

Legal Complaints Service response to LSB Business Plan

We took the opportunity to pick up aspects of your business plan and set out some of our learning and experiences from handling complaints about solicitors under a few key themes. We hope that our experiences of managing a redress scheme, of working with external regulators and of handling complaints with consumers and the profession will help you bring your plan to life and ensure a better system for everyone involved.

Market structure issues

Alternative Business Structures

The introduction of alternative business structures (ABSs) seems likely to be a watershed for the legal services market. Our view is that it has the scope to be a great model to promote innovation in providing legal services. It also has the potential to break up and significantly change what the legal profession currently looks like.

Our main question about the introduction of ABSs is - what it will mean for consumers? We already see innovations in how legal services are provided and from this know there is a huge potential for confusion. For instance, recently we began to see an increase in the numbers of complaints about a specific area of conveyancing. Consumers who had approached financial institutions to re-mortgage their houses had been offered legal services through the financial institution. This led to a complicated situation when things went wrong. We found that as the solicitors involved had been retained by the financial institution, the consumers whose houses were jeopardised by the transaction could not complain to us. Strictly speaking they were not the client – instead the client was the financial institution. To meet this gap, we were able to put in place arrangements with the Financial Ombudsman Service to make sure that these consumers could seek redress. This example demonstrated to us that the growing commoditisation of legal services is bringing together new forms of practice - and the result is that it can be confusing for consumers when things go wrong. ABSs will be more complicated again. Our experience is that there will be a need for the future Office for Legal Complaints (OLC) to have strong links to other ombudsman organisations to make sure consumers can find the right home for a complaint.

What the re-mortgage cases also taught us is that people do fall through the gaps of redress and regulation when different industries come together to sell a product that involves legal services. This will also happen with the introduction of ABSs. For instance, currently we receive complaints about firms that are not regulated. We have no reason to believe that there will not be unregulated businesses that present themselves as ABSs in the future. Following on from our experience of handling re-mortgage complaints and other conveyancing issues, the LCS, in partnership with a range of other key organisations, established a Conveyancing Forum which is a chance to swap ideas and work together on current issues and to fill gaps where new developments mean that consumers could lose out. We welcome the LSB taking on such a role, encouraging people to come together about key issues to seek constructive ways of working together for the consumer in the future. We would hope the OLC or LSB would think about building on existing forums such as the Conveyancing Forum to ensure that the work done there to date is able to help inform the future.

Principle based regulation

The complaints that come through our door demonstrate that client care needs to be tailored to meet a person's needs rather than being a tick box exercise that meets an arbitrary

minimum standard. The former Code of Conduct for the solicitors' profession set out a rule-based approach that, in our view, did not serve consumers or the profession well. The current Rule 2, which sets out principles of good client care, recognises the diverse range of ways a firm can deliver good client care. There is scope to develop a principle-based approach further.

Principle-based regulation seems a better way of supporting the entrance of new forms of practice into the market. We understand that the idea is that through the introduction of new forms of practice the market will develop innovative new ways of delivering legal services that make good business sense and also meet the needs of consumers. Given this, then principle based regulation seems to provide sufficient flexibility to help the sector achieve this while also providing a strong safety net for consumers and the public. We would argue that a principle-based approach does not mean regulation is not robust. However, it will require attention to promoting good practice (which we note the LSB sees as central to its role) and further attention to promoting client care, consumer focus and ethics throughout legal education and training.

Access and availability issues

Throughout the debate about the Legal Services Bill access to justice and the importance of access to redress were a recurrent theme. Ensuring access to redress is an area that we think ought to remain a high priority for the LSB and the OLC particularly as the legal services market continues to change shape and link in to other professions and industries via legal disciplinary partnerships (LDPs) and ABSs. Issues of location and the spread of legal services, especially in rural areas, cost, level and quality of the service provided could all raise regulatory issues – and result in complaints – and will need sophisticated responses to the issues thrown up by this new and unknown market shape.

In your Business Plan you note that evidence from complaints will help the LSB work in partnership with approved regulators and the profession. We have only recently begun to draw out information about trends to inform how we deliver our service and to pass on to other regulatory and representative bodies to inform their work. We have found this information to be useful to inform our work and also to pass to the profession to help it respond to current issues and continue to improve its service delivery. We would be happy to share some of our work with you if you think it would be of use.

