality

However, legal service providers and legal service consumers may place emphasis on only one of these dimensions rather than associate all three collectively. Providers may focus upon technical competence, whilst consumers focus upon the quality or usefulness (utility) of the service. This asymmetry is observed elsewhere in the relationship, such as the information asymmetry between providers and consumers whereby the providers' knowledge and expertise potentially puts the consumer at a disadvantage in selecting services.

¹ Quality in Legal Services. Legal Services Consumer Panel. November 2010

² Mayson S Civil legal aid: squaring the (vicious) circle. Legal Services Institute. September 2010

17. A commonly accepted and understood concept of quality in legal services is therefore not easy to define. Some legal services providers will undoubtedly build a legitimate reputation as delivering high quality services to consumers. Market forces and competition will serve to strengthen this reputation further as the providers strive to maintain or improve that quality and their position in the market place. Consumers who are frequent users of legal services will similarly strengthen their views on the providers' service quality subsequently demonstrated through repeat business with a provider.
18. Conversely, other providers may seek to influence consumer choice, for example through associating high price with high quality. Outside of the legal services sector research³ has shown input cost to be to some extent a valid proxy for quality where prices are set other than through normal market mechanisms, but that this is otherwise at best ambiguous where prices vary. In the private market of the legal services sector, prices are set via normal market indicators, but indicators of quality remain somewhat opaque. Equally, it has been argued that where the public interest is concerned, the mitigation for poor quality will not be achieved simply as a result of economic competition within the market.
19. Decker and Yarrow⁴ highlighted the need to maintain a standard of quality of service as perhaps the most compelling reason for regulation of legal services. The importance of legal services to individual consumers and more broadly the public interest in confidence in the law and the legal processes makes such a consideration central to any change in regulation.
20. It is therefore essential to know whether future changes introduced by this proposed approach to quality deliver the types of outcomes that consumers actually want. The LSB commissioned Opinion Leader to carry out research⁵ to explore what consumers really want when they engage with legal services. This research has produced a series of "consumer outcomes" that help us understand the types of behaviours that we would expect to see if the market was competitive and focused on delivering a quality service for consumers.
21. Opinion Leader describes seven consumer outcomes which, in essence, are broad principles of quality service delivery: transparency, communication (initial choice and active ongoing engagement), professionalism and integrity (good quality advice), timeliness, an alignment with the consumer's best interests (utility), and fair and efficient complaint handling. Unsurprisingly, this would appear to indicate that consumers are more focused upon good customer services than they are on the detail of regulation. A tacit assumption pervades that their interests are protected by regulation and that this is therefore not their prime concern.

³ Cooper, Gibbons, Jones & McGuire Does hospital competition save lives? Evidence from the recent English NHS choice reforms. London School of Economics December 2009

⁴ Decker & Yarrow. Understanding the economic rationale for legal services regulation. Regulatory Policy Institute October 2010.

⁵ Opinion Leader Legal Services Board: Developing measures of consumer outcomes for legal services. A report of research carried out by Opinion Leader. March 2011 (http://www.legalservicesboard.org.uk/news_publications/latest_news/pdf/consumer_outcomes_final_research_report.pdf)

22. The magnitude and type of quality risks to the individual consumer become apparent within an overview of some of the published information⁶ on the quality of legal advice (produced to assist LSB round table discussions). The overview highlights that consumers believe they are more able to judge service quality (attributing good service to personable factors) than technical ability. The latter rather rests on a presumption of sufficient qualifications to practice and a tacit belief that there is little variation of technical expertise between providers.
23. A further review⁷ of published material (again produced to assist LSB roundtable discussions) similarly illustrates an inability of consumers of other (non-law) regulated professions to assess the technical ability, quality of the service, or advice utility they receive. Professional regulators of these cohorts deploy a variety of regulatory interventions to protect the public interest, some of which address quality risks, but consumers appear to be unaware of many of these.
24. The risks identified also resonate with those described within the theories of consumer harm elsewhere⁸:
- a. **Consumers have a limited choice** - they are disadvantaged by virtue of area of residence, employment status, or previous legal history. This limited choice can inflate margins on the range of services available to these consumers, resulting in further limitation due to lack of affordability.
 - b. **Consumers perceive they have limited choice** - lack of awareness of alternative options and lack of understanding of available options can mean consumers struggle to compare the quality of services or compare and contrast between service providers, or, they are risk averse and prefer to stay with a known provider. This lack of substitution can lessen competitive pressures between providers.
 - c. **Providers do not compete effectively** - a lack of competitive pressure does not force the least efficient providers to become more efficient or otherwise exit the market. This lack of competition can result in barriers to entry, expansion or diversification within the market and directly affect the elasticity of supply and hence price of legal services.
25. In an attempt to provide a practical approach of easily observable characteristics to capture differences across the legal services sector, the LSB commissioned a study⁹ to develop an outline framework based on segmenting parts of the supply of legal services that exhibit similar features. The segments are defined by the type of consumer problem, the services offered and the sophistication of the consumers served, rather than traditional supplier-focused measures such as number of partners and turnover.

