

LSB Consultation Paper – Approaches to Quality

SRA Response

Introduction

1 The SRA is the independent regulator of solicitors, authorised bodies providing legal services, and individuals working within those bodies authorised by the SRA. We regulate in the public interest.

2 This paper sets out the SRA's response to the LSB's consultation Paper, Approaches to Quality, published in March 2012.

Commentary

3 The issue of the quality of legal services received by consumers is of relevance both to the Approved Regulators and the LSB in its oversight role. The SRA, along, no doubt, with other regulators and the LSB, would strongly support the principle that consumers should receive good quality legal services, and would acknowledge that. However, it is important that attention in this debate is very strongly focused on the issues of:

- the role that regulatory intervention can, and should, play in ensuring quality (in all of the aspects identified by the LSB) for consumers;
- the nature of any such intervention and whether it can proportionately deliver the desired outcomes; and
- given the finite resources available to regulators (on the basis that the acquisition by regulators of the resources required to undertake all possible actions would be disproportionate and have a disproportionate negative impact on the sector), the relative importance of this issue compared to the other risks to the regulatory objectives that are faced.

4 The maintenance of a strictly analytical approach is particularly important when considering an issue such as quality where there might be an almost an instinctive response that because improving quality is self-evidently a good thing, it follows that regulators must intervene with prescriptive quality standards. We should not assume that that is either the most effective, or the most appropriate, response to quality deficiencies.

5 If we take as a definition of quality the three factors identified by the LSB (technical quality, client care and utility of advice), regulators have traditionally focused most strongly on the first aspect, i.e. technical quality, and addressed it, again primarily, through regulatory

intervention. It is most clearly in the public interest, and for the purpose of the protection of consumers and the rule of the law, to ensure that consumers do not receive incompetent legal advice or representation.

- 6 However, regulators generally, including the SRA, have also moved beyond that to address, through a variety of regulatory tools, key client care issues such as the provision of costs information and the mandating of complaints procedures.
- 7 Authorisation, supervision and enforcement activity and risk assessment and prioritisation is applied by the SRA across existing “quality” requirements and will continue to be applied under the SRA’s OFR approach on a risk basis. For example, the SRA’s recent early intervention in the provision of legal advice for PPI claims falls squarely into pre-emptive action under the “utility of advice” aspect of quality. In addition, for example, our commissioning (with other regulators) of the Legal Education and Training Review is addressing head on qualification and entry routes and requirements which go to the heart of the assurance of “technical quality”.
- 8 The key question raised by the LSB’s paper, when considering the assurance of quality in the wider context of regulators’ overall responsibilities, is where regulators’ primary focus should be if quality is to be assured and, ideally, enhanced. Are consumers likely to be best served by additional or different regulatory interventions or by increased, and increasingly diverse, competition and innovation in the legal services market? As a regulator committed to the principles of better regulation we should only consider the former approach where it is a proportionate response to a demonstrable deficiency.
- 9 In considering this question it is also important to maintain an awareness that the collection of significant amounts of additional information (or the requirement of its publication by regulated providers) is itself an intervention with associated costs and therefore associated impacts on consumers. That is not to say that the provision of more and more relevant information to consumers is not desirable or might not be beneficial. However, there is a strong argument that those providers that recognise this will and should, gain a competitive edge over other providers which will, in the medium to long term, drive the shape of the market in a way that is positive for consumers.
- 10 On this basis, should regulators not increase interventions above those necessary to protect consumers and ensure “proper standards of work”, focus on increasing competition in the sector and have confidence that the market is capable of driving improvements in quality? Or should resource be directed to additional regulatory interventions on the basis that the market for legal services will always be incapable of addressing these issues? As in all judgements to be made by regulators there is a balance to be struck and, ultimately, the correct decision may lie somewhere between these two extremes,

However, that decision will need to be made, and kept under review, in the light of the full assessment of risks at any point in time. As we consider the issues raised in the consultation paper this broad context must be kept in mind, and we should not rush to direct regulatory intervention on specific quality issues, or assume that one type of intervention will be appropriate in all circumstances or not vary over time.

Questions

Question One

- 11 Although categorisation is necessary for a real understanding of the issues, in our experience the very process of categorisation can be problematic and difficult to undertake other than through relatively detailed analysis of individual quality failures. This is because the use of complaints data, which is a primary source for the identification of quality problems, does not necessarily reflect the primary source or all of the sources of the problem. For example, real dissatisfaction with the ultimate outcome of a case may manifest itself in a complaint about poor communication or vice versa.
- 12 Failures in all three aspects of quality (as identified by the LSB) are present and failures in the quality of service are probably the most commonly identified.

