

Legal Services Commission's Response to the Legal Services Boards discussion paper on developing a regulatory regime for alternative business structures

3 August 2009

1. Introduction

The Legal Services Commission (LSC) is a non-departmental public body sponsored by the Ministry of Justice (MoJ). The LSC is the biggest single purchaser of legal services in England and Wales with an annual spend of £2.1 billion; we are responsible for the delivery of civil and criminal legal aid and the development of community legal services.

2. Overview

The LSC is grateful for the opportunity to respond to this discussion paper and recognises the significant benefits of widening the market. We are also eager to ascertain how the market in its expanded state will be regulated to ensure that safeguards are in place to manage this expansion.

The LSC seeks a harmonious relationship with regulators and suppliers of legal services so that we can jointly deliver excellent quality services, offering real value to clients, informed by clients themselves, whilst ensuring access to justice.

3. Access to Justice

The scale of ensuring 'Access to Justice' will require support from a wide range of stakeholders; it will involve joint research initiatives and require extensive feedback from consumers. The recent LAG survey¹ was extremely informative in relation to the consumer's perception and experiences of legal aid services and provides qualitative information on preferred methods of receiving advice and the supply and referral downfalls encountered.

Analysis of the market, that includes consumers perceptions and experiences, plus preferred methods of receiving legal services needs to be fully collated and considered, resulting in a universal definition of 'Access to Justice' if we are to ensure the market represents and delivers what consumers want / need.

Delivering 'access to justice' requires further thought on alternatives to court action and more focus on dispute resolution and mediation. We need to ensure that full use is made of new delivery methods and technologies as well as changes to market structure. We need to do all of this in the context of increasing restraint on public spending.

The LSC is very keen to work with the LSB and others to deliver this programme of work.

¹ LAG and the Access to Justice Alliance (AJA) "Availability of Advice Survey", February 2008.

4. Widening the market

In responding to this discussion paper we aim to state our suggestions for regulation of new business entities so as we can have confidence that risks associated with market expansion are mitigated.

Potential risks could be that commercial investors will not be subject to similar codes of ethics and may put profit before standards. This could also lead to cherry picking cases that are more financially viable and more likely to succeed, thus, reducing access to justice and resulting in unfair competition by leaving the more traditional services to pick up the more work intensive and complex cases, or in the worse case scenario individuals failing to find representation at all.

Of course the potential benefit of widening the market far outweighs the risks identified above if properly regulated. Commercial and business structures pride themselves on excellent customer service and understanding consumer needs. Profit in such organisations is based on good reputation and delivery of good services tailored by clients themselves. It is also highly likely that such an organisation will develop innovative and additional ways of delivering services if it felt this would increase its reach. It is also reasonable to suggest that with an increasing competitive market the ability to reduce costs by way of service selection is likely to be achievable.

Arguably, this could have an impact on smaller forms and sole practitioners plus, instruction of the self-employed bar. Clearly, such services will have to modernise to compete and may also adopt some of the more sophisticated ways of delivering services from adopting similar methods and developing skills to enhance their practices.

5. Regulation

When considering regulation the most appropriate starting point is the principles as set out within the Better Regulation framework. It would be difficult to criticise any one of these principles and as such the LSC entirely agrees that regulation should be in accordance with them. However, principles alone would not be considered sufficient for the regulation of all types of entities. Principles need to be supported by rules that are not over prescriptive but which adequately inform the entity of regulatory requirements and responsibilities but without overburdening them with unnecessary processes to ensure compliance.

To some extent the rules that sit within principles should be established from analysis of the biggest risks associated with their non-compliance. The LSC is chiefly concerned with the regulation of publicly funded services although we consider that regulation of legal services should not fundamentally differ on this basis. However although we fully understand the benefits of consistent regulation we also recognise that regulation based on risk alone cannot apply equally to all types of firms. Given the difference between sophisticated and private clients and the many different business models that are permitted within the Act assigning the same level of regulation to all entities could be seen to be disproportionate.

The LSC strongly believe that a principle –based regime must be supported by some element of ‘outcome focused’ regulation. This approach supports the view of the Solicitors Regulatory Authority (SRA) whom are currently consulting on proposals to introduce supervisory visits on large entities.

Whatever the option for regulating legal entities, it is paramount that mechanisms are in place to measure compliance against such standards / rules or principles. Relevant legal professionals are subject to either the Bar or Solicitor Code of Conduct, however, neither regulator has any system in place to routinely measure compliance against the code or against their own standards. Whether or not services are provided through an ABS it is vital in the interests of consumers that this huge gap in this regulatory system be addressed and some form of assessment implemented.

Lack of assessment and a total lack of standards in relation to advocacy is a specific area that the LSC are currently working collaboratively with the profession to address. Lack of any consistent standards has resulted in allegations of poor advocacy and unlawful referrals that are not within the clients' best interest. The universal grading of advocates to work within a particular level would alleviate this to a degree; however, the consumer needs more information in regards to the role of the solicitor / barrister and their options for representation. It maybe that clients will see the benefits of a seamless service and relish the opportunity to be sure that their advocate will not be replaced at the last minute but the choice needs to be theirs.

6. Competition

The LSC sees the opening of the market as an advantage for the commissioning of legal services. The development of ABS should provide more choice for consumers. Another key benefit of more new business structures is that they provide more flexibility for legal professionals themselves in the way that they provide services. The LSC is keen to allow flexible arrangements for bidding, but for example the fact that the BSB have not yet removed restrictions in their current code to offer the opportunity to barrister led firms to bid for LSC contracts will hamper this process.

7. Role of NFP's as special bodies

The LSC considers that all bodies that offer legal services to the public, including those in the Not- for- Profit (NFP) sector should be regulated. The LSC is concerned that some NFP organisations tasked with delivering legal advice appear to be almost totally unregulated. We believe that it is in the interests of consumers and NFP providers that they are regulated equally where providing similar or identical services.

We are grateful for the opportunity to respond to this consultation and hope you will find it useful. If you have any further queries please contact Louise Sowden at louse.sowden@legalservices.gov.uk or telephone 0117302312.

Yours sincerely

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