

Response to the LSB Business Plan 2010/11

I am a solicitor in private practice, the managing partner of a firm with about 60 fee earners, most of whom are solicitors representing vulnerable clients under a legal aid contract. We also undertake non-legally aided personal injury and employment work, and cases against the MOD for members of the Armed Forces. I am a member of the Law Society's Council, and sit on its Regulatory Affairs Board. Through my work at the Law Society, as the owner of a regulated business and as an authorised person I am keenly interested in legal regulation and in your activities. I commented on last year's business plan as well.

The draft plan indicates that you are well aware of your obligation to be proportionate, accountable, consistent, targeted and transparent. I applaud your commitment to remain small but perfectly formed (page 29 paragraph 96), to go for a gold standard rather than gold plating (page 6, penultimate paragraph), and to ensure value for money (page 5 paragraph 3). I found Annexe 1, in which you seek to link the regulatory objectives to the joint endeavours ahead to be particularly useful as an insight into your thinking.

I have the following comments to make:

Definitions

I think it would be helpful to have some definition of terms. For instance, there are references to the legal services market place, but also to the legal services profession/ industry/ sector. It may be that these terms are being used interchangeably, but it may also be that you seek to identify fine differences within the regulated community. It would be helpful if you could clarify this.

The draft refers variously to consumers, customers, citizens and clients.

I am unhappy about the reference to citizens: There are many people within the jurisdiction who are not citizens, and the law should apply equally to citizens and non-citizens, some of whom will be in an extremely vulnerable legal position as a result of their non-citizenship.

As for the distinction between clients, consumers and customers, I think it is correct that, traditionally, those who use regulated legal services are seen as clients, and the service provided to them is meant to be expert, tailored and suitable for their particular needs. However, if one considers the comment of DCA minister Bridget Prentice in 2007 that she didn't see why "*consumers should not be able to get legal services as easily as they can buy a tin of beans*" it is clear that she envisages a relationship more akin to that of customer and supermarket, which is very different: after all, no one expects to give details about their diet and lifestyle when they go out to buy a tin of beans, nor do they expect to receive advice from a shop assistant that salad or a nice piece of fish would be a better choice for them.

Where to draw the line

The question then arises as to whether the protection of specific regulation is needed when the activity being regulated is equivalent to buying a tin of beans.

I note that the LSB will be conducting research to establish whether some currently non-reserved work should become reserved work. I suggest that a convenient dividing line between the two would be to consider whether the work is of such a nature that the purchaser of the service should have the *ex ante* protection of a client rather than the *ex post* protection of a customer. Will writing seems a good example where the risks of getting it wrong justify the higher level of protection.

The consumer interest.

A good deal of your draft plan focuses on identifying and promoting consumer interests, and I note that on occasion the interests of consumers appear to be conflated with the public interest. There are two points here:-

- (a) It would be better if you referred to the *legitimate* interests of consumers, as this would show that their interests were being considered within the broader context of the public interest; and
- (b) You need to acknowledge the difference between the legitimate interests of consumers in the abstract and the actual expectations of particular clients in specific circumstances. The work that is being done with consumer groups and other stakeholders may be seen as dealing with the first group – the ideal set of reasonable and realistic consumers who have sensible expectations and are willing to accept the limitations as well as the possibilities of what can be achieved by lawyers. *Ex ante* regulation to meet the legitimate needs of these ideal consumers seems entirely appropriate. However, the reality is that some clients have unreasonable expectations and do not comply with the reasonable expectations of their lawyers; in fact, just as there can be bad lawyers and bad regulators, there can also be bad clients. Of course even bad clients are entitled to a professional service, but it is important that the enforcement of regulatory standards, particularly in the complaints service, recognises the reality of the problems that some legal services providers face, so that unfair burdens are not placed on the profession through an unrealistic assumption that all clients are

reasonable people with reasonable expectations and demands.

Regulatory overlaps.

You point out that there are already over a hundred Legal Disciplinary Practices (with different kinds of lawyers in partnership) in the jurisdiction and there are likely to be many applications for ABS to be licensed within a couple of years. Different legal professionals will continue to be regulated on a personal basis by their approved regulator, but they will also be subject to regulation from their entity regulator, which may be a different approved regulator. The Clementi report described the regulatory maze: if it is not to be replaced by a regulatory hall of mirrors, a shape-shifting Looking Glass world in which the definition of a legal professional's obligations and duties varies according to the regulator of the entity for which she works, consistency between regulators is vital.

