Reforming competition and consumer policy

Legal Services Board response to BEIS consultation

September 2021

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Executive Summary

1. The Legal Services Board oversees the regulation of legal services in England and Wales and is the competent authority for the Office for Legal Complaints.

2. The main points in this response are as follows:

Alternative Dispute Resolution

- The LSB wishes to secure access to redress for consumers across the legal services market. The unregulated sector is growing and has a significant market share in areas like will-writing. We encourage the Government to consider a flexible legislative mechanism giving ministers powers, subject to secondary legislation, to require businesses carrying out activities meeting a specific description to participate in ADR
- Clarity is needed on how proposals for assuring the quality of ADR providers will interact with existing arrangements in regulated sectors. It will be important to avoid duplication and conflicting measures, and to maintain the independence of LSB's oversight role
- Technological solutions are available that could help consumers to navigate the complex redress landscape. We would welcome government using its coordinating role to bring fresh impetus in this area.

Other issues

- Proposals to open up further routes to collective consumer redress would improve access to justice. Third-party litigation funders are increasingly financing such claims, raising questions about the need for regulation
- The proposal to make it automatically unlawful to pay someone to write, or host, a fake review would support LSB's efforts to increase competition by improving transparency on the quality of legal services
- Business education is important to support small businesses to prevent legal issues arising and resolve them effectively. We consider that small businesses would benefit from a vision and action plan for legal support equivalent to that developed by the Ministry of Justice for citizens.

Introduction

3. The Legal Services Board (LSB) oversees the regulation of legal services in England and Wales. We are an independent body created by the Legal Services Act 2007 ('the Act'), and we are independent from both the legal profession and government. In all our work, we consider how best to promote the eight regulatory objectives[1] set out in the Act.

4. Our core functions include overseeing the performance of the nine regulatory bodies who carry out day-to-day frontline regulation of legal services, setting the annual fees that practitioners pay them and approving changes to their rules and other arrangements. We ensure that regulation of legal services is carried out independently of the organisations that represent providers. We also collect evidence on legal needs and the operation of the market.

5. In the context of this consultation, we are the competent authority for the Office for Legal Complaints (OLC) – the board of the Legal Ombudsman – under the ADR Regulations 2015. However, since the OLC has not sought certification under the Regulations, we have not been called upon to exercise this role.

6. Our regulatory objectives, which include protecting and promoting the interests of consumers, and promoting competition in the provision of services, give us a keen interest in the overall operation of the competition and consumer policy regime. However, this consultation response mainly focuses on the consumer redress proposals, particularly as they relate to ADR services.

Alternative Dispute Resolution

Improving the take-up of ADR by businesses in unregulated markets

7. We welcome the Government's policy objective to improve the take-up of ADR by businesses in unregulated markets. In March 2021, the LSB published a ten-year sector-wide strategy for legal services focused on tackling nine key challenges[2]. Within the challenge of closing gaps in consumer protection, we set a goal to achieve universal access to ADR for consumers across the legal services market.

8. The Legal Ombudsman's statutory jurisdiction extends to 'authorised persons' only. There are just six 'reserved legal activities' – work that only authorised persons are permitted to do. This creates the possibility of a substantial market for unregulated legal services businesses that fall outside the reach of the Act.

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[1] They are: protecting and promoting the public interest; supporting the constitutional principle of the rule of law; improving access to justice; protecting and promoting the interests of consumers; promoting competition in the provision of services; encouraging an independent, strong, diverse and effective legal profession; increasing public understanding of the citizen's legal rights and duties; and promoting and maintaining adherence to the professional principles.

[2] Legal Services Board, Reshaping legal services: a sector-wide strategy, March 2021.

Unless consumers use providers that voluntarily participate in an ADR scheme, their only possible recourse is through the courts.

9. The exact size and nature of the unregulated market is unknown, although the LSB has started a mapping exercise to obtain a clearer picture. Unregulated providers are likely to have a large presence in some segments of the market. For example, survey evidence suggests that around 130,000 wills are prepared by unregulated businesses annually. Between November 2020 and July 2021, the Legal Ombudsman's online complaint checker was used 29,822 times and out of this 2,837 answered *"No"* or *"Don't know"* to a question asking whether an authorised person was used[3]. This data suggests both a sizeable market and substantial numbers of people frustrated in accessing redress. Further, the unregulated market is characterised by online delivery models. Covid-19 has accelerated a trend towards greater online service delivery, which means the unregulated sector is likely to be growing and is set to grow further.

