



A RESPONSE BY

**THE CHARTERED INSTITUTE OF LEGAL
EXECUTIVES**

AND

ILEX PROFESSIONAL STANDARDS LIMITED

APPROACHES TO QUALITY

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Introduction

This response represents the joint views of The Chartered Institute of Legal Executives (CILEx) an Approved Regulator under the *Legal Services Act 2007 (the 2007 Act)*, and ILEX Professional Standards Limited (IPS), the regulatory body for 22,000 members of CILEx. The consultation was separately considered, in the case of CILEx by a committee comprising of the President and the Vice President together with a number of Council members; and in the case of IPS its Board. The outcomes of those respective considerations were exchanged and with no significant difference of opinion between the two organisations, a joint response is tendered. For the purposes of this response, 'we' is used to mean both CILEx and IPS unless the context suggests otherwise.

CILEx and IPS promote proper standards of conduct and behaviour among Chartered Legal Executives and other members of CILEx. We aim to ensure CILEx members are competent and trusted legal practitioners and are fully aware of their obligations to clients, colleagues, the courts and the public. We aim to help good practitioners stay good and improve throughout their careers and to ensure the public know the quality of work Chartered Legal Executives can provide.

We welcome the opportunity to comment on proposals put forward by the Legal Services Board (LSB) on quality assurance. We hope the responses to questions below may be of value to the LSB and help to inform its approach.

Questions

Question 1: In your experience, when consumers do not receive quality legal services, what has usually gone wrong? Where problems exist, are these largely to do with technical incompetence, poor client care, the service proving to be less useful than expected by the client – or something else?

As has been seen through our disciplinary casework, where problems exist, they are usually to do with poor client care. Problems are less likely to do with technical competence and even less likely to do with usefulness of service. Technical incompetence may be harder to detect by consumers as, based on the evidence provided in the consultation paper, consumers tend to think all lawyers are technically competent. Technical incompetence may eventually be noticed by regulators dealing with complaints about conduct. Usefulness of service is less of an issue as entrepreneurial and principled firms will recognise service gaps and fill them to compete more effectively in the market they serve. We agree that overall, consumers are more focused upon good customer service than they are on the detail of regulation.

The research commissioned by the LSB from Opinion Leader revealed what consumers want when they engage with legal services. On the whole the preferred outcomes identified by consumers support good client care, they were:

1. Transparency
2. Communication (initial choice and active on-going engagement)
3. Professionalism and integrity (good quality advice)
4. Timeliness
5. An alignment with their best interests (utility)
6. Fair and efficient complaints handling

It is important not to lose sight of the fact that most 'natural persons' will commonly access legal services in times of stress or trouble. This taken together with limited knowledge and understanding of the profession; limited opportunity to build relationships; limited choice of providers and limited information on which to base an informed choice, are all factors that might be perceived by consumers to restrict the scope for good customer services when it comes to accessing legal advice. This may also go some way in explaining the preferred outcomes most favoured by consumers, which is based on an inequality bargaining power between the consumer and the provider of legal services.

Question 2: Would it be helpful if the regulators approached issues of quality by looking separately at different segments of the legal services market? Which segments do you perceive as being greatest risk to consumers?

We agree that market segmentation will help approved regulators define what needs to be measured in order to monitor changes in the legal services sector. Market segmentation provides a breakdown of the legal services sector and enables approved regulators to target high risk areas and ultimately provide a more outcomes focused approach to regulation.

That said, at present, there is no industry standard segmentation. Further research appears to indicate that none of the prevailing segmentations identified has remained stable over time. Moreover, as none of the existing segmentations has been designed with the primary objective of monitoring developments across the legal services sector, it is appropriate to develop "market segmentation with the primary objective of monitoring changes in the functioning of the legal services sector".¹

As proposed in the paper, rather than a broad brush approach to regulation a targeted approach to quality assurance requires categorisations/market segmentation based upon the type of law, type of legal activity and type of

¹ A framework to monitor the legal services sector; September 20th 2011 Oxera.

consumer. The LSB are already looking how quality is assured in the provision of immigration advice and services.

When mapping areas of law, consideration needs to be given as to whether the matter is contentious or non-contentious. Furthermore, in light of the LSB's review into boundaries of legal services regulation, market segmentation should also involve considering non-reserved areas of law as abuses can go unchecked and consumers of these services do not always have routes of redress.

The Legal Ombudsman's (LeO) data on complaints could also be used, so that areas that encounter a lot of complaints are targeted. However, LeO's data shows quality of service, not quality of competence.

Market segmentation should be carried out on the basis of risk, considering amongst others, areas that involve large amounts of money, have limited quality indicators at present or involve vulnerable clients. Risks in each segment should be assessed. It may be revealed that contentious areas of law or areas of law that encounter more complaints are not the riskiest areas.

