



Enhancing consumer protection,
reducing regulatory restrictions

Response by Citizens Advice to
the Legal Services Board

November 2011

Introduction

Citizens Advice is the national body for Citizens Advice Bureaux in England and Wales.

The CAB service is the largest independent network of free advice centres in Europe, with nearly 400 main bureaux providing advice from over 3,300 outlets, including bureaux in the high street, community centres, health settings, courts and prisons. In 2010/11 Citizens Advice Bureaux in England and Wales advised 2.1 million people with seven million problems in total.

Bureaux are a significant provider of legal advice as the Legal Services Board is well aware: “More than 50 per cent of bureaux have LSC contracts and the majority of the advice they provide is legal advice (over 95 per cent).”¹ Bureaux also see a lot of consumer complaints against private sector providers of legal services: last year we saw over 60,000 issues reported concerning solicitors and barristers, and 17,000 concerning compensation redress.

The key question over the boundaries of legal services regulation is how the regulatory regime can assist consumers in benefiting from the provision of those services. Legal needs research from the Legal Services Research Centre consistently shows that around a third of the population have unresolved civil legal problems at any one time, and that a significant percentage get no legal advice at all.² Moreover, as legal aid is restricted in scope and only available to those on very low incomes, it is important that advice and legal services providers outside the legal aid funded sector should be encouraged to innovate in order to reach a wider range of consumers at lower cost.

Citizens Advice was closely involved with the development of the Legal Services Act, having campaigned for better regulation of the sector. We participated actively in the Ministry of Justice’s Consumer Panel which oversaw the drafting and initial implementation of this important legislation. We have also been supportive of the concept of “Alternative Business Structures” on the basis that a wider range of business models incorporating both legal and non legal services could have potential to serve consumer need better than the more traditional legal services structures in the private sector. However, the Legal Services Act regime is not without its problems – especially in respect of the definition and boundaries of “legal activities”. We therefore welcome the approach of this paper which signals a shift towards activity based regulation organised around clearly identified risks.

Regulatory principles – Questions 1-4

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?

We agree that regulation should be appropriate to the market and delivered on the basis of achieving the Legal Services Act’s regulatory objectives which include consumer interest and protection, public interest, competitiveness, sound professional service/standards and improving access to justice and public awareness of legal issues.

¹ *Understanding the supply of legal services by ‘special bodies’* A report prepared for the Legal Services Board September 2011

² *Causes of Action, Civil Law and Social Exclusion*

Consideration of “appropriateness” should include the nature of the relationship between the client and the provider, and balance consumer benefits against the risk of consumer detriment. For example, risks to consumers may arise where the provision legal services provides a platform for marketing other associated services. In markets where clients are particularly cost sensitive due to lack of alternative information on which to base choice of provider decisions, there is a risk that providers could use loss leader services to draw clients into a relationship which could be abused.

The risk that regulation could become a disincentive to provision should also be considered. It is particularly important when considering clients with limited financial means who may rely on legal services in categories of law where there are minimal commercial incentives to provide services, or services will only realistically be provided in the Not for Profit (NfP) sector. Currently, parts of the NfP sector are subject to overlapping regulatory regimes, for example covering the provision of immigration advice. Many of the sector’s legal service activities are of a lower risk than those of commercial providers, as NfP agencies do not hold client funds or charge for services, although we accept that the sector’s clients, a high proportion of whom have low incomes and other vulnerabilities, also need protection and assurance given the level of reliance that clients place on the advice provided. However, there also would be a clear client detriment if over regulation had the effect of significantly contracting supply, especially in the NfP sector which is currently facing disproportionate pressures from substantial cuts being made to legal aid provision.

Regulation should therefore be set at an appropriate level to deliver on regulatory objectives. Consideration should be given to supporting additional voluntary quality assurance measures which could serve as an incentive for providers to rise above minimum standards and to allow clients to more easily allow quality providers to distinguish themselves. A good starting point and baseline requirement might be for all providers, from whatever sector, to be required to demonstrate how they are meeting the regulatory objectives of the Legal Services Act.

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?