⁶ Quality in legal services: a literature review. Legal Services Board November 2011 (http://www.legalservicesboard.org.uk/news_publications/latest_news/pdf/quality_of_the_legal_profession.pdf)

⁷ Quality in other regulated professions. Legal Service Board November 2011 (http://www.legalservicesboard.org.uk/news_publications/latest_news/pdf/quality_in_other_regulated_professions.pdf)

⁸ Theories of harm and consumer detriment. Office of Fair Trading. April 2010

⁹ A framework to monitor the legal services sector. Oxera Consulting, prepared for the Legal Services Board. September 2011

26. This framework has subsequently been tested in benchmarking one sector of the legal services market – city firms. The associated report¹⁰ has begun to provide a clearer understanding of the potential quality risks; the consumers of this sector, often corporate bodies with an in-house legal department, and who are repeat purchasers, have a greater capacity to use knowledge and buying power to make informed decisions and therefore the firms are likely to pose relatively fewer regulatory risks. Although some personal consumers were found to access services from this sector, they were described as having significant wealth with relatively complex personal situations. Consequently these too were categorised as sophisticated consumers.
27. However, what is not clear from this benchmarking exercise are the risks which might be anticipated with a less sophisticated, infrequent or vulnerable personal consumer. It is believed that this cohort of ‘natural persons’ are exposed to a greater potential for market failure i.e. poor quality legal service, and therefore need greater consumer protection. This hypothesis requires further testing in the high street sector, and we are collaborating with the Law Society and Ministry of Justice to undertake research with solicitors’ firms during 2012. Whilst informed in part by the LSB Regulatory Information Review¹¹, a finer granularity of understanding is required to identify which groupings of individual consumers are placed at most risk by which types of legal activities.
28. This latter consumer segment may also utilise legal services provided by non-commercial bodies (with non-lawyer owners and/or managers). Often located within the not-for-profit sector, the consumers are typically those from disadvantaged or socially excluded groups with a very wide range of problems, often without the ability to pay for the legal service they need¹². At the current time, regulation extends only to the individual authorised persons working within such organisations and is therefore limited in scope. The LSB is currently considering its approach to non-commercial bodies and what regulation of the entity might look like if the transitional protection from regulation for these providers put in place by the 2007 Act is lifted, including consideration of quality risks. However, as with mainstream legal services, there may be wider quality risks in the provision of non-reserved services that will remain outside of the scope of such regulatory interventions.
29. So, in responding to the regulatory objectives¹³ we are seeking to identify the risks which are prejudicial to the substantive delivery of these objectives. In doing so we must guard against unduly affecting competition in the provision of services or the strength and independence of the workforce. There is a difficult, but vital, balance to be struck.

¹⁰ Benchmarking the supply of legal services by city law firms. Charles River Associates, prepared for the Legal Services Board. August 2011

¹¹ Legal Services Board Regulatory Information Review Literature Review Specification December 2010 (http://www.legalservicesboard.org.uk/what_we_do/Research/Publications/pdf/RIR_Literature_Review_workv3.pdf)

¹² Understanding the supply of legal services by ‘special bodies’. Frontier Economics, a report prepared for the Legal Services Board. July 2011

¹³ Legal Services Act 2007 s1(1)

Question 1: In your experience, when consumers do not receive quality legal services, what has usually gone wrong? Where problems exist, are these largely to do with technical incompetence, poor client care, the service proving to be less useful than expected by the client – or something else?

Question 2: Would it be helpful if the regulators approached issues of quality by looking separately at different segments of the legal services market? Which segments do you perceive as being greatest risk to consumers?

Regulating quality risk in the legal services market

30. We share regulatory objectives with the regulators, including to encourage an independent, strong, diverse and effective legal profession, and to protect and promote the public interest and the interest of consumers. However, to deliver these objectives it is not the role of LSB to define, or even assure and accredit, quality standards which tackle every regulatory issue. Rather it is for each regulator to assure quality standards and effective legal services through its regulatory arrangements. It is reasonable to expect that this will be achieved through a bespoke risk-based approach, tailored to their respective regulated cohort, but constrained within the bounds of the regulatory framework and drawing upon a toolkit of interventions.
31. To do so, the regulators need detailed knowledge of their regulated cohort – both individuals and entities. They must be able to quantify the markets they inhabit and be able to describe the impact of any proposed regulatory changes on that market both in terms of professional skills and competencies and the systems needed to underpin their delivery, but, also and above all, in consumer benefits and outcomes. This requires a thorough risk and impact assessment and ultimately a determination of what areas regulators can ignore consciously and leave exclusively to the professional representative bodies.
32. Assessing quality risk and deciding upon appropriate targeted regulation is the task of the regulators. The LSB's role as an oversight regulator is to challenge and support the regulators through them developing a framework or toolkit for assessing or addressing the issues, and to assess the outcomes against delivery of the regulatory objectives.
33. Regulation of the legal workforce has traditionally focused upon requirements for entry of individuals and entities, cyclical retention of a right to practise at generalist and specialist levels (which may equate to no more than payment of a retention fee, rather than proper re-accreditation), and dealing with failings of fitness to practise (FtP). These regulatory activities are defined by entry criteria (or barriers) and professional ethics and standards. Historically, these have then been underpinned through a minimum level of competence set by the regulators. However, this does not test ability at any given moment, rather relying upon a generic and title-based FtP concept. Consequently, a fundamental tension exists between being "fit to practise" in regulatory terms and being "fit for purpose" in terms of a consumer having confidence in who to approach when for a given service.