The LSB acknowledge that further understanding is required to identify which groups of individual consumers are placed at most risk by which types of legal activities. Research so far has revealed that the 'less sophisticated consumer'; who is usually from disadvantaged or socially excluded groups and without the ability to pay for the legal services they need; are more likely to use legal services provided by non-commercial bodies often located in the not for profit sector. Therefore, the way in which quality standards in the not for profit sector are maintained, may need to be reviewed to ensure that it is fit for purpose.

Question 3: How can regulators ensure that regulatory action to promote quality outcomes does not hinder (and where possible encourages) innovation?

The relationship between regulation and innovation is ambiguous complex and dynamic. It is ambiguous because regulation can have both a positive and negative impact on innovation outcomes and policy objectives. The complex nature of the relationship between regulation and innovation stems from the fact that the links are multi-dimensional. Regulation can affect both the supply-side and demand side of an innovation system. It can also affect the direction of innovation, for example, the demand for particular technologies. The relationship is dynamic in the sense that the development of new technologies, products and business processes can lead to the emergence of new markets and market failure which, in turn, may necessitate changes to the current regulatory framework.

To ensure that regulatory action to promote quality outcomes does not hinder innovation, quality criteria should be proportionate, targeted at risk and based on evidence deriving a need for regulatory change. They should be outcomes based avoiding prescriptive and detailed rules but at the same time stipulate clear requirements which are easily understood by the regulated community, reducing the

possibility of misinterpretation. Furthermore, firms should be given flexibility as to how they deliver desired regulatory outcomes.

To avoid impeding innovation, approved regulators should consult and engage with individuals and firms, clearly informing them of future changes in the regulatory framework in advance, so that they have sufficient time to comply with new rules and requirements.

Question 4: What balance between entry controls, on-going risk assessment and targeted supervision is likely to be most effective in tackling the risks to quality that are identified?

An outcomes focused approach to regulation will be the most effective way to achieve balance between entry controls, on-going risk assessment and targeted supervision. Once the consumer-focused outcomes are kept at the forefront throughout each stage, balance will be achieved.

Entry controls are important for determining technical quality. Good entry requirements equip the regulated community to meet the consumer-focused outcomes. They must not become a barrier to the profession, rather entry barriers should be targeted at the risks that actually exist in that segment of the market. IPS is developing an outcomes based competence criteria which will be used to accredit potential immigration advisors.

On-going risk assessment involves having a framework in place for identifying and mitigating risk. A risk identification framework monitors risks to the regulatory objectives and consumer-focused outcomes. It monitors a range of factors which can impact on the quality of service provided by individuals and entities, such as business models, ownership and management structures, financial issues, size of entity, range of services provided, consumer segments, workforce skills and knowledge and experience. With the outcomes in mind, approved regulators should track changes in the risk profile over time, at an individual, entity and thematic level.

On-going risk assessment involves monitoring continuing professional development (CPD) and is a way of ensuring continuous technical quality. At present both IPS and the SRA have initiated substantial reviews into CPD. In order to ensure that CPD enables practitioners to remain fit for purpose, IPS is researching a move to an outputs measurement of CPD, assessing how CPD improves competence, rather than focusing on inputs, i.e. the time spent on CPD. IPS agrees that a fundamental tension exists between being 'fit to practise' in regulatory terms and being 'fit for purpose' in terms of a consumers having confidence in who to approach for a given service.

Targeted supervision involves approved regulators supervising firms according to risk and targeting resources on those businesses, individuals, sectors and issues that present the greatest risk to the regulatory objectives and consumer-focused outcomes. This is done using a range of tools including returns, random and planned site inspection and thematic reviews. It involves the assessment of a number of

factors including education and qualification requirements for individuals and for entities, financial stability, insurance requirements and ownership. It is for approved regulators to decide on the appropriate balance between entity and individual supervision based upon actual risks.

An effective enforcement strategy can also tackle risks to quality, when it encourages compliance, deters non-compliance and punishes transgressions appropriately. Publication of disciplinary cases and decisions in service complaints should serve as a deterrent to the wider regulated community.

Question 5: Quality can also be affected by external incentives and drivers. Some examples include voluntary schemes (for example the Association of Personal Injury Lawyers (APIL) Accreditation), consumer education and competition in the market place. How far do you think these external factors can be effective in tackling the risks to quality that exist? Which external factors do you think are most powerful?

External factors such as voluntary quality schemes, consumer education and competition can contribute to tackling the risks to quality that exist. Some factors are more effective than others.

Voluntary quality schemes are an optional form of accreditation that practitioners can obtain to demonstrate that they meet specific quality standards or have specialist expertise. Whereas regulatory standards should offer consumers assurance about the acceptable quality standards, voluntary quality schemes should set enhanced standards over and above those requirements.

If, as research suggests, most consumers think that all lawyers are equally competent, voluntary quality schemes can be a way of showing relative quality. For voluntary quality schemes to become legitimate tools of regulatory intervention, they need to drive quality standards by focusing on outcomes achieved rather than simply being a badge to demonstrate processes that are in place. We agree that the schemes need to become much more explicit about where they are situated on the continuum between identifying competence, specifying good practice and applauding best practice.