We agree that regulation should go beyond minimum standards to avoid a “race to the bottom”. In the legal services market where clients are likely to base their decision making almost solely on price as they have no previous purchasing experience, there should be strong commercial pressures to reduce prices. However, there have also been long-standing concerns about the price of services, especially where court processes are engaged. For example Lord Justice Jackson’s report on civil litigation costs has highlighted how cost rules and procedures, and their interaction with fee charging regimes, can put professional legal services beyond the reach of many ordinary consumers.³ Citizens Advice has long been raising transparency concerns about both marketing and pricing mechanisms in the claims sector, and especially issues under so called “no win, no fee” regimes.⁴ Bureaux regularly report situations in which clients are dissatisfied with the quality of services and outcomes from engaging professional legal services. For example:

A CAB in the East of England (Ref: 227637233) saw a woman who lived alone in a council house. She had had an accident in 2007 when a bannister collapsed away and she fell

³ Lord Justice Jackson’s *Review of Civil litigation costs*, HM Judiciary 2009

⁴ *No Win, No Fee No Chance*, Citizens Advice 2004

suffering a fractured skull and blood clots to the brain. She never fully recovered and was unable to work and had to rely on benefits for income. She engaged solicitors on a no win no fee basis to sue the council for personal injury damages. After two years preparatory work, the case was eventually due to be heard in court. However, with less than a week before the hearing, she received a letter from the solicitors stating that 'fresh evidence' had come to light which meant they were withdrawing from the case. If the client wished to continue with her claim, she would have to be prepared to pay £60,000 costs to the council if she lost the case, and she would also have to pay up front barrister's fees of £2,000 per day. They gave her a deadline of 1.00 pm on Monday having only received the correspondence late on Friday, and she was unable to contact them to ascertain what the 'fresh evidence' was.

A London CAB (Ref: 222823748) reported that a 41 year old man had been presented with a bill for solicitor's fees of £22,815.83 for services which he had originally understood would be conducted on a 'no win no fee' basis. The bureau found that the solicitors had already obtained a default judgment and were seeking enforce it against the client, so he would have a very limited opportunity to apply to set aside the judgment. The client did not speak English and felt that he had been taken advantage of as he could not understand legal letters.

Another London (Ref: 224706827), reported the complaint of a 58 year old Bangladeshi man who had had an take away restaurant which had traded for 8 years. The client agreed to vacate his current business premises when his landlord asked him to move out so that he could demolish the building. His landlord offered him a new lease on a different building, but this was handed to him in a state of disrepair - council inspectors having deemed the property unfit to open. He compiled a complaint against the landlord who accepted the list of defects, but did not rectify any of them. He then went to a law firm to seek assistance, but found the services offered to him unsatisfactory along with delay, failure to keep him informed, and failure to progress. The client had been to court and although he won the case, he was ordered to pay costs, fees and rent. He felt upset that he had lost his livelihood, was left in debt and could not see a resolution of the problem.

It is important that there is an appropriate balance of price against quality standards. The LSB could encourage high standards by helping potential clients distinguish between providers by supporting and promoting additional voluntary quality standards. As regards redress as a consumer protection mechanism, a regulatory system which relies too heavily on "after the fact" redress rather than up front quality assurance standards could lead to a situation where there are commercial advantages to providing a substandard services in the knowledge that dealing with subsequent complaints is cheaper than investing in a quality service.

If a range of services at different prices are to be encouraged, consideration needs to be given to how providers describe and market their services. Prices will be an important distinguishing factor between providers so it is important that clients are able to identify clearly what is being offered for the quoted price. We have argued that especially in managing low value cases (eg consumer, housing and personal injury claims) price regulation of some services may be appropriate in order to maintain proportionate costs.⁵

⁵ Citizens Advice's submission to Lord Justice Jackson's Review of Civil litigation costs, 2009

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?

It is important that the extent of regulation is clear to both clients and providers alike. The current situation where clients are often unaware that their legal advice is not covered by regulation is clearly problematic, as is the lack of clarity over how to process a complaint or obtain redress for poor service. For example:-

