



Enhancing consumer protection, reducing regulatory restrictions

Comments from ACCA
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General comments

The discussion document identifies the possible negative effects of reservation with reference to 'professional monopolies'. We agree that there are costs to the general public if this is the result of reservation. In respect of each reserved activity, the cost to the public must be weighed against the benefits of heightened quality and performance, a clear ethical code, and access to redress (including requirements for a complaints procedure and professional indemnity insurance). In addition, to the extent that the services that the public consider to be 'legal services' are performed by lawyers with reserved titles, there is the significant benefit of clarity for customers.

There is no statutory basis for the regulation of those who do not offer reserved activities and do not have a title protected in legislation. In view of the objectives of providing choice and value for consumers, there should be no presumption that regulation of these practitioners is the only option. However, it is essential that the public is protected, and so any choice of service provider that they are required to make must be an *informed* choice.

The term 'legal advice' is extremely broad, and it is probably true to say that most professionals in public practice (eg surveyors, architects, accountants, etc) and other specialists (eg in human resources, advertising, construction, maintenance, etc) will be expected to provide advice to clients on the interpretation of, and compliance with, the law. Consumers are generally aware which trades and professions are regulated by trade bodies or professional bodies. To bring every body whose members may provide 'legal advice' within the oversight of the Legal Services Board (LSB) would be unrealistic, unnecessary and disproportionate. We accept that other measures may be possible, and these should stem from the objective of providing the public with informed choice.

It is difficult to define the boundaries of legal services. It could easily be argued that taxation advice often takes the form of a legal service. But regulation of such a service is better placed in the hands of accountancy regulators, as taxation advice is provided primarily by accountants, and usually closely aligned to other accountancy services. Although the term 'accountant' is not a legally protected title, we believe that the public is accustomed to differentiating between a regulated and an unregulated accountant.

Voluntary schemes of regulation are admirable, but there is potential for confusion if professionals who choose to be regulated by a professional body cannot easily differentiate themselves in the marketplace from unregulated practitioners. However, it is the role of their professional body to promote the 'brand', rather than the Legal Services Board (LSB). Nevertheless, for some legal activities, a formal system of regulation may also benefit the reputation of the profession, as there will be less confusion for clients between regulated and unregulated practitioners. However, as already stated, there are alternative ways of reducing such confusion, while retaining customer choice.

The discussion document refers frequently to measures other than increased regulation, and to the disadvantages of reserving legal services (using the term 'monopoly'). Conversely, the document also implies that unregulated providers put pressure on regulated firms, with the effect that standards fall in the regulated firms. Two points are relevant here: first, the regulators are failing to maintain standards among the regulated providers; secondly, the public is not perceiving any advantage in obtaining services from a regulated entity. The discussion document does not, in fact, focus on the other measures that may be taken as an alternative to regulation. The regulators should be encouraged to promote the 'brand' while, of course, continuing to keep separate their representative and regulatory functions.

If the list of reserved legal activities is to be extended, there will need to be transitional provisions in respect of unregulated practitioners already supplying such services, in order to ensure continuity of service for their clients. We acknowledge that applications will be received from potential approved regulators, but if this is intended to provide continuity of service, such applications will have to be approved prior to the legislation extending the scope of reserved activities. Prior to this, acceptable systems of regulation must have been identified among the existing approved regulators, and each potential approved regulator must have demonstrated that its regulatory system is similarly robust.

Specific questions

Question 1: What are your views on the three themes that we have put at the core of our vision for the legal services market? If different, what themes do you believe should be at the core of our vision?

Taken together, the three themes may be summarised to say that the regulatory objectives are paramount, and in order to achieve these, the LSB will adhere to the principles of better regulation, and have particular regard for an appropriate and proportionate approach in each particular market. We endorse this view.

We note that the LSB recognises the role of consumer and competition law and, with this in mind, additional incremental regulatory measures should be resisted in the first instance. Any such regulation should be subjected to a rigorous and objective assessment of cost and benefit.

Question 2: What is your opinion of our view that the purpose of regulation is to ensure appropriate protections and redress are in place and above this there are real competitive and cultural pressures for legal services to deliver the highest possible standards with a range of options for consumers at different prices? If different, what do you consider that the role of regulation should be?

Broadly, we agree that the purpose of regulation is to ensure appropriate protection and redress for consumers. However, 'appropriate' measures should principally involve regard for the public interest. Competition, quality and choice are admirable aims in any area where legal services are being provided. However, increased regulation is not always the means by which this should be achieved.