We also noted that, generally speaking, there is evidence of your thought and attention to equality and diversity issues throughout your Plan, which we welcome. You ask in the Plan which are those areas that we believe the LSB could add value in terms of diversity. Following on from what we have said above, we think the following areas are those in which the LSB could add real value.

Research

Historically and currently, the emphasis has been on research to identify the profile of the 'profession'. Little meaningful work has been done on the consumers of legal services. Where work does exist there has been little attention paid to issues of diversity and so meaningful analysis is not usually possible.

The Plan places a lot of emphasis on research and proposes a research strategy. We believe that it would be ideal for the LSB to conduct or commission research which identifies the profile of current consumers of legal services. This would set out what the consumer base looks like – who is using the services of the legal profession in England and Wales? This information would enable the LSB to work on initiatives to both improve the service provided to diverse users and widen access to justice for those groups who do not use legal

services including those from the traditionally 'hard-to-reach' communities. This work is likely to have a positive and productive influence on the communications and awareness raising strategies that the LSB and OLC may wish to put in place.

Without knowing more about consumers of legal services the LSB may find it difficult to achieve its objective of ensuring a market that allows access to justice for all consumers. At present we have nothing but anecdotal evidence to tell us if there are gaps in legal services provision.

Enforcement/ oversight of rules governing discrimination and equality of opportunity

The Solicitors Code of Conduct includes a specific rule prohibiting discrimination by solicitors towards their clients or any other party. The Bar Council have a similar provision. We believe that there is a real opportunity here for the LSB to review the requirements imposed under such rules and in particular to benchmark good practice in relation to equality and diversity in the legal profession. Again, this is an area that is likely to benefit from a shift to a principle-based approach.

Our sense is that current practice varies between different pockets of the profession. Ideas for good practice and information gained from a benchmarking activity could be used to produce a minimum standards guide, statement of principles or information sheet to inform consumers about what they can expect from their lawyer in terms of service. This would help consumers be better informed about their rights and what level of service they can expect from their lawyer. Areas that would be very relevant to include would be current issues around the Disability Discrimination Act (DDA) and, for instance, the reasonable adjustments solicitors and other legal professionals are required to make in respect of deaf clients.

Promoting access to a diverse legal profession

While reading section 5F of your Plan, we were concerned that there is a significant risk of duplication of work in this area. We noted that you were aware of this possibility, which is encouraging. A large amount of research and other work has been done on this area by the Law Society and other organisations. One way in which LSB could make a key difference in this area is by bringing together the various pockets of work that has been done or is in the process of being done. This could involve bringing together key people from each of the organisations doing this work and setting up an overarching equality and diversity panel/ group which would help to avoid duplicity and lead to a more coherent and consistent approach to addressing equality and diversity issues in the regulatory world.

Excellence in regulation

Interaction between redress and regulation

We know from our experience that a proportion of consumers do not receive awards of redress for poor service and that there are gaps in the current regulatory structure. Currently, if a solicitor, for whatever reason, cannot or will not pay an LCS award of compensation, consumers first must rely on a solicitors' professional indemnity insurer to pay. If the insurer does not pay, consumers may be eligible for payment from the Solicitors Regulation Authority (SRA) Compensation Fund. Enforcement requires a case to proceed to the Solicitors Disciplinary Tribunal to make the award enforceable in court, a lengthy and costly process, administered through the SRA. Even with these mechanisms in place some

consumers continue to fall through the gaps in the regulatory system and end up with no redress.

A recent example of this is the case of Mr S. Mr S complained to us about a conveyancing matter. After investigating his matter, Mr S was awarded approximately £13,000 for compensation and refund of fees by the LCS. This was over 2 years ago and Mr S has not yet received payment. The solicitors are bankrupt and one of the partners has been struck off by the Solicitors Disciplinary Tribunal. We contacted the insurers and the Assigned Risk Pool to seek payment. Neither will pay. Mr S is also ineligible for a Compensation Fund payment as his case does not fall in the strict parameters of the Fund's rules. He has exhausted all our avenues of challenge and review, including the Legal Services Ombudsman who asked us to reconsider. One of the many issues in this case, however, is that the LCS is unable to compel the solicitor or the solicitor's insurer to pay. In addition to all this, Mr S also contacted the Financial Ombudsman Service (FOS) to see if they could assist as the insurer was not paying. As Mr S is a third party to insurance, the FOS is unable to look at his complaint. Mr S remains out of pocket and without effective redress for the poor service by a solicitor.