You recognised this in your recent consultation document "*Alternative business structures: approaches to licensing*", where you comment on the importance of creating a single framework Memorandum of Understanding covering all approved regulators, licensing authorities and relevant other regulators to achieve this consistency. In that consultation you said that you hoped that the MoU would be agreed in principle by June 2010.

I can see no reference to regulatory overlap or to the MoU in your draft work plan. As far as I can see there is no specific reference to this piece of work in the 2009/10 work plan either. I hope that your final plan for 2010/11 will set out clearly what work is being done on this MoU; whether it is on target for agreement in June 2010; and what specific regulatory overlap issues have emerged from the regulation of LDP's over the last year.

Removing Outdated Distinctions

In his overview, your chief executive says that the regulatory objectives run like lettering through a stick of rock through your full programme of activity, acting as the test against which you measure the relevance and impact of activities. The LSA provides that these same regulatory objectives also apply to the approved regulators, licensing authorities and, proportionately, to the providers of legal services. The regulatory objectives go much further than, for instance, the provisions of the current Solicitors' Code of Conduct, and therefore create obligations which go beyond honesty and client care. You therefore need to have a fresh look at the regulatory privileges enjoyed by some in-house lawyers and the entities for whom they work, as it cannot be claimed with any confidence that their compliance with the regulatory objectives can be satisfactorily monitored by their employer/client.

It is clear that many of the regulatory objectives have particular relevance to the activities of those employed in the Government Legal Service. S193 of the LSA specifically exempts these lawyers from having to obtain a practicing certificate, which means that, although they are subject to regulation, neither they nor their employer make any contribution towards the cost of such

regulation. This cannot be right and puts the approved regulator in a difficult position, as that part of the profession which does have to pay for regulation is likely to be unhappy if it has to pay more to ensure the Government Legal Service complies with the regulatory objectives. If you consider that the exemption under s193 militates against the promotion of the regulatory objectives, I hope you will say so, and will invite the Government to amend the Act accordingly.

Now that ABS are more than just a twinkle in your eye, and entity regulation is fast approaching, you should be looking at all entities which provide legal services, to see if you should be making a recommendation to the Lord Chancellor under s106(1)(e) that some of them should be brought within the ambit of licensing. Even if in-house solicitors continue to be exempt from the cost of regulation in some circumstances, it is not necessarily the case anymore that their employers should not require to be licensed as ABS.

I am thinking particularly of publicly funded in-house lawyers, for instance those working in local authority legal departments. As a legal aid lawyer, it is not hard to

think of examples where local authority lawyers appear to be involved in activities which run counter to the regulatory objectives, and as the LSA does not provide an exemption for non-compliance on political or fiscal grounds, as opposed to commercial ones, it is important that approved regulators have the right to regulate those entities as well as privately funded ones.

I suggest, therefore, that, bearing in mind the regulatory objectives and the justification for regulating privately funded entities, you develop a set of principles for identifying which entities should be regulated, and then measure all unregulated entities providing legal services against these principles, to see whether you should be making recommendations under s106(1)(e).

Access to justice

In Appendix 1 you define access to justice widely, and I agree with your definition, up to a point. However, in detailing the many ways in which people may access justice, you have not mentioned the principle, referred to in Article 6 of the ECHR, of equality of arms. It may well be that in some circumstances people can access justice through the internet, by phone, from advice workers etc, but if someone is up against an opponent who is able to instruct an experienced lawyer, it is likely that justice will only prevail if that individual has similar access to expert advice and representation.

In considering whether access to justice is being achieved in any situation, therefore, I suggest that a good rule of thumb for you to use is to consider whether you would feel that you had access to justice if you found yourself in

the less privileged position in any of the scenarios where it is being suggested that asymmetric access to expert help nonetheless provides access to justice.

In paragraph 35 of Appendix 1 you mention that you will not necessarily equate a reduction in availability of some kinds of services for some consumers with a reduction in access to justice. In principle this is a reasonable point, but it would be helpful if you could provide clarity on the criteria you will apply to decide if a reduction in availability does or does not amount to a reduction in access to justice.

If you do identify such criteria, I suggest that you give particular weight to any reduction in access to legal aid, free, or pro bono services for poor and/or vulnerable people, as these are likely to be people with the most limited access to alternative solutions to their problems, as well as, by virtue of their vulnerability and/or lack of resources, being people most likely to have problems needing legal resolution. An significant increase in access to cheap conveyancing, for instance, could not properly be said to increase access to justice if a consequence is a reduction in access to legal aid or pro bono services.

I hope you find these comments helpful.

LSM 27 February 2010