34. More recently an additional focus has been placed upon the role of continuing professional development (CPD), re-validation and re-accreditation in assuring an individual remains fit for purpose. The gap that continues to remain is whether the individual or service is fit for purpose for the consumer segment(s) it serves and if the entry barriers are targeted at the risks that actually exist in that segment of the market.
35. The legal services market in England and Wales is in a state of evolution; consumerism, technology, globalisation and the broader social change within our society are all factors in driving the change. New regulatory challenges will begin to emerge. Innovation and opportunism may lead to legal services which pose unknown quality risks, especially if those services lie outside of the current regulatory frameworks. Regulation should not stifle innovation or impede growth, but neither can these be allowed to place consumers at greater risk than is acceptable in the particular context. The test for the regulators now is to identify appropriate mechanisms to quality assure the individuals, entities or activities across the widening and diverse span of legal service provision.

Question 3: How can regulators ensure that regulatory action to promote quality outcomes does not hinder (and where possible encourages) innovation?

36. Such changes may necessitate expanding the research evidence base and require a degree of flexibility and agility on the part of the regulators if consumers and the public interest are to continue to be protected. This must also be set within the guiding principles of better regulation and the general duties placed upon all approved regulators¹⁴ described in **Figure 1**:

¹⁴ Legal Services Act 2007 s28(3)

Figure 1 Quality assurance – suggested best regulatory practice

Better regulation principle	Purpose
Proportionate	Reducing the burden, ensuring effective functioning in the market whilst protecting the consumer
Accountable	Cost benefit justification and a robust and compelling case to introduce, achieving the objective at the least cost and with the least coercion and with clear, transparent, time-bound evaluation.
Consistent	Enabling a firm basis for decisions by consumers to choose suppliers confidently and suppliers to invest and innovate with a proper degree of certainty.
Targeted	Remove existing regulation that unnecessarily impedes growth whilst seeking to modernise and improve compliance methods
Transparent	Consulting with those affected and being clear about how effectiveness will be monitored

37. The various reviews of published material and studies referred to in earlier paragraphs demonstrate that different consumers have different starting points for different services. Rather than a broad-brush approach to regulation and the traditional supplier-focused measurements, a targeted approach to quality assurance requires categorisations that are more reflective of these differences. Market segmentation based upon the type of law, type of legal activity and type of consumer addresses this need. When considered together, not only do these characteristics provide a breakdown of the legal services sector, but they also provide a focus upon outcomes.

38. In discussion with regulators and others (spanning legal and non-legal professional practice and regulation) we have identified risks posed to consumers by quality issues in the market, what (if any) evidence base there is for these, how the risks have been described, and appropriately and proportionately addressed through regulatory intervention. Broadly these fall in to three categories;