A CAB in Yorkshire and the Humber was contacted by a man Ref: 185661413) concerning advice on a company which claimed to be providing legal services. His wife had been coldcalled by the company and agreed to them visiting her at home. She was interested in because the family home was in her sole name and willed to her son. The company persuaded her to sign up for a trust deed and a power of attorney, after suggesting she could lose the home to the 'Government' who would sell it to pay care home fees if she became ill,.. The company asked for the whole amount of money up front which the client paid; they took his wife's will and other details to include in the Trust Deed and promised to come back within the week. This did not happen despite the client chasing it up. He then put in a formal complaint by email asking for all of his money to be returned. A solicitor rang the client and said he would look into it. He left it a week and then put in another complaint. The solicitor rang back again and the client told him he would come into their offices to pick up his money the next day. When he arrived, he found that the company who contacted him shared a building with a solicitors' firm, and the solicitor who contacted him appeared to be a partner in both companies. The solicitor convinced the client that everything was OK and gave him a draft copy of the trust deed and promised that the Power of Attorney would be in the post that evening. The client was still very unhappy with the service and product sold to him by the company and now wanted to cancel. Having done research, he found out for himself that the company which sold him the service were not regulated by any official regulatory body. Another solicitor has subsequently advised him that there would be no guarantee that the Trust Deed could save the family home from being used to pay care home fees. The client was concerned that there may have been a breach of contract because the firm used the words 'GUARANTEED' their information. He contacted Trading Standards via Consumer Direct who have suggested a breach of contract letter could be downloaded.

There are good reasons for extending the remit of the Legal Ombudsman. Clarity for the consumer should remain an important goal for the LSB. We believe that having a single complaints service for all consumers of legal services will take the LSB a considerable way towards achieving this goal.

However, careful consideration needs to be given to the boundaries of legal advice. We are concerned that regulation should improve the position for clients and not stifle provision, particularly where clients cannot afford to pay for services and where they rely on the Not-for-Profit sector for assistance. Clear guidance on the extent of regulation will need to be provided to avoid reducing the help available. For example, community groups will often provide assistance to clients in welfare benefits matters. Often the assistance required is related to the assisting a client who is not confident to act alone due to literacy issues or fill in forms with factual details, the assistant is in effect acting as a scribe rather than a adviser. Unless clear guidance is available about the boundaries and meaning of advice, some of these important informal sources of help could diminish.

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

We agree that current regulatory schemes can be unclear for clients. One of the purposes of the Legal Services Act was to simplify the complex and piecemeal regulatory system associated with different professions' structures. A balance needs to be struck between the appropriateness of regulation according to risk in particular markets, and consumer understanding of the protection that regulation provides. Sections 24 and 26 of the Act allow for the widening and narrowing the scope of what is subject to legal services regulation, but as we highlight in our answers to questions 7 and 8 below, this process may prove to be cumbersome.

Authorised persons – Questions 5-6

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

There are benefits inherent in regulation by protected title in the provision of many areas of legal advice and representation. The provision of standardised and rigorous entry requirements to a profession provide significant protection for clients both by ensuring appropriate expertise and by ensuring that provision is subject to widely accepted professional ethics, as well as specific practice rules and professional codes. Individual practitioners have invested heavily in the process of entering the professions creating a inbuilt incentive to uphold standards. However, it can be all too easy for under-qualified or inappropriately qualified persons to hold themselves out as professional legal experts in particular practice areas, as our previous response to the LSB highlights.

A CAB in the South West saw a couple who were in dispute with their plumber who was represented by an unregulated lawyer. The "lawyer" used a letter heading which included 'Advice & Legal Services - A Partnership' on the notepaper as well as the names of "Partners" who were married and one of whom had an LLB qualification. They represented the plumber in court and led the client to believe that he was in some way a qualified legal practitioner. The client's legal action for damages against the plumber was subject to numerous applications and delays because of the conduct of these representatives. A complaint about the Partner was made by the CAB to the Law Society but they were unable to assist as they could find no "direct evidence" that he ever held himself out as a solicitor.

A CAB in the East of England saw a Polish man who had engaged a company who advertised themselves as "Property Lawyers" for conveyancing because he thought they were lawyers, not licensed conveyancers. He thought he was going to get back £1,000 on completion, but this was not forthcoming. He asked for a complaint form and was told 'they don't do them.' He did not realise the difference between a lawyer and a conveyancer and felt he was misled by the headed notepaper.

As a starting point we would agree with the appropriateness of maintaining a professional post-holder approach for most types of litigation and specialist advocacy before the higher courts. However, there are different models of legal advice and support delivery which could benefit clients/consumers from expanding provision and providing competition. Lay advisers who specialise in discrete areas of legal advice can provide excellent quality services benefiting from their focus and specialist knowledge. The rights of lay advisers (whether acting pro-bono or as paid caseworkers) to assist and represent

persons before lower courts and tribunals have been recognised since the 1995 Courts and Legal Services Act. It is likely that such services many have to be called upon more in the future, as the recent Civil Justice Council Report on litigant representation identifies a significant gap for legal support and advocacy especially those who self-represent with some assistance.⁶ The protected title approach also needs to take account of the separate review that the LSB is undertaking on legal education and training.