The Solicitors Regulation Authority's recent move towards Outcome Focused Regulation has 'freed' many members of the legal profession to focus on fundamental principles of behaviour, and so give them a clearer understanding of how to deliver their services to an acceptable standard. This less prescriptive approach to regulation enables providers to differentiate themselves, compete

and provide value for money and choice for customers while focusing on outcomes. It enables commercial objectives to lead to quality and competition, and this is certainly preferable to additional regulation.

Question 3: In light of the changing market do you think that specific action may be needed to ensure that more legal services activity can unequivocally be included within the remit of the Legal Ombudsman and, if so, how can this best be achieved?

We note that the LSB intends to issue a section 20 request to the Office for Legal Complaints in order to obtain details of complaints received from members of the public who were mistaken in thinking that the service they had purchased was regulated. We question whether the LSB has a benchmark against which to measure the results. Without this, there is a significant risk that measures to protect a minority of consumers will be detrimental to the interests of the general public.

Examples given of the changing market include online options, and the discussion document implies that users of such options expect some form of redress when things go wrong (whether they be errors of the user or weaknesses in the design of the system). It is difficult to determine the data necessary to be able to form an opinion on this, and so we suggest that an assumption be made that misunderstandings on the part of the users, concerning the level of protection they have when using an online service, are relatively few.

It is also noted that financial institutions may use lawyers in order to provide legal services within the range of services that the financial institutions provide. The implication in the discussion document is that such systems are failing, and we suggest that the reason for this must be a weakness in the regulation of the lawyer who is providing the reserved legal activity.

We urge that weaknesses in current systems of regulation are addressed prior to assessing the need for further reaches of legal regulation. Paragraph 82 of the document highlights the problems being experienced due to outsourcing, and the use of unqualified employees under the supervision of qualified lawyers. If the latter are appropriately regulated, why are they not being held to account by their approved regulator?

Paragraph 83 of the document highlights the issue of lawyers providing legal services (albeit unreserved activities) without holding practising certificates. This suggests a fundamental issue concerning the definition of public practice and licensing arrangements. The regulations of ACCA, for example, state that individuals and firms that allow themselves to be perceived as being in practice fall within the definition of practising. We urge the LSB to focus on improving the regulatory arrangements of approved regulators before attempting to bring more professional bodies within its oversight.

We note that the Practising Requirements of the Bar Standards Board (BSB) state:

'For the purposes of this Code a barrister practises as a barrister if:

(a) he supplies legal services and in connection with the supply of such services:

(i) he holds himself out or allows himself to be held out as a barrister ...'.

We question whether a barrister must be held out as a barrister in order to be required to hold a practising certificate and so be subject to the standards of service of the BSB. We would expect the standards of the BSB to apply whenever a barrister either supplies legal services *or* allows himself to be held out as a barrister, and it should not be necessary to demonstrate both.

In conclusion we do not perceive the need for any action to ensure that more legal services activity can be included within the remit of the Legal Ombudsman.

Question 4: What are your views of our diagnosis of the weakness of the existing system and the problems within it?

With regard to the claim of will-writers that they require regulatory status in order to differentiate themselves from unregulated competitors, we would contest that this should be the responsibility of their trade bodies. The difficulty in achieving this will be in inverse proportion to the reputation of will-writers under the regulation of their trade body. In contrast, an extension of reservation may be seen as unfairly prejudicing the interest of solicitors and barristers, who are regulated across a range of legal services. In any event, this would not

distinguish specialist will-writers from other lawyers who provide a range of legal services.

Question 5: What do you see as the benefits and downsides of regulating through protected title such as solicitor and barrister?

As noted, consumers must understand the distinction between regulated and unregulated activities. They cannot be expected to be familiar with legislation concerning reserved legal activities and protected titles. However, there is an understanding by the general public that solicitors and barristers are regulated. We believe that other terms (such as will-writing and estate administration) do not attract the same understanding. Therefore, there is great value from regulation through those protected titles primarily.

According to the discussion document, consumers who seeks the security of using an established 'brand' (eg solicitor or barrister), may forego cheaper or otherwise more appropriate options. This problem (which we believe is a lesser problem than that of consumers being unaware of the protection offered by regulated providers) cannot be easily overcome, because that would require consumers to be able to better assess their own needs.

