



The Law Society

LSB Consultation - Approaches to Quality

Law Society Response

1st June 2012



LSB Approaches to Quality - Law Society Response

The Law Society is the professional body for over 140,000 solicitors in England and Wales. It negotiates on behalf of the solicitors profession, lobbies regulators, Government and others. It also works closely with stakeholders to improve access to justice for consumers.

We welcome the opportunity to respond to the Legal Services Board's discussion document on attitudes to quality in the legal services market.

We note that this document is a discussion paper and as such does not put forward any firm policy proposals. We trust that any proposals arising from this discussion paper will be subject to a full and thorough equality impact assessment as well as further consultation.

We should begin by stating that we believe that clients are entitled to receive a standard of service from solicitors which (a) provides competent, ethical advice and service provision that meets their needs and achieves, so far as practicable, their aims, (b) is delivered promptly and courteously and (c) is done with clarity about fees. We believe that these objectives are enshrined within the SRA handbook and it is the role of the regulator to ensure that this is achieved.

However, there are many more intangible and subjective aspects to quality: for example, consumers may choose different levels of expertise according to their perceptions of the likely quality of that advice and, indeed, their ability to afford it. They may also choose different types of service delivery according to their needs and, indeed, ability to afford it. We do not believe that these choices should be fettered and we believe that the market should be able to deliver different ways of providing services provided that they meet the basic quality of service appropriate to that client. Subjective views of quality should not affect that.

We also believe that the market, voluntary schemes and work by professional bodies can strongly influence and improve quality and these need to be included in the mix and that regulatory action, which may stultify improvement, should be a tool used as a last resort and then based only on proper evidence. In particular, professional bodies have a strong history and a vital interest in maintaining and improving quality and need to play a strong part in this.

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?

In our view, it is impossible to generalise about the reason why consumers may receive a poor service. It may be a mismatch of expectations as to what legal services can deliver to resolve the issues of the client. Problems do not arrive conveniently labelled and packaged. It may arise from lack of competence or it may be that there are poor systems for providing the necessary level of client care. Some may be isolated incidents of the sort that, regrettably, happen in the best regulated practices; others may be a result of systemic problems. In our view, the role of the regulator is to address the latter.

We would, however, suggest that there are problems with the suggestion that poor service may necessarily result in a service being “less useful than expected by the client”. In most areas of law, clients expectations may prove to be unrealistic. While lawyers have a role in managing those expectations, the fact that a client may be disappointed by advice does not necessarily imply that there is poor service.

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 generally that a risk-based approach to regulation is appropriate and that, if there are concerns about quality in certain areas, these should be dealt with according to what is appropriate to address a particular problem of particular firms not providing a service that meets the minimum regulatory standards.

In some sectors, those risks may arise where there are consumers who are vulnerable because of their particular circumstances – financial or health – because they are infrequent purchasers of legal services or lack information. However, these may be addressed as a result of high entry standards, accreditation schemes or other information requirements. However, what is essential is that any action on quality should be based upon evidence that there is a problem – which may arise out of frequent complaints or other research.

We do not see a satisfactory way of defining or categorising different consumer groups, either in terms of specific groups of people with a need or different areas of work that meet relevant needs. We have a particular concern with any attempt to define or identify ‘vulnerable’ clients. Vulnerability is not necessarily a homogenous or static group or status. Individuals could be vulnerable one day and not the next, or vulnerable in relation to one particular area of law but not others. Defining vulnerability by looking at

specific demographics is also problematic. Some single parents might be vulnerable but many are not. Those with 'mental health problems' may be labelled as vulnerable, but many mental health issues go undiagnosed and many clients are emotionally affected in the course of dealing with legal issues. The elderly are sometimes described as a vulnerable group, but this is simplistic and can be patronising. There are many judges of the Senior Courts who could be classed as elderly. In many ways the elderly as a cohort are amongst the most robust and realistic of clients through their life experience.

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

The Law Society believes that firms need to be free to develop new ways of providing legal services that meet the needs of the market and consumers and that, in order to do so, they should not be fettered by unnecessary regulation or inappropriate burdens. That is why we support the concept of Outcomes Focused Regulation.

There is a real danger that clumsy requirements to ensure quality will inhibit this growth. A particular example can be found in the original proposals for quality assurance for advocacy which would have prevented many perfectly competent solicitor advocates from providing a useful service to clients. Contrary to the views of the Criminal Bar Association (which has a clear vested interest) it is not necessary for every hearing in a case to be conducted by an advocate with the competence to conduct a full trial and it is very strongly arguable that consumers may well prefer that some hearings should be conducted by a competent solicitor than by a barrister who, given the way in which the Bar practises, may very well not be available to conduct the trial.