Competition is a powerful external factor. However, it may not be the best way of assessing quality. Competition on quality is dependent on consumers knowing about and responding to differences in quality and deciding that the differences in quality are worth paying for, therefore competition might be a tool only in markets dominated by sophisticated consumers. For competition to be a regulatory tool competition on quality needs to be differentiated from competition on price as price competition can in some cases lower quality. The price of the service needs to remain constant for competition on quality to take place.

Consumer education is an unlikely regulatory tool as it is very difficult to control. It is not a perfect world and no amount of information will prevent the possibility that a consumer will sometimes choose a legal service provider unsuited to their needs. That said, it would be beneficial if consumers are educated on the benefits of instructing regulated legal practitioners to handle their legal matters and that less qualified non-regulated alternatives are not assessed on the same basis and are therefore more risky options with limited forms of redress.

Question 6: Another possible tool for improving quality is giving consumers access to information about the performance of different legal services providers. How far do you think this could help to ensure quality services? How far is this happening already?

Question 7: What do you believe are the greatest benefits of such transparency? What are the downsides and how can these be minimised?

Answer to question 6 and 7:

We recognise that there is an increasing appetite amongst consumers to compare products and services and that there are few tools in the legal services market to enable consumers to compare legal services and to exercise greater choice.

There is no easy and more importantly fair way of comparing the performance of legal service providers beyond improving what is already in place. Consumers can currently use complaints data published by approved regulators and the Legal Ombudsman. There are directories that contain data on different law firms and chambers but they are too complex for general consumer use at present.

Comparison websites is a potential tool. Searches on comparison websites may not reveal information that is of great significance to consumers given that each person's legal matter is specific. Those sites can become subjective and opinionated whereby one person's bad experience can sway future clients.

The range of services that are compared is also important. There may be wider quality risks in the provisions of non-reserved services that will remain outside of the scope of such regulatory interventions if the focus is solely on reserved legal activities.

It may not be viable for approved regulators to open up their professional registers for comparison websites to use, due to data protection. This is an issue that we would need to explore. At present we are of the view that opening CILEX's professional register will not give consumers enough information on which to choose a legal service provider.

The LSB mentions that with the widening of legal services and blurring of international boundaries comparisons and ranking of utility of advice or outcomes may be more relevant. We are unable to see how that will be the case as the

chances of comparing like for like are diminishing day by day as different models emerge.

The suggestion of an independent reviewer of legal services outcomes that could describe and publish outcomes data by firm or chamber may not be feasible. It would be difficult to ensure independence and lawyers would challenge the data produced on the slightest ground.

Question 8: The table below (Figure 3 gives some examples of how risks to quality can be mitigated and actions that can be taken by regulators to ensure this happens. Can you suggest any other actions that can be taken?

The actions listed in the table appear to address all the identified risks. Evidenced/accredited quality marks are listed as a regulatory intervention to assure quality or competency of defined aspects of service provision. We would like to suggest an additional regulatory intervention of on-going monitoring and supervision.

Accreditation schemes are listed as a regulatory intervention to demonstrate contemporary competency and ability to practice. It would be helpful if the LSB could clarify whether accreditation schemes lie with the regulatory or representative bodies.

Question 9: Which of the possible interventions by regulators do you think likely to have a significant impact upon quality outcomes?

Different consumers want and need different levels of quality in different circumstances and the most appropriate regulatory intervention will vary from case to case. It may be the case that sophisticated clients may be more able to assess risk than individual consumers and therefore an approved regulator may select regulatory interventions that centre upon less empowered consumers.

In order to ensure that all of the regulatory objectives are met approved regulators may need to consider that higher quality standards may imply higher costs for legal services providers which may translate into higher prices for consumers and may ultimately impact on access to justice.

The interventions that naturally fall within outcomes focused regulation, such as entry and authorisation requirements, outputs based CPD, risk profiling, market segmentation and consumer engagement are likely to have a significant impact upon quality outcomes.

Question 10: To what extent should the LSB prescribe regulatory action by approved regulators to address quality risks?

The LSB has already been too prescriptive. This approach to quality does not add much significance beyond the LSB's regulatory standards requirements (set out in its *Developing regulatory standards* consultation) and the regulatory objectives set out in the Legal Services Act 2007.

Due to its proportionate nature outcomes focused regulation achieves acceptable quality standards that meet regulatory objectives of consumer and public interest. Regulation should be proportionate and targeted and not focus on gold-plating legal service provision.

The legal services market in England and Wales is in a state of change. Increased innovation and opportunities may lead to legal services which pose unknown quality risks, especially those services that lie outside of the current regulatory framework. The changes in the market will not occur overnight but will be revealed through risk frameworks and business modelling. Approved regulators will develop as the market changes, to be able to identify appropriate mechanisms to quality assure the individuals, entities or activities across the widening and diverse span of legal service provision.

CILEx/IPS