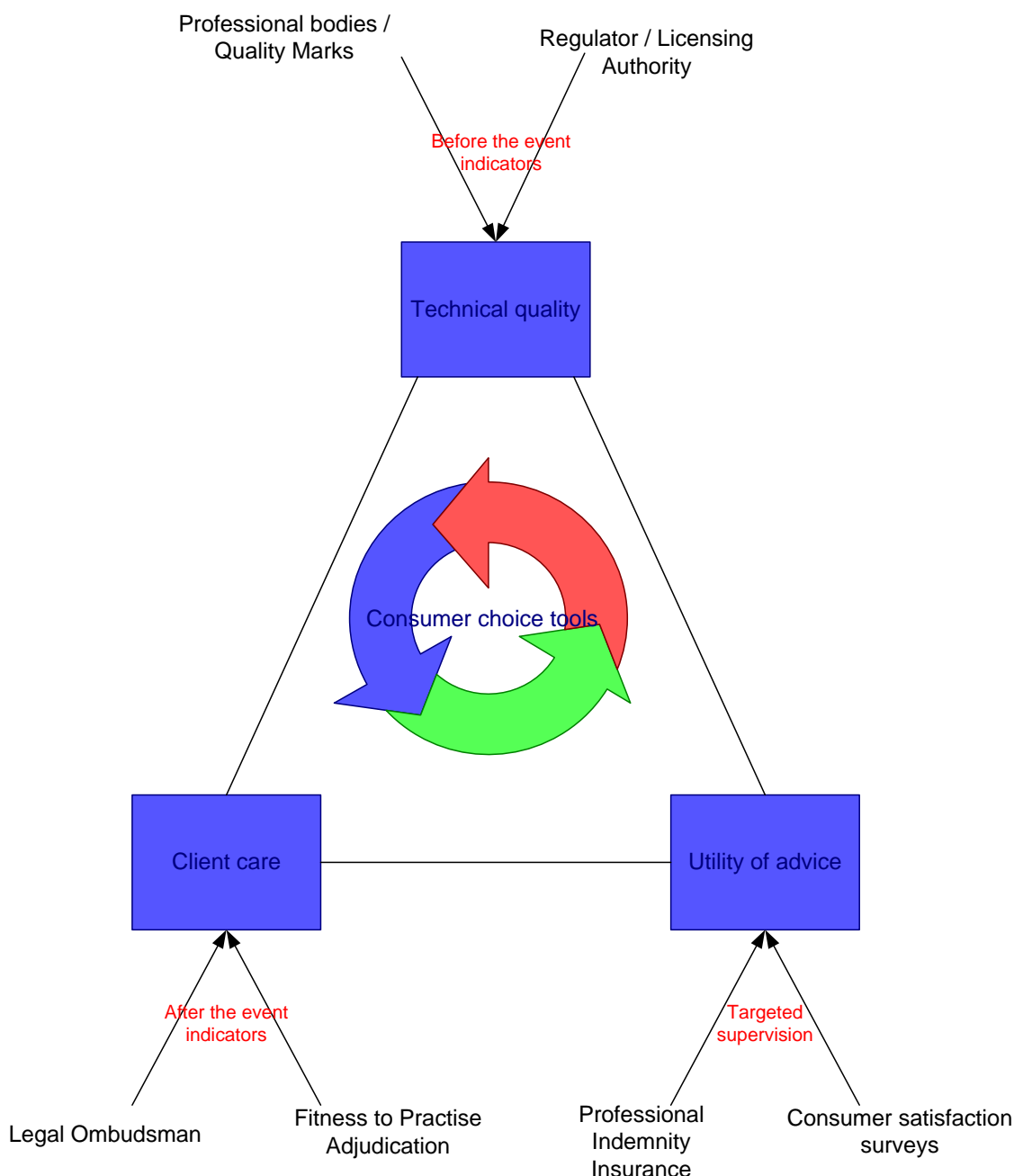
- a. Before the event assurance – entry hurdles, training and accreditation, and assurance of competency
- b. Increased consumer empowerment – transparent / published data and tools to support choice (based upon after the event information)
- c. Targeted supervision – proportionate and risk-based by regulators or on behalf of regulators, but touching all who deliver a legal service (i.e. not reserved to lawyers).

Question 4: What balance between entry controls, on-going risk assessment and targeted supervision is likely to be most effective in tackling the risks to quality that are identified?

Regulatory interventions for quality assurance

39. The inter-relationship between the three dimensions of quality (technical, utility of advice and client care), is illustrated in **Figure 2**. The range of interventions for the reduction, mitigation or removal of quality risks in order to better quality assure the legal services workforce and the legal services it provides will need to touch upon each of these. To do so will require data, efficacy measures and evidence of outcomes either to prioritise future regulatory interventions or, where there is a direct correlation, to target them at known areas of quality risk.

Figure 2 The inter-relationship of technical quality, client care, and utility of advice



40. Whilst the following paragraphs offer an initial outline view of the possible range of interventions, they must also be considered alongside the legal education and training review. If legal services are to effectively serve the consumer, then the legal workforce needs to have the right skills and knowledge, and a capability to constantly update both. Therefore consideration of quality interventions needs to inform the education and training review currently being conducted by the Solicitors Regulation Authority (SRA), the Bar Standards Board (BSB) and ILEX Professional Services (IPS). Changes to the range of interventions may well come about as a result of the review. The LSB will ensure that this debate and the review are properly dove-tailed.

Technical quality

41. Technical quality is believed to be assured through entry criteria, re-certification and progression criteria, and evidence of continual professional development (CPD). However, the former merely serves to provide a form of assurance of fitness to practise through acquisition of a qualification, whilst the latter provides little assurance other than box-ticking, since it is based upon input measures and not outcomes that demonstrate a fitness for purpose.

42. The requirements for qualification have become the only ‘before the event’ quality assurance means utilised by regulators but this does not provide the consumer with sufficient information to judge whether an individual is competent and honest. Historically it was to erect a barrier to entry to protect the legal qualification from competition. But society and the market place have changed, bringing greater consumer demand and expectation, and competition from other non-lawyer providers.

43. It is therefore imperative that the legal education and training review provides proposals to move the current “one size fits all” approach to technical quality to one that is more closely aligned to the changing market, and recognising the variety of legal services provided to the differing consumer segments. Understanding the likely demand for generalist and specialist lawyers and how the regulatory requirements for education and training will fit will be central to the success of the review.

