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Regulatory standards and assessing regulatory performance

No-one takes on the challenge of modernising the regulation of a sector with such a strong heritage of professional ethics and societal importance as legal services in the expectation that they will be applauded for doing so. Regulators need to be – and usually are - thick-skinned. But there are occasions when the mischaracterising and denigrating nature of criticism risks undermining the public confidence in the regulatory system as a whole – to the detriment of consumers, the public and the profession,

I am confident that the tough challenge we receive from the legal sector is not leading to such risk at present. But it seems timely to cut through some of the critical rhetoric, to outline our statutory responsibilities, our vision for the provision of legal services in England and Wales and what we see as the role of the Law Society and the Solicitors Regulatory Authority (SRA) within this framework.

Background

The Legal Services Act 2007, which established the LSB, provides the LSB with its statutory role and remit, including our duty to act in accordance with the regulatory objectives, to maintain appropriate standards in the profession and to apply general principles of better regulation..

We have a central role to play in driving necessary improvements across the sector. We see this as ensuring that the principles of proportionality, accountability, consistency, targeting and transparency are at the heart not simply of what we do, but also of the activities of the bodies which we oversee.

Underpinning all of our work are the eight regulatory objectives. These objectives have no order of precedent but their aim is to ensure that regulators support the rule of law, improve access to justice, protect and promote consumers' interests and the public interest, promote competition, encourage a strong and effective legal profession, increase public understanding of their legal rights and maintain the professional principles of those providing legal services;

To meet these objectives does not mean just sitting, watching and reacting. It means being involved, intervening (only where necessary), and providing leadership in thinking about new ideas and directions.

Regulation and the approved regulators

Our approach to regulation has a number of elements:

- ensuring best regulatory practice by those we oversee
- managing our statutory approval role properly
- ensuring that important issues are addressed by regulators (whether individually or collectively)
- developing and disseminating a comprehensive evidence base
- using our intervention powers proportionately and effectively (and only when needed)
- filling in the gaps in policy making
- but abstaining from intervention in individual compliance activities

The approved regulators, which include the Law Society operating through their independent regulatory arm the SRA, are required to act in a way which meets the regulatory objectives and to adhere to the principles of better regulation. You could say this means '*we are all in it together*' - albeit with different responsibilities and pressures.

To characterise it in a simple way, it is our job to look across the legal services world at a macro level and the approved regulators' role to look at a micro level.

The LSB approach

We know that there are saints and sinners in all walks of life and in all professions. The question is what do we and the regulators do to keep out the crooks and the unethical, and those with weak values that can be shaped to allow misdeeds to go ahead unchecked? Simply expecting all those with the title 'Solicitor' to behave in a correct fashion does not appear to have worked. Historically, the regulation of legal services has been achieved through the regulation of individual professionals. This approach provided consumers with a degree of protection. But it was not perfect. Many examples of where the consumer was let down ranging from incompetency to outright criminality can be found with a simple Google search.

This is why we have developed, for the first time, a coherent approach to defining and assessing regulatory quality in the legal sector. We expect regulators:

- to have codes that specify the outcomes that consumers (which are everyone from the most vulnerable to the CEO of a FTSE 100 company) can expect from lawyers
- to understand the different risks to the consumer, the wider regulatory objectives posed by those they regulate, and to have a way of identifying those lawyers that pose the greatest risks

- to supervise according to those risks, allowing those that pose the fewest risks the greatest freedom while enforcing in a fast and fair manner, that act as a genuine deterrent to those who pose the most risk

We will be holding each approved regulator to account against these standards. We do that on behalf of consumers, the public and for you. It is of immense importance that those who are regulated have confidence in those who are regulating.

These standards lead to an approach that regulates not just individuals but also the systems in which they operate and their behaviours. Such an approach requires a greater emphasis on business governance, capability and management competency.

This is why we welcome the SRA's requirement that all firms, not just those that are ABS, have a Head of Legal Practice and Head of Finance and Administration. It is the role of these individuals' to ensure compliance with the relevant regulatory requirements.

Outcomes focused regulation

A number of commentators have questioned the appropriateness of outcomes focused regulation in the legal services market. It is our belief that this is the most appropriate form of regulation for professionals. It gives professionals the ability to use their professional judgements to determine how they can best achieve the required outcomes. It provides clarity, freedom and most importantly accountability.

The SRA has taken significant steps towards outcomes focused regulation. Part of this has included a considerable trimming down of its code. However it still contains 516 pages.

By way of comparison, on the issue of professional indemnity insurance for instance, IPReg, the Trade Marks and Patent Attorney regulator, requires each firm to have cover commensurate with the risks at large arising from the extent and size of their practice.

IPReg's requirements are covered in two paragraphs (one focusing on rules, the other on guidance). The SRA has a separate rule book.

This is not to say that IPReg have it right and SRA have it wrong. Both regulate very different practitioners and the risks are different. But, it is a good example of where less rules and regulation actually equals more clarity and thus increased freedom to innovate in the provision of services without reducing protection for individual consumers.

Everyone needs the regulators to seize the initiative and drive development of an innovative legal services market.

We want to remove restrictions and detailed rule books when they can no longer be justified and to liberate the creativity of both existing legal businesses and potential new entrants.

In conclusion

As a final thought, what will this mean for solicitors?

Ultimately our vision is a market of well run firms which have a clear understanding of their consumers', or potential consumers', needs which will result in a tailoring of services to suit them. Such firms will have documented and adhered to processes and controls, and maintain the highest ethical standards.

These firms will be given the freedom by the regulator to grow and develop their business and where they deem it appropriate develop innovative services that meet consumer needs. These firms will not be left entirely unsupervised by the SRA but their interactions will be appropriate.

At the same time those firms without robust systems and controls and with higher risk profiles (be it because of the area of law they operate, the consumers they serve or the way they are structured) should expect a supervision approach commensurate to these risks.

This is not to say that all firms operating in a certain area of law will face higher compliance burden. A well run firm operating in a higher risk area of law may have a lower risk profile than a poorly run firm operating in a lower risk area of law.

However only when the legal services regulators concentrates clearly on risk, quality and ensuring that firms have the systems and controls in place to deliver the outcomes that consumers need and the wider regulatory objectives demand will the full benefits of the Legal Services Act be delivered.

This is as true for the new entrants as it is for existing firms.

We want regulators to step back from dictating the services offered and the structures of business operating in the legal services market to allow market forces play a greater role. This we believe will help create a legal services market that is the right size for consumers and solicitors.