We also believe that it is important that regulators should bear in mind the market for particular services, particularly where, as in publicly funded work, the fees are low. The burdens on lawyers there should be no higher than are required to achieve a competent standard of service.

Above all, regulators need to seek evidence about (a) the problems and their extent, (b) the way in which the market provides the services and then take a view on the most proportionate way of addressing any problem about the quality of the work undertaken.

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?

The Law Society believes that a balance between these mechanisms is needed. We are strongly in favour of entry controls that deal both with personal integrity but also test skills and knowledge at entry level. This restriction on entry is a justified barrier and for the sake of public protection in relation to probity must be maintained. The training for the overwhelming bulk of lawyers is based on providing a wide general knowledge of the law and practice, which is used as a basis for lawyers to specialise in individual areas. This specialisation is achieved through practical training, supervision, experience and CPD, [though, admittedly, on an ad hoc rather than an organised basis].

The Law Society considers that this training provides an important basis for practice because:

- There are no entirely discrete areas of law – the intellectual framework of the law is, itself, an important concept that any professional lawyer needs to understand, while most areas of law require at least a basic knowledge of others. It is important for a solicitor to be able to identify gaps in his or her knowledge; and to advise properly. This is important for consumers. The system provides a strong element of flexibility for lawyers wishing to move from one specialism to another in their early years; and
- In the Society's view, the qualification requirements for use of the title "solicitor" or "barrister" should be sufficient to ensure that an individual is qualified, to entry level and, subject to supervision and the rules governing competency, to undertake the full range of legal work permitted by their regulator.

We would qualify this in two important ways:

- We recognise that many people who provide legal services are expert in some individual areas of the law but have not demonstrated the full range of legal expertise. We also recognise that knowledge and experience can be gained in a number of ways. There may well be strong arguments for there to be particular qualifications which recognise expertise provided that these can be used only under supervision, but which could be used to count towards qualification as a solicitor. We would support there being a variety of ways of developing and demonstrating that expertise.
- There is also much to be said for further qualifications being available to demonstrate expertise. We believe that voluntary accreditation schemes, such as those operated by the Law Society, play an important role in highlighting the quality of firms and help the consumer make an informed decision about the services they are paying for.

We also consider that supervision by other competent practitioners is an important tool to ensure that all round competency and expertise is gained and maintained.

There are likely to be areas where risk assessment may be necessary and may mean that it is right for particular firms to be particularly watched by the regulators. Such examples might occur where an individual or firm or moving

into a new field of work, unrelated to their existing work, where they are undertaking work at a very low price which might well raise questions about quality. We believe that that a regulator should consider these and, possibly, other issues if there is evidence to show that they may cause concern and that some targeted supervision of the practice may be appropriate. What is important is that those interventions and supervisions should not be such as to stifle innovation and the ability of solicitors to offer new products and services if they wish. Any intervention or supervision should be based on evidence.

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?

We believe that external incentives are a very strong determinant of quality. In areas where there is competition and informed, regular purchasers, the market is likely to play a very strong role in determining quality. There are a number of sectors of the legal services market to which this applies.

Accreditation schemes can be an important way for solicitors to demonstrate, both to the regulator and to consumers, that they have achieved a certain standard. They have become a particularly important tool for bulk purchasers such as the Legal Services Commission to ensure that professionals have reached an appropriate level of confidence. We believe that there is considerable scope for such schemes to develop. However, in order to do so, there needs to be a clear market incentive for firms to gain accreditation – either because it is a particular requirement of bulk purchasers or because the scheme has gained such a level of market recognition that consumers will automatically look for that accreditation.

We believe that, in order to obtain such market recognition, schemes need to be:

- Robust in assuring the right level of competence;
- Marketed to consumers as a clear mark of quality on which they can rely; and
- Provide advantages to those gaining the accreditation through the “kitemark” of quality, the likely increased work and, possibly, benefits in terms of efficiency and reduced insurance premiums.

We are heartened by the impact that the Society’s Conveyancing Quality Scheme has had in gaining significant membership. It has been developed to meet assurance and service needs of the market and presented to lenders as a way of providing them with the assurance that they need; many lenders are showing support for it. The next step is to market it further to consumers.

We support the views of the Legal Services Consumer Panel in its discussion paper on such schemes and we are reviewing our own schemes to ensure that they comply more closely with the criteria it sets out. The advantage of such schemes is that they are put together by a wide range of expert practitioners who have a strong knowledge of “what good looks like” and what people need in order to be able to practise effectively at different levels. We agree that consumer or lay input may become relevant and useful once schemes are fully developed.