44. Quality marks provided by professional bodies similarly reveal comparatively little about the competency of an individual or a firm, especially if the requirements necessary to achieve a quality mark are not publicised, nor validated. This is confirmed by an assessment of existing voluntary quality schemes undertaken by the Legal Services Consumer Panel (LSCP)¹⁵ that no discernible proof exists (such as spot checks or mystery shopping) that schemes currently deliver on their quality claims. Yet, whilst it appears no more than a stamp of attainment, it can and is required by some sophisticated consumers in their purchase specification, posing the question whether it is the sophisticated consumer or the regulator that is assuring quality standards – and, if so, whether the consumer segment as a whole which accesses such services requires any further regulatory protection.

¹⁵ Voluntary quality schemes in legal services. Legal Services Consumer Panel. November 2011

45. We have considered this matter further in discussion with voluntary quality scheme operators and approved regulators. It is worth recording here that a number of scheme operators acknowledged that the LSCP report has served as a well-timed and well-received prompt to review and amend or develop their schemes, particularly, but not exclusively, in relation to lay input into governance.
46. For quality schemes or marks to become legitimate tools of regulatory intervention for the approved regulators then much hinges upon the rigour of initial assessment and regularity of re-accreditation of the process. But this requires the schemes to become much more explicit about where they are situated on the continuum between identifying competence, specifying good practice and applauding best practice. In this scenario it is inherently unlikely that best practice could apply to more than a minority of players – and arguably a small minority - in any part of the legal services sector. Also, schemes need to focus upon outcomes achieved rather than processes in place, not least to avoid over-investment in systems and to ensure that there is not a chilling effect upon innovation.
47. Both regulators and scheme operators may want to think carefully about what the award of a quality mark is meant to communicate and to whom. In particular, there needs to be differentiation between marks directed at sophisticated purchasers, who may well be able to make judgements based on different levels of accreditation within a scheme, compared to a message to the individual consumer or to the public which needs to be significantly simpler to assimilate.
48. In many ways these considerations are illustrative of the type of shared debate and consideration of some of the other activities and initiatives which are touched upon throughout the remainder of this paper. Often the key is for detailed risk assessment information to be shared between scheme operators (or in the case of other initiatives alternate parties who are primary data sources) and regulators; subject to any relevant data protection issues being resolved. Where professional skills and competence and the associated quality schemes cut across the activities of several regulators, it follows that these too should share data and compare assessments of outcomes derived through the schemes.
49. Consequently, given these requirements, it seems reasonable to suggest that the regulators integrate the risks into their respective regulatory strategies, and assess the necessary corrective action alongside their other regulatory activities. The resulting outcome would demonstrate a technical quality reflective of the recommendations of the legal and education review, the routes to and maintenance of qualification, and the routine demonstration of competence.

50. It will also be for the regulators to seek to demonstrate why particular legal activities do not require regulatory intervention; either because they are not needed or because sufficient mechanisms already exist. Segmenting services and consumers of those services will provide a much more targeted and proportional approach. Sophisticated consumers can assess risk and determine their degree of acceptance of it or requirements for its mitigation. It is unlikely that the individual consumer is able to mirror this. The regulators' interventions could therefore be centred upon these less empowered users.
51. Thus far the focus has been upon the individual practitioner but some regulators also regulate legal entities and others plan to do so. Currently there is no identified or accepted benchmark about what characteristics in a legal services entity make for high quality outcomes for its consumers. There is a difficult balance to strike, made much more challenging by the absence of research evidence, about the quality and systems issues that need to be addressed, and any consequential impact upon for example restricting access or inflating prices. Anecdotal evidence suggests that a number of companies are using branding or marketing techniques to introduce their own quality labels – an initiative which may be expected to grow with the introduction of Alternate Business Structures (ABS). This makes it all the more important to assure minimum standards of governance to assure competence in entities and businesses that are branding their own definitions of quality.
52. As they continue to develop their risk assessment and supervision processes, there may also be opportunity for regulators to introduce a route of 'earned recognition', defined by the Department of Business, Innovation and Skills (BIS)¹⁶ as being where an entity or firm demonstrates an in-house voluntary quality assurance scheme of its own or adherence to a strong external scheme which broadly addresses the issues highlighted in the LSCP report referred to in earlier paragraphs.
53. What will inspire or incentivise entities to develop quality assured technical competencies that might eventually supplant other aspects of regulation? Of course the ability to remove regulatory intervention requires entities to be compliant; where they are not, then a different set of tools may be required depending upon the particular failure and its impact on the regulatory objectives. Incentives to compel improved technical quality of entities may therefore be driven by the very penalties to sanction against poor quality. However this can result in a tendency to meet the minimum requirement to escape sanction. A more positive aspiration or driver is the competitive market, and regulators therefore need to consider how market segmentation and competition might be harnessed to raise the benchmark of entity quality for the benefit of the consumer.