We have increasing examples of this type of case where no payment of compensation or redress is given to the consumer. This case is extreme due to the amount of money involved. It is typical, however, of how the current regulatory framework lets some consumers down, at the expense of the reputation of the profession and of the organisations that regulate the profession. We would welcome a role for the LSB in taking the broad view and trying to tackle how the different aspects of regulation join together to work in the consumer interest.

To effectively enforce its decisions the OLC will need strong relationships with other regulatory bodies. Good relationships are already important and this can only grow as more complex forms of practice are introduced into the legal services market. We welcome the stated role of the LSB in bringing people together to ensure effective regulation.

Redress and oversight regulation

We were interested to read your thoughts about how you will work with approved regulators (ARs) and the OLC to set aims to ensure effective regulation and redress across the sector.

We have worked closely with our external regulators and during this time have thought hard about how good regulation can support an organisation to deliver its services to the benefit of consumers. There is a lot of literature dedicated to promoting good regulation which we don't seek to précis here. We thought instead it may be useful for us to set out what we have learned in practice from working with external regulators:

- that effective target setting takes time, joint working and an understanding of each other's priorities. We think that the aim of working partnership with ARs and key stakeholders, challenging their thinking and actions as well as jointly celebrating successes, will be the most effective thing you can do to make sure legal services are effectively regulated;
- reporting requirements should be efficiently constructed and as few as possible, while still meeting the needs of the regulator. Without this in place, reporting becomes an additional cost that can detract from the service the other organisation is there to deliver;
- the other side of this is that organisations like the OLC and the ARs will need to have a dedicated resource to make sure it supports the LSB appropriately. Our

experience is that this must be included in the business plan of the regulated organisations or it will detract from other key work in the reporting organisation; and

- that there is a joint obligation to be mindful of the impact seeking to involve the media can have on the regulated organisation and in terms of consumer confidence in the regulatory regime generally. Where possible a co-ordinated approach to briefing the press is likely to ensure that consumer confidence is maintained even in circumstances where organisations may have different perspectives on a specific issue.

Education and training

Your plan talks about the importance of promoting ideas of customer service in legal education and training. We would argue that more than a 'Marks and Spencers' commercial approach to customer services is required to achieve good client care by legal professionals. While there is a lot of scope to debate whether the Legal Services Act reforms will change the nature of the profession as a whole, we would argue that lawyers as professionals have a duty of care to their clients that goes beyond customer service in simple transactional terms. Our view is that good client care should form the basis of every part of the legal service provided – from how a lawyer explains costs, risks, and delivers legal advice. Equipping lawyers to be able to provide good costs information, help consumers understand when things are not straight forward and at times give unwelcome advice are all as important as whether the final outcome is legally correct. What we have learned from complaints is that solicitors at present are not as good at aspects of this as they could be. There is a clear role for better education and training that gives lawyers these practical skills at an early stage of their careers.

When things go wrong?

It's easy with hindsight to see things that have gone wrong. The Legal Services Act seeks to promote innovations in the legal services market. Our view is that this will bring many benefits and will also see new players in the market seeking to push legal, regulatory and ethical boundaries. We know this happens as we handle the complaints that flow to us when new opportunities have opened up to the profession. The coal health scheme and subsequent complaints is a telling example of this. Our question, and one which we are still grappling to answer, is how does excellent regulation define strong parameters to make sure consumers, and especially vulnerable consumers, are not exploited and also allow the profession to be innovative? Redress plays an important part in responding to any subsequent issues; however preventing the harm in the first place would be preferable.

As it came into being, the current Board of the Legal Complaints Service was keen to put in place effective measures to pass back to the profession what we learn from complaints. As part of our Improvement Agenda 2007-2010, the LCS committed as one of its strategic objectives to work with the solicitors profession to improve standards of client care and share our knowledge of complaints handling to assist firms to think about how to prevent complaints. We know from this experience that the LSB and OLC will need strong relationships with regulatory bodies to support an effective risk based approach to regulation and to support the range of activities that exist and could be developed to support the legal services market be more consumer focused and better equipped to resolve complaints. At the very least, this means that the OLC will need to be in a strong position to identify and spot trends and be able to pass that information to the LSB, regulators and the professions. The need for effective relationships and dialogue can only grow as more complex forms of practice are introduced into the legal services market, especially alternative business

structures (ABS) which will open up legal services to a range of new players, and therefore a range of different regulatory structures.