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?

There are benefits of simplicity of authorisation linked to particular regulators, however clients could suffer detriment if an authorised person is free to advise in areas where they lack direct expertise or training. Regulatory arrangements where *authority is linked to the activity* would have the benefit of enabling clients to be confident that the adviser is the most appropriate person to assist them. It is also important that clients are provided with the sufficient information about the levels of expertise different providers bring to the services they are providing and that clients are empowered to make effective choices from the available market place. Expertise in practice may be provided by entities rather than just authorised persons, so we strongly welcome the shift towards regulation and accountability of the economic unit providing the service, and away from regulation of individual lawyers

Widening the regulatory net – Questions 7-13

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?

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

Our starting point, having observed the how consumers interact with legal services from complaints and issues brought to bureaux, is that the that the market can change very quickly, especially in advice and intermediary service areas such as claims management, referrals, probate/will writing and debt recovery services. We have always maintained that regulatory boundaries need to be sufficiently broad and flexible to deal with changing supply and practice patterns on the ground, with regulators adopting a more of a “functionalist” than a “formalist” approach – ie looking at the *function* of particular services, rather than their formal status within the legal services hierarchy and landscape. Bespoke regulatory solutions may be necessary in some sectors, and solutions may differ for business to consumer or business to business relationships or transactions. The vulnerability and capabilities of clients involved in transactions also needs to be considered, as well as those on the receiving end of legal communications. For example, we have raised some very serious concerns about civil recovery practice.⁷ We have also general concerns about the enforcement sector (for

⁶ *Access to Justice for Litigants in Person (or self-represented litigants) A Report and Series of Recommendations to the Lord Chancellor and to the Lord Chief Justice, CJC 2009*

⁷ *Unreasonable demands? Threatened civil recovery against those accused of shoplifting or employee theft Citizens Advice 2009*

example bailiffs, which policy makers have consistently failed to act on due to a lack of bespoke regulatory solutions.

This paper proposed no less than seven stages or process to go through before a regulatory intervention under the Legal Services Act might be triggered, including:

- Identification of the area of legal services for review emerging from requests by the Lord Chancellor or Lord Chief Justice, Office of Fair Trading, the Ombudsman, approved regulators or the Legal Services Consumer Panel.
- Identification of issues from a review of the initial evidence base
- Compilation and analysis of further evidence:
- Analysis of existing mechanisms and non-statutory interventions
- Option appraisal on regulatory arrangements
- Identifying impacts and undertaking Impact Assessments
- Recommendations on possible “reservation” under Schedule 6
- Consideration of providing guidance on optimum standards under Section 162
- A statutory order to put any reservation into effect
- Application from potential approved regulators for operation and enforcement for any newly reserved activity

Our concern is that rigid adherence to these stages could take a very considerable period of time, up to several years, before any outcome is specified, by which time the market may have changed again or the consumer detriment issues may have moved on. We consider that it may be necessary to adopt a “fast-track” procedure where there is overwhelming evidence that a particular sector requires a specific regulatory intervention. Whilst “reservation” of an activity may not always provide the way forwards, it is imperative that for any activity that remains unreserved, that the LSB can work with other regulators – for example financial services regulators – to address problems quickly. Within any market there can be “rogue” elements which take full advantage regulatory gaps of the amount of time and procedure that can be involved for regulators to take action against bad practice. Regulators need effective tools to act quickly, as has been demonstrated with civil sanctions pilot for consumer law enforcement.

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

We believe that, as with regulation, it is important for consumers to be able to understand when privilege applies. Privilege is a protection that belongs to the client rather than the legal adviser, and therefore serves as an important consumer protection tool. However, given that the scope of privilege can be subject to determination by case law, it may be difficult to achieve clear guidance on this.

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?

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

We would echo the comments of Professor Stephen Mayson that the distinction between “reserved” and “unreserved” activities can appear confusing, especially for consumers.⁸ This is because it reflects historical legal structures rather than contemporary market dynamics and interactions with consumers. We have argued for many years that legal services regulation needs to shift from a

⁸ *The Regulation of Legal Services: What is the Case for Reservation?* Legal Services Institute 2011

backwards looking to a forwards looking approach. The test for exposing any activity to greater regulation should be the reliance that consumers' place on particular services, and the risks that they may be exposed to if things go wrong.