¹⁶ Better Choices: Better Deals – Consumers powering growth. Department for Business Innovation & Skills April 2011

Question 5: Quality can also be affected by external incentives and drivers. Some examples include voluntary schemes (for example the Association of Personal Injury lawyers (APIL) Accreditation), consumer education and competition in the market place. How far do you think these external factors can be effective in tackling the risks to quality that exist? Which external factors do you think are most powerful?

Client care

54. Client care is not proactively quality assured; rather it is a reactive process triggered by consumer complaint or fitness to practise investigation and is therefore an 'after the event' indicator. However, the outcomes of these events may be critical learning episodes and either in isolation or collectively point to a failing in educational or professional standards determined by the regulator.
55. Since matters of client care may be directed via various complaints handling routes, including at the first stage to the provider firm, then, to identify an informed and complete view of matters arising, it will be necessary for certain data about complaints to be published across the range of bodies; at firm level, Legal Ombudsman and the regulators. It will then be for the regulators to map the collated data against their respective educational and professional standards and determine whether targeted regulation or changes to standards and regulation are necessary. This approach gains support from the Legal Ombudsman who, in their strategy for 2012-15,¹⁷ describe an enhanced research function to mine complaints and outcomes data and present the data in useful and accessible ways to stakeholders, including regulators.
56. The virtuous circle of learning from adverse events and complaints is consequently demonstrated in practice. Assuming the data are capable of being validated as a reliable risk indicator, the benefits are two-fold; the regulator makes fewer interventions with the entity, and the regulator gains insight into the underlying evidence for educational and training changes or review of professional standards. Comparing the output from a range of entities afforded earned recognition then begins to provide a view which might be extrapolated to a service-wide evidence base.
57. Of course, comparing data from different sources has become a publicly accepted norm in price comparison and 'search and match' websites. Such sites have begun to emerge listing legal services both in relatively crude price terms (inasmuch as instant quotes or fixed-fees are not a particularly common feature of legal services), and to identify solicitors to meet the users described need. In a report for the Law Society¹⁸, price comparison sites are recognised as interactive aids and decision tools, and an important part of consumer choice. Despite this view, the sites are also criticised for commoditising routine legal services. The report does, however, suggest that additions to

¹⁷ Final consultation draft Strategy 2012-2015, Business Plan 2012-2013. Legal Ombudsman. October 2011

¹⁸ Applying the comparison web site model to legal services. The Law Society November 2011

assist consumers in the initial screening process of available alternatives, to afford a more in-depth comparison between legal service providers is the way forward in an increasingly technological and global legal market.

58. A recent report by the LSCP¹⁹ on the current challenges facing consumers, law firms and the comparison websites suggests that consumers would like to access such tools to compare and contrast providers. However, the report also reflects upon the need for standards to underpin the comparison websites as, drawing upon evidence from other sectors, “they do not always work in the interests of consumers”. There is therefore some work to be done before these might have a more legitimate role in managing quality risks. Indeed, a debate is necessary as to whether the sites themselves should be subject to some form of accreditation or even more direct regulation. But these matters should not preclude serious consideration of their role in client care.
59. At this point it is worth adding a cautionary note. Technological innovation is not without risk and the exploitation of personal data in modern commerce presents an as yet unqualified conundrum. The LSCP undertook a mystery shopper exercise to inform the report and described poor performance in respect of the use of personal information. Whilst many sites had privacy policies, personal details are passed to third parties without consent or opportunity to opt out. Conversely there was no evidence of commercial influence on the presentation of information such that consumers might make poor choices.
60. To support consumers in navigating the various information sources, an initiative announced by BIS may prove a useful adjunct²⁰. ‘Midata’ is a voluntary programme which over time will give consumers increasing access to their personal data in a portable, electronic format. Individuals will then be able to use this data to gain insights into their own behaviour, make more informed choices about products and services, and manage their lives more efficiently. In an adjunct to this, the LSCP in its report on comparison websites recommends that regulators should open up their professional registers so that comparison websites and others can use the data to provide innovative services to consumers.
61. It is important to recognise that consumers will not only be the individual person, but may equally be a small to medium sized firm or a sophisticated city firm or specialist; all can be similarly disempowered in the absence of validated and comparable information to inform choice about client care. Higher quality standards may imply higher costs for provider services, and which translate in to higher prices for consumers – and hence potentially have an impact on access to justice. It would be inconsistent with the regulatory objectives to focus upon driving up quality standards without considering the impact this might have on the care a client receives. That is not to say that higher costs can necessarily be avoided; investment in technology, website development and validation will be necessary.

¹⁹ Comparison websites Legal Services Consumer Panel February 2012

²⁰ Better Choices: Better Deals Consumers powering growth. Department for Business, Innovation & Skills April 2011

62. Consumers therefore need to have sufficient information to make informed judgements about the legal activity they seek, and the indicative or absolute price for the activity. In order to gain the maximum benefit from all of the developments referred to above, consumers may therefore require assistance in understanding the different types of law that can be undertaken, and how in light of these the costs and success rates can be placed in context of their use of those legal services. In effect this offers a regulatory intervention that explains and contextualises performance data.