We began to work with the profession as a way to help consumers avoid their problems in the first place and as we believe that this is part of the role of an effective regulator. As such, we welcome the legal literacy aspects of your plan, and agree that this is a key area of work which has not had necessary attention in the past. We would also add that the LSB and the professional bodies need to focus on supporting the profession deliver good services by closing the loop and feeding the lessons learned from regulation as well as redress back into the profession itself.

Redress

As we have just touched on, the information obtained from handling complaints is immense. Capturing this information and using it to respond to risks to inform the profession, public and regulators is something the LCS has only begun to do in a systematic way in the last two years. There is a strong culture among solicitors and that this influences the way they respond to complaints. Using the lessons learned from complaints handling and using this knowledge to prevent complaints and promote good complaints handling would be a valuable activity by the LSB.

In our view, the Legal Services Act calls for a significant cultural change in legal services. We know there are fears that the new culture will be 'anti-lawyer' and will not value the skills and experience of individual lawyers or the profession as a whole. We do not think these fears are justified, but know from our own experience of seeking to make the LCS a more consumer focused organisation that these fears exist and play a part in how regulation currently works.

We welcome the chance for cultural change that the new Act and the creation of bodies such as the LSB and the OLC will bring about. It will also be a shift for consumers and also for everyone currently working in the regulatory bodies as well as for solicitors and firms. We do not see the new aims as being anti-lawyer but instead as a chance to bring about more effective regulation that meets the needs of everyone involved in legal services. However, the cultural shift required should not be underestimated.

Legal redress

We read section 5C of your plan with interest. We think it is worth noting that redress in the legal services market is quite different from other areas in which redress is required. In simple terms, legal complaints are rarely single issue complaints. A typical complaint tends to include a range of issues to do with poor service by the solicitor and has an emotionally upset consumer at the heart of the complaint.

The importance of listening, and the 'soft' skills of a caseworker cannot be underestimated. From the feedback we receive from consumers who have used our service, a common theme is that to resolve a complaint successfully a caseworker needs to be able to manage strong emotions. People use solicitors at key stages of their life, and so it is not surprising that consumers can be very upset when things go wrong and they feel they need to make a complaint.

Furthermore, our experience of legal complaints is that solicitors have a level of technical knowledge of lawyers far above most consumers. In addition, the legal training engenders a certain approach in lawyers as they are a profession who have learned to think and behave in adversarial ways. The LCS believes that an important aspect of being an independent

complaints handling body is to help level the playing field. As noted above, we think that education and training for lawyers and legal literacy for consumers are key areas of focus for the LSB and the profession generally. Improvements in these areas will also assist the OLC in handling complaints in the longer term.

Following on from this, we debated whether a description of the OLC as a disinterested redress body captures what the role of the OLC will be. We appreciate that the breadth of the role of the OLC as an impartial and independent body is hard to set out in brief in what is the LSB's (and not the OLC's) Business Plan. We certainly agree that the OLC cannot show bias in its investigations and determinations. However the word disinterested could be read to imply that the OLC will be disinterested in the outcomes of complaints. The OLC will have a duty to ensure consumers are making informed choices through the complaints handling process. The OLC will also ensure its decisions are fair and reasonable. For these reasons, we would like to suggest that perhaps a more positive word might convey the breadth of the role of the OLC.

Client care

We noted that you will consult on setting rules for in-house complaints handling by firms, and we will look forward to the consultation. As you may be aware, last year the LCS sponsored an excellent in client care award at the annual Law Society Awards Night. The entrants confirmed what we thought to be true, which is that there are many and diverse ways to deliver excellent client care. We will look forward to sharing our learning with you in more detail as you come to think about this issue in detail.

Resourcing

OLC budget

In section 8 of your Business Plan you outline costs and resources for the LSB. As part of this we noted that the LSB budget has risen to £4.9M and that you make a commitment that the estimated £19.9M budget for implementation costs will not rise. We would be interested to know in more detail where the difference of £0.8M will be taken off the OLC implementation budget? We also noted that Elizabeth France gave her approval and would be interested in the assessment that occurred between the LSB and the OLC that gives you confidence that the lower figure is sufficient to start up the OLC.