It is worth recalling that Sir David Clementi's review offered two "models" of regulation, one model based around one all encompassing regulator for the sector on a par with the Financial Services Authority, and one based around a looser family of professional bodies regulation under the general umbrella of a Legal Services Board.⁹ The latter approach won the day given the arguments that it is desirable for many aspects of the legal professions' work to be regulated at arms' length from Government in order to maintain constitutional principles around the political independence of professional legal advocacy, and especially the higher ranks such as judicial office-holders. However, we would argue that giving primacy to professional bodies in all regulatory policy making can put too much weight on historical structures which may no longer be fit for purpose, and at worst can look as if the process is legitimising self-regulation. This is where the Legal Services Board comes in, in being able to assess the quality, adequacy and transparency of professional regulation, and to look at the wider public and consumer interest.

Looking across all reserved and unreserved activity to see if the regulatory menu is fit for purpose is therefore no more than the Legal Services Board fulfilling its general remit to keep the legal services market under review. We would suggest that the LSB should publish an annual market intelligence review that could pick up changes in activity and developments within particular sectors.

As well as will writing, we would observe that many legal service activities such as mediation, drafting tenancy agreements, claims management and debt enforcement that are currently unreserved unless directly related to litigation, which have far more potential for consumer detriment than some of the more obscure reserved activities such as administration of oaths and public notary activities.

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?

We agree that further consideration needs to be given to the issue of how "general legal advice", whether provided by legal or non-law professionals might be best regulated and quality assured in the future. Alternative Business Structures may not be the appropriate vehicle for this as ABS licensing is primarily concerned with reserved activities, and only captures the regulation of unreserved services such as the provision of advice, as an activity connected to the provision of a regulated service by a regulated entity. The LSB's recent research paper on "special bodies" also highlights many of the issues that advice sector organisations which deliver legal advice face within the regulatory landscape.¹⁰ The key is to ensure that appropriate standards are met and that quality assurance standards and quality marks are in place. We would welcome further discussion with the LSB around these issues.

Immigration advice is also an area that should be reviewed due to overlapping and unclear regulation, for example the role of the Office of the Immigration Services Commissioner scheme for registration of immigration advisors.

⁹ *Review of the Regulatory Framework for Legal Services*, Sir David Clementi 2004

¹⁰ *Understanding the supply of legal services by 'special bodies'* A report prepared for the Legal Services Board September 2011

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 are pleased that action is now being taken in this area. We agree with the Legal Services Consumer Panel who have suggested a preventative regime, including of the following elements as requirements for businesses in this sector:

- Education, so that a qualification must be obtained or an exam passed prior to undertaking will-writing;
- Provision of an office holder who would answer for the business on will-writing presumably to the regulator;
- Conduct rules, including to tackle known problem areas;
- Ongoing competence to retain accreditation;
- Monitoring compliance: including that the regulator's toolkit should include mystery shopping;
- Redress: including insurance, a compensation fund and access to the Legal Ombudsman;
- Discipline: sanctions for misconduct.

It is useful to note that the Panel's mystery shopping revealed as many problems with solicitors as with will writing businesses. We agree that will-writing should be regulated, but not be restricted to the legal profession, on the grounds that:

- This is often a complex job and consumers need to be able to trust providers;
- The will-writer needs to know about and be competent to inform the consumer about legal responsibilities, taxation etc
- Anyone who has a valuable asset, such as a house or a pension, or has financial responsibility for anyone else, such as children, usually needs to have a will and may need additional products, for example about legal guardianship of children;
- This is a one off purchase, so people are not familiar with their shopping list for the purchase, how to choose a supplier, what to ask of them and how much to expect to pay. It has its own language too;
- The product should be capable of amendment when circumstances change after any major life event (marriage, domestic splits, childbirth, the taking on of financial responsibility for another person);
- The contract for this service is between the will-writer and the person who will be dead when any problems come to light;
- Storage is vital to ensure that the contents of the will and the person's wishes are to obeyed;
- There must be an ADR provision and the Legal Ombudsman seems best placed for this role. We could suggest that there is a requirement that all paid for will-writing services offer ADR, following the model used for estate agents under the Consumer Estate Agents and Redress Act 2007. (this was mentioned at the discussion group, by me in one group and by someone else in the other group)

We consider that for regulation to work, there would need to be a public register and a lot of educational publicity. There would need to be an offence of failing to be registered or for receiving payment whilst not registered. Registration would need to be available only to those who fit the set criteria.