Question 6: Another possible tool for improving quality is giving consumers access to information about the performance of different legal services providers. How far do you think this could help to ensure quality services? How far is this happening already?

Utility of advice

63. Utility of advice may become an 'after the event' indicator where a claim against individual or entity indemnity insurance is made, and is in all likelihood to already be incorporated within the complaints data referred to in earlier paragraphs. However, Professional Indemnity Insurance (PII) information is also used to describe the characteristics of high quality and conversely low quality practice.

64. Insurers routinely collate this information to develop risk profiles or predictors of poor practice to determine insurance premiums. This collation has an advantage of not reflecting a single qualifying point in time, but rather is a real-time measure through regular update to reflect repetitive or increasing risky behaviour demonstrated through claims history and actuarial costs. In other words, insurance providers utilise information about quality risks to pre-empt detriment by financially weighting premiums for predicted poor quality. Of course the converse could be said to apply when premiums are reduced due to an absence of claims history. But low insurance cost does not necessarily equate with high quality service provision and may be more indicative for example of an individual or firm with an effective complaints handling practice. Obviously, this in itself could signify improving quality if the learning from the matter of complaint is fed back in to policy and practice.

65. These same profiles or predictors could be utilised by regulators to much more effectively target regulatory intervention. However this does rather assume that the personal and commercial data held or created by the PII providers could be made accessible to the regulators. Data protection and confidentiality may indeed preclude revelation of detail to a third party (a regulator) but the common agenda of removing quality risks to consumers may be sufficient to prompt a debate to explore what options for data sharing or collaboration on profiling exist. Regulators that already produce risk profiles of entities have the added opportunity to validate or amend the profiles to be reflective of current practice.
66. If this proposal were to be successfully achieved, a range of regulatory tools might be then be proportionately applied by regulators to supervise the entities deemed to present a risk to consumers, with a more liberal response to those not deemed to present a risk. Persistent poor quality would therefore be dealt with through better targeting existing compliance and enforcement strategies.
67. Whilst the use of PII profile or predictor data might provide objective measures of quality, there are other more subjective measures. Mystery shopper or customer satisfaction feedback mechanisms not only provide 'after the event' information about quality, but provide a co-regulatory role for the consumer. Wielding this power, the consumer role is a powerful disincentive to poor quality. This has been successfully harnessed in health care through Patient Opinion²¹, an independent website platform for patient feedback, and used to improve UK health services. More generally, consumer empowerment has seen consumers drive change in markets through their shared commentary or feedback on services or brands such that a firm's success depends upon its engaging with empowered consumers. The challenge for regulatory intervention is to protect the consumer who does not exercise that empowerment and is not equipped to assess choices or options without dampening the social might of those who are not such passive consumers.
68. We know that a range of consumers exist and who utilise a range of legal services. The earlier referenced Oxera framework (market segmentation) may provide a suitable tool to segment the market for type of consumer and types of service used, and enable a comparison of the customer feedback to again inform a more targeted approach for supervision by the regulators.
69. This framework might also be utilised to provide outcomes data (utility of advice) about legal services to drive quality improvement through reputational incentive. Currently there are web-based and hard copy directories published about legal services providing some degree of comprehensive coverage of the marketplace and the quality of service provided within that market. Some of these publications are more independent than others. Ranking of firms by outcomes can be a powerful incentive to improve by increasing ranking to overtake competitors, but loses strength when unduly influenced by the very service providers it purports to rate.

²¹ <http://www.patientopinion.org.uk/> Patient Opinion: every voice matters. Founded 2005.

70. We know that the spectrum of legal services is widening, both in the way they are reaching across international boundaries, and in the increasing delivery in partnership with other professional services. Comparisons and ranking of utility of advice or outcomes may be more relevant in these developing sectors than in the established and historical models of practice since the consumer has thus far little or no usage experience on which to draw.
71. A truly independent reviewer of legal services outcomes, analogous to Dr Foster in the healthcare sector, could describe and publish outcomes data by firm or chambers. Whilst this could form a reference source for consumers in selecting a legal service provider, a report that describes and rates the service outcomes can be instrumental in driving improvement to achieve or secure a good quality reputation. If a trusted source, it is reasonable to suggest that this resource becomes a legitimate trigger for targeted regulatory intervention.

Question 7: What do you believe are the greatest benefits of such transparency? What are the downsides and how can these be minimised?

Summary of regulatory interventions

72. Our starting point is to seek to ensure that regulation delivers the public interest and that the interests of the consumers are placed at the heart of the system. Our approach to regulation is:

- a. Consumer protection should be appropriate for the particular market
- b. Regulatory obligations should be at the minimum level to be proportionate to the risk and to deliver regulatory objectives
- c. Regulation should live up to the better regulation principles in practice

73. The following **Figure 3** is offered, not as an exhaustive list, but broadly illustrative of regulatory interventions to assure quality in legal service provision. Nor is it intended to confer a mandate or standardise interventions for specific quality risks.