Linked to this, we would also be interested in whether you will be consulting in tandem with the OLC about the levy and polluter pays rules at the same time? We note that you advise that the costs of the Legal Services Act reforms are likely to be defrayed in the longer term. We would like to note that while we agree that this is likely to be the case, short term debates about what the profession can afford dictate our current budget and we would ask you to be mindful of the tension between what the profession can afford and what this means we can deliver until the OLC is up and running.

Early resolution of complaints

Your discussion of resources also prompted us to think about the potential design of the OLC. If the OLC were to have a front end that provides information but does not seek to resolve complaints quickly at this early stage this can lead to a heavy increase in the number of complaints received by an organisation, impacting on resources, responsiveness and the ability of an organisation to respond to changing trends and demand. We are able to share our evidence that prompted our move from a customer contact centre that provided

information to a contact centre that seeks to actively resolve complaints at an early stage of an enquiry by a consumer. Our experience indicates that a high quality of first contact by experienced caseworkers can reduce the number of complaints by approximately 10 per day. This means it is easier to manage demand and provide an efficient complaints handling service at the 'back' end. As the assumptions about the costs and resources for the OLC to date assume efficiency savings of 10% to 15% through process changes and streamlining, a strategy for managing cases as early on as possible in the process seems vital to begin to fulfil these assumptions.

In addition our view is that the work the LSB does particularly in promoting in-house complaints handling such as that required under Rule 2 of the Solicitors' Code of Conduct will be very important for the OLC to manage its budget and workload effectively. If the majority of complaints can be handled effectively at the first stage, this is better for consumers and also means less expense for the profession in paying for the OLC. We know that some complaints are very important to inform our knowledge of the legal services market, as discussed previously in this response. This, however, is in the interests of all concerned for as many complaints as possible to be resolved even before they are registered as complaints.

Timing and consultations

Previously in this response we touched upon how we think the introduction of ABSs might interact with the redress function provided by the OLC. We noted that the introduction of ABSs into the legal market is still some time away. We welcome a longer lead in time. Putting in place appropriate and effective arrangements to handle complaints about ABSs (and particularly those with complex company structures) will be a significant piece of work. With the changes that flow from establishing the OLC, the LCS would not be in a position to be able to effectively manage additional pressure of market change in the period prior to the OLC opening its doors. We would be very happy to share our insights and experience of the introduction of LDPs (for which we are ready) if this will inform the LSB and OLC in your thinking about ABSs. However, we would ask you to consider the impact on complaints handling organisations as you develop detailed plans for the timing of the introduction of ABSs.

We will also look forward with interest to your consultation about the rules governing separation of the regulatory and representative functions within ARs. This is an area of that is important to us. While we will not have a life as the LCS in the future we are keen that we do our part to make sure consumers are able to access independent redress as it is currently structured until the OLC opens its doors.

Risks and issues

Finally, as we read your Plan it occurred to us that there are a few areas which we believe could benefit from some more attention. Firstly, we would like to see more momentum to get the OLC started. There is a great deal of momentum behind the LSB – as you note you are well ahead of schedule. We would welcome some of this impetus behind the OLC as at present we have a big planning gap which is impacting on our ability to deliver complaints handling now.

The Plan also makes no reference to the governance or reporting arrangements that will be in place between the LSB and OLC and it might be useful to develop this relationship more in advance of the OLC coming to life.

We also feel that the delay in establishing the consumer panel is unfortunate. We would welcome this Panel being in place to inform the establishment of the OLC as well as the LSB. As an independent, consumer-focused point of reference the Panel should provide the OLC with a good sense check as to whether the organisation will meet its objectives as set out in the Legal Services Act.

While reading your Plan, it occurred to us that many of the risks to your Plan are outside the control of the LSB. The current economic climate and debates about what effective regulation should look like seem to be the most likely risks to successful delivery of your Plan. The challenge you put out to the legal community is to be applauded. However, its ability to deliver the results you would like to see will depend on the ability of the profession to afford the change that will see it improve its performance generally. This is a risk that we believe can be managed so that the establishment of the LSB brings success across the sector.