Question 6: What are your views on whether there should be a consistent approach to the allocation of title to authorised persons? What are your views on whether the title should be linked directly to the activities that a person is authorised to undertake or linked to the principal approved regulator that authorises them?

In addition to the points raised above, it should be noted that, while the concerns of legal services providers are worthy of attention, they must be seen as secondary to the concerns of consumers and the wider public interest.

Question 7: What are your views on our proposal that areas should be examined “case- by- case”, using will-writing as a live case study, rather than through a general recasting of the boundaries of regulation? If you disagree, what form should a more general approach take?

In view of our reservations concerning any extension of oversight of the LSB before the regulatory systems of the existing approved regulators are reviewed and enhanced, we agree with the proposal that areas should only be examined on a case-by-case basis. We would also draw attention to the general point made above concerning the need for continuity of service when reserving additional legal activities and receiving applications from potential new approved regulators.

Question 8: What are your views on our proposed stages for assessing if regulation is needed, and if it is, what regulatory interventions are required?

Again, we would also draw attention to the point made above concerning the need for continuity of service when reserving additional legal activities and receiving applications from potential new approved regulators. As a starting point, any expansion of the list of reserved activities should be resisted.

Question 9: What are your views on the implications of our approach for professional privilege?

Legal Professional Privilege is intended to provide a benefit for consumers, but it also provides a competitive benefit for the authorised person. It is not clear what is meant by ‘the implications of our approach for professional privilege’. However, the discussion document states:

‘Although we do not consider that the maintenance or extension of existing rights of privilege should determine questions of regulation, we must be mindful of the consequential impact on the issue when considering changes to regulatory boundaries and connected regulatory decisions.’

We agree with the sentiment expressed above.

Question 10: Do you believe that any of the current reserved legal activities are in need of urgent review? If so, which activities do you think should be reviewed and why?

We believe that probate activities should be reviewed in this respect. In the absence of detailed empirical evidence, it is likely that the high volume of probate forms that are 'stopped' by the Probate Service arises through the inability of professionals other than lawyers to submit the forms. For example, the majority of the work required to complete the forms may be competently and efficiently performed by an accountant or an estate administrator. If such professionals were able to submit the forms, there would be continuity of service and more accountability by the providers of the services. Wider choice for consumers and increased competition may also ensue.

Question 11: What are your views on our analysis of the regulatory menu and how it can be used?

We have no comments on the LSB's analysis of the regulatory menu. However, we are in favour of regulation targeting outcomes, rather than using rules that target inputs. We also endorse the statement in paragraph 139 that professional bodies should 'play an important role in helping to distinguish their members in the market place on the basis of quality and high standards'.

Question 12: Do you have any comments on our thoughts on other areas that might be reviewed in the period 2012-15, including proposed additions or deletions, and suggestions on relative priority?

The objective of providing redress for any consumer of legal advice is ambitious, as there are numerous trades and professions that provide advice or services based on their judgement of legal issues. A further practical issue is that of determining at what point the provision of legal advice is defined as the delivery of a service. There is a danger that professionals (such as architects) who rely on a level of knowledge of certain aspects of the law may take decisions on behalf of their clients rather than provide them with the different options available under the law so that the client may chose the optimum for them.

Question 13: Do you have any comments on the approach that we have adopted for reviewing the regulation of will-writing, probate and estate administration?

We note that the document states that there is ‘a strong prima facie case to be answered for making will-writing a reserved activity’. We would prefer the stance that there is a strong case for improving standards, and it is likely that this is best driven by improving standards within the regulated legal profession first.

Conclusions

Consumers of legal services are usually vulnerable, as they are not in a position to easily assess their own needs. Therefore, they may encounter difficulty in selecting the appropriate provider. Protection of the consumer and upholding the public interest may come about through focusing on the consumer’s informed choice of provider.

The discussion document acknowledges that there are alternatives to extending the number of reserved legal activities, but it is imbalanced in that it does not suggest what those alternatives might be. In addition, we have strong reservations concerning any extension of oversight of the LSB before the regulatory systems of the existing approved regulators are enhanced.

We would prefer to see more emphasis on professional bodies promoting the ‘brand’, which may only be achieved by demonstrating high standards and robust regulation.

Where a possible extension of the LSB’s oversight is being reviewed, any assessment of costs and benefits will be extremely complicated and wide-ranging. It is likely that the results will have limited value, and we urge that the LSB should only commence such a course of action after all other alternatives have been fully considered.