Question 8: The table below (Figure 3) gives some examples of how risks to quality can be mitigated and actions that can be taken by regulators to ensure this happens. Can you suggest any other actions that can be taken?

Question 9: Which of the possible interventions by regulators do you think likely to have a significant impact upon quality outcomes?

74. The toolkit of potential regulatory interventions has a clear focus on the various approaches to quality; both of the legal services workforce and of the quality of advice and care provided to consumers. However, it is not our intention that a toolkit be developed in splendid isolation. Rather that the next steps are taken collaboratively with regulators, and that these are aligned to the wider work currently underway on developing regulatory standards and the scope of regulation.

75. Following this consultation, the LSB is seeking to finalise a framework for the regulators to identify and assess risks to quality. We expect to then challenge them to set out their approach to quality and to identify the regulatory interventions or tools they will draw upon to address the risks, and to evaluate those interventions for effectiveness in improving outcomes for consumers.

Question 10: To what extent should the LSB prescribe regulatory action by approved regulators to address quality risks?

Figure 3 Examples of quality risks and suggested regulatory interventions

Quality risk mitigation	Regulatory interventions
Demonstrating basic / initial skills and knowledge necessary to be fit to practise	Entry and authorisation requirements
Demonstrating contemporary knowledge and awareness of practice	Outcomes focused / assessed CPD / authorisation
Demonstrating contemporary competency and ability to practice	Accreditation schemes / minimum competency assurance
Assured quality or competency of defined aspects of service provision	Evidenced / accredited quality marks
Identifying patterns or pockets of practice at the two extremes of the normal distribution curve; targeted regulation	Trend data e.g. complaints, market outcome data
Removing sub-standard competency or behaviours not acceptable for public protection	Fitness to practise investigation and sanctions at individual and firm level
Informing professional development, standards and ethics	Closing the virtuous circle – feeding the learning from outcomes in to standards and training
Matching the consumer and their needs to the right legal service and the right legal service provider	Comparison websites and consumer 'help' or choice support information
Targeted regulation; informing professional development, standards and ethics	Risk profiling / predictive characteristics of high risk practice (failing or innovative practice)
Quality assurance and service development triggers, co-regulation	Consumer satisfaction feedback / consumer co-regulation
Targeted regulation, earned recognition / self-regulation	Oxera framework to segment market for customer feedback / develop a trusted source of comparative data for targeted intervention

How to respond

76. Views on our proposed approach are welcome. Please submit electronically (in Word or pdf format) by 5pm on Friday 1 June 2012 – this provides 12 weeks for interested parties to respond.

77. Hard copy responses by post or fax are also welcome to:

Email: consultations@legalservicesboard.org.uk

Post: Emily Lyn

Legal Services Board

7th Floor, Victoria House

Southampton Row

London WC1B 4AD

Fax: 020 7271 0051

78. In framing this consultation paper we have posed specific questions to help inform our final decision. These questions can be found in the body of this paper and also consolidated at Annex 1. We would be grateful if you would reply to these questions, as well as commenting more generally on the issues raised (where relevant). Where possible please can you link your comments to specific questions or parts of the paper rather than making general statements?

79. All responses will be published on our website unless a respondent explicitly requests that a specific part of the response, or its entirety, should be kept confidential.

80. Following the conclusion of this consultation exercise, we intend to publish our approaches to quality in Q3 (2012/13)

Complaints

81. Complaints or queries about this process should be directed to Nicholas Bare, Consultation Co-ordinator, at the following address:

Nicholas Bare

Legal Services Board

7th Floor, Victoria House

Southampton Row

London WC1B 4AD

Or by email to: nicholas.bare@legalservicesboard.org.uk

Annex 1 – List of questions

Question 1: In your experience, when consumers do not receive quality legal services, what has usually gone wrong? Where problems exist, are these largely to do with technical incompetence, poor client care, the service proving to be less useful than expected by the client – or something else?

Question 2: Would it be helpful if the regulators approached issues of quality by looking separately at different segments of the legal services market? Which segments do you perceive as being greatest risk to consumers?

Question 3: How can regulators ensure that regulatory action to promote quality outcomes does not hinder (and where possible encourages) innovation?

Question 4: What balance between entry controls, on-going risk assessment and targeted supervision is likely to be most effective in tackling the risks to quality that are identified?

Question 5: Quality can also be affected by external incentives and drivers. Some examples include voluntary schemes (for example the Association of Personal Injury lawyers (APIL) Accreditation), consumer education and competition in the market place. How far do you think these external factors can be effective in tackling the risks to quality that exist? Which external factors do you think are most powerful?

Question 6: Another possible tool for improving quality is giving consumers access to information about the performance of different legal services providers. How far do you think this could help to ensure quality services? How far is this happening already?

Question 7: What do you believe are the greatest benefits of such transparency? What are the downsides and how can these be minimised?

Question 8: The table (Figure 3) gives some examples of how risks to quality can be mitigated and actions that can be taken by regulators to ensure this happens. Can you suggest any other actions that can be taken?

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