We believe that there does need to be further consumer education which should cover what consumers should expect in respect of the main services that they are likely to receive. Consumers (non business) are generally infrequent purchasers and their understanding of the law and legal process is, at best, likely to be minimal and, at worst, completely misinformed. We believe that there is strong scope for professional bodies to provide information about:

- Common legal issues that affect consumers – providing general information about the law and its processes. The Law Society produces such guides and there may well be scope for these to be revised and published further.
- What they can expect from legal services providers – again, some work has been done on this both by the Society and the SRA and it may be appropriate to review this;
- What they should look for in choosing a lawyer – which might well include information about accreditation schemes and other sources of information.

In our view, unless there is real evidence that a sector, as a whole, has significant problems with quality of services, such that they make it right for the regulator to taken action, then the regulators should not prescribe schemes but should encourage voluntary schemes.

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?

It is understandable that, as with every other part of the service sector, consumers want to know whether the firm they are using will meet their needs. As we have said, for many consumers, legal advice is a distress purchase which they make only a handful of times in their lives. They are unlikely to have the knowledge to establish whether the lawyer they instruct is competent or what they should expect. However, there are also significant difficulties in measuring performance.

It is not, for example, very often appropriate to measure “success” in achieving a client’s aims. In litigation work to do so would be (a) meaningless because a lawyer has no control over the basic strength or weakness of the client’s case and (b) dangerous because it would place unconscionable

tensions on a lawyer's duties to the justice system which override the duties to the client. Similarly, in non-contentious work, problems may not be discovered until many years after the event (when a house is sold or a testator has died, for example).

Sometimes views may be coloured for the whole transaction by a relatively minor occurrence at the very end – such as the moving day on a house purchase – a matter largely out of the hands of the practitioner.

Similarly, we have strong reservations about attempts to publish figures about complaints. First, complaints will generally represent a very tiny proportion of the total transactions undertaken by a firm and may well not be a meaningful proxy. Moreover, complaints will often come from clients who are dissatisfied with a perfectly proper result and use a complaint about service or conduct as a proxy for this. And, because this is the only information available, there is a significant danger that consumers will use it in a way which is unfair to competent practitioners and which may cause greater inconvenience to themselves. We recognise that the Legal Ombudsman is making strong efforts to ensure that the information that it provides is placed in context and we will be monitoring its effects closely, but we remain sceptical as to whether this information will prove more misleading than helpful to consumers.

It is inevitable that comparison websites will be developed for lawyers and we welcome the thoughtful approach taken by the Consumer Panel in its recent paper on the subject. However, it must not be forgotten that such sites are readily open to abuse and are no more than a single indicator for potential clients to consider. Given that, such sites will develop, it may be appropriate for the professional bodies to consider whether there is a role for them in producing sites which are as reliable as possible, given their limitations, and are properly moderated and assured.

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

We believe that it is right that consumers should have access to transparent, accurate information. At present, there is little to rely on other than word of mouth or market reputation (which individual consumers may not be able to access), the marketing by the firm and, shortly the LeO complaints figures. At a time when, through referral fees and marketing by large providers, consumers are increasingly being directed towards particular firms and have no way of assessing whether or not those firms are suitable, reliable information about quality would be of assistance. It will help consumers make informed choices and, of itself, be likely to improve quality by driving those who do not provide a good service out of the market.

However, there are two dangers. The first is that the information itself may not be appropriately balanced or consumer reviews are influenced by

inappropriate expectations or, indeed, the site is used by competitors to denigrate other firms. The second is that consumers will use such information as the single determining factor in their choice without looking more closely at the firms in question. We believe that these could be minimised by an appropriately managed site and by clear warnings to the consumer and improved education.

Question 8: The table (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?

In our view, the most important step is for regulators to work closely with providers and professional bodies to establish proportionate steps to deal with risks, where there is evidence that those risks exist. The professional bodies have a long history in maintaining the quality of the profession and have a strong interest in ensuring that its high quality is maintained and improved.

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

As suggested above, unless there is major evidence of serious risks that require regulatory action, the role of the regulator should be to work with the professional bodies to identify ways of addressing concerns.

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

We believe that LSB should only prescribe regulatory action where there is strong evidence that there significant, systemic risks to consumers. Regulation sets the minimum standards to assure protection of the public interest in the purchasing of legal services. The performance of lawyers and law firms in the market place will differ and market forces will reveal the quality of the providers within it. Consumers make informed choices based on the way those providers are shown to perform in the market. The regulator should not seek to impose rigid standards on the market which may in fact inhibit the market from innovating and improving.