Question Two

- 13 Yes, regulators should segment the legal services market in their consideration of this issue and segment it by all relevant factors, e.g. consumer, provider, type of service, etc.
- 14 There are greater asymmetries of information present on the bulk consumer market when compared to the corporate client market and, in our view, this is a relatively strong indicator that risks in this sector are likely to be greater. However, the split is not simply one of private consumer and business consumer, as many SMEs share more characteristics with private consumers than they do with major corporates.
- 15 In addition, as legal services providers have sought to become more focused on the identification of new business streams and have more actively “sold” these into the private consumer market, there has been a trend of emerging risk in the “utility of advice” aspect of quality in this mass private consumer market. The miners’ compensation schemes, personal injury work generally, PPI compensation claims and stamp duty land tax avoidance schemes all have some common characteristics in this area and have presented new challenges that, historically, regulators have not faced.

Question Three

- 16 Question three is directly preceded in paragraph 35 of the paper by the statement,

“The test for the regulators now is to identify appropriate mechanisms to quality assure the individuals, entities or activities across the widening and diverse span of legal service provision.”

- 17 The broadness of that statement itself carries some risk that regulators will be driven down a path that stifles innovation and development, probably at some considerable cost, rather than allowing innovation and development to flourish to the ultimate benefit of quality for clients. If paragraph 35 is taken to mean that across all sectors and across all three aspects of quality identified by the LSB, regulators must identify additional quality assurance mechanisms (beyond the general educational, authorisation, and supervisory controls already in place), the SRA would disagree on the basis that such an approach would not be based on risk, proportionate or targeted.
- 18 Rather our approach would be to target additional intervention only on those areas where there was evidence that a risk to consumers justified regulatory intervention. Such an approach is, in our view more likely to ensure that innovation that will benefit consumers is not hindered.

Question Four

- 19 Ongoing risk assessment should be present across all of the risks to quality that are identified. In our view, entry controls, supported by effective systems for ongoing assurance of competence, are most likely to be effective in assuring proper standards of technical competence. Targeted supervision can be effective in addressing risks to technical competence and utility of advice. Consumer empowerment, to the extent that it reduces asymmetries of information, can be effective across all dimensions of quality. However, in this there are questions to be addressed as to the balance between regulatory intervention and the proper operation of a liberalised and competitive market.

Question Five

- 20 These schemes can be effective and have been shown to be effective in other sectors. For example, the use of comparison websites in other sectors has significantly increased transparency and consumer information. However, primarily these have been market driven in highly competitive consumer sectors or consumer driven, rather than regulator driven. These approaches have not emerged in the legal services sector to the same extent; and there are reasons for this. These include the fact that, traditionally, legal services have not been commoditised and therefore comparison is difficult, there has been a

lack of diversity in competition, etc. However, as the LSB has rightly identified in the paper, these market conditions are rapidly changing and it will be interesting to see the extent to which this sector begins to utilise (commercially driven) approaches that have become common in other sectors. It is the transformation of the sector that is currently in train that is most likely to drive the development of the wide range of mechanisms present in other sectors that is most likely to deliver positive benefits for consumers.

Question Six

- 21 This is clearly a tool for improving quality and one that operates more effectively in other markets, although it is not happening to a significant extent at present. The issue for regulators is to the balance of advantage between regulatory intervention to mandate it and allowing such approaches to be driven by the market.

Question Seven

- 22 It is relatively difficult to draw comparisons between existing ranking systems and directories for legal services providers and a more, “mass market” automated approach. The production of current ranking directories is highly labour intensive, has significant manual intervention, and is based on qualitative judgments rather than quantitative data. At the other end of the spectrum, there have been websites for providing feedback on lawyers which have lacked credibility. The difficulty is in creating a forum that enables objective reporting against a common agreed framework of outcomes. This, in a sector where information asymmetries not only make initial lawyer selection difficult but also make post event assessment of the utility of the outcome difficult.

Question Eight

- 23 The table appears relatively comprehensive.

Question 9

- 24 In our view regulatory intervention is most necessary, and most likely to be effective, in providing an assurance of technical competence in all its manifestations in the table.

Question 10

- 25 It should not. There is a framework provided by the LSA which is fit for purpose and which, properly applied by Approved Regulators is capable of ensuring these issues are addressed. However, the LSB should maintain a dialogue with the regulators and be prepared to intervene on specific issues where there was a demonstrable failure in

regulation by specific regulators on specific issues; but only in those circumstances.

SRA
1 June 2012