10. Proposals in other parts of government are seeking to expand dispute resolution outside of the courts. In July 2021, ministers at the Ministry of Justice (MoJ) and the senior judiciary issued a call for evidence[4], stating: "*Our ambition is to mainstream non-adversarial dispute resolution mechanisms, so that resolving disagreements, proactively and constructively, becomes the norm*." In December 2020, the Competition and Markets Authority (CMA) recommended[5] to the MoJ that it "create, or empower the creation of, a mandatory public register for unauthorised providers". While stating the detail of such a register was for the MoJ to determine, it suggested it was important to "mandate redress that is proportionate to risk and consumer detriment, yet also cost-effective".

11. We note the sectoral assessment in the ADR impact assessment annexed to the consultation document. Although the analysis necessarily relies on the available evidence, it is unhelpful for legal and accountancy services to be combined as a single category. These are very different markets, not least in the context of consumer redress, as accountants generally serve business consumers, whereas legal services providers serve citizens and small businesses[6]. In our view, legal services match well against the impact assessment criteria:

    - Nature of the purchase – legal services are complex, and the CMA has found a lack competition due to low market transparency

[3] Based on unpublished figures provided by the Legal Ombudsman. The 2,000 figure represented more than 1 in 10 of all forms completed and excluded contacts by telephone and other routes.
[4] Ministry of Justice, Dispute resolution in England and Wales: Call for Evidence, July 2021.
[5] Competition and Markets Authority, Review of the legal services market study in England and Wales. An assessment of the implementation and impact of the CMA's market study recommendations, December 2020.
[6] Small business consumers represent a tiny proportion of complainants to the Legal Ombudsman.

- Nature of consumers – consumers often access legal services when they are at their most vulnerable and some legal needs result directly from protected characteristics[7]; legal services are often distress purchases; many legal services are essential to make and high cost
- Consumer experience – survey evidence suggests lower trust of lawyers than other professionals[8]; research indicates high barriers to complaining about legal services[9][10]; although the size of the unregulated sector is unknown, elsewhere in this response we provide evidence that some parts of the market are large and that the sector is growing (see paragraph 9).
- Availability and effectiveness of other types of consumer protection/ enforcement – the available data suggests the certified ADR services in the legal services sector handle very low numbers of complaints; since people can perceive the courts as the domain of legal professionals, they can find it especially intimidating to pursue redress through this route.

12. In this context, we consider there is a very strong argument, as a matter of principle, to secure market-wide access to redress for legal services consumers. As well as the economic and other criteria in the ADR impact assessment, the rule of law is undermined if citizens are unable to pursue redress against those businesses providing services that are designed to safeguard their legal rights.

13. Should these arguments be accepted, further work will be needed on redress options. As LSB has stated elsewhere[11], extending the Legal Ombudsman's jurisdiction is one option, but other options should also be considered.

14. We encourage the Government to consider a flexible legislative mechanism enabling it to expand mandatory industry participation in ADR. For example, ministers might have powers, subject to secondary legislation, to require businesses carrying out activities meeting a specific description to participate in ADR. This would provide a targeted and proportionate approach allowing government to respond quickly to evidence of emerging consumer detriment.

Assuring the quality of ADR services

15. The consultation proposes to require that all providers of consumer ADR are assessed and approved for their ability to provide an ADR service.

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[7] Examples include issues involving mental capacity, special educational needs, discrimination.
[8] The Legal Services Consumer Panel publishes an annual tracker survey. 64% of recent users of legal services who responded said they generally trust lawyers to tell the truth compared to 71% of teachers and 86% of doctors.
[9] In the Legal Services Consumer Panel's annual tracker survey, 36% of respondents who were dissatisfied with the service they received did nothing about this. A further 34% raised their concerns with the service provider but did not make a formal complaint.
[10] Research by the Solicitors Regulation Authority and Legal Ombudsman found the most common barriers to making a complaint related to people having the confidence and information to complain. There were also concerns about whether the solicitor would handle the complaint fairly or take notice.
[11] Legal Services Board, Reshaping legal services: a sector-wide strategy, March 2021.

16. It is unclear how these proposals would interact with existing arrangements in regulated sectors where quality assurance mechanisms already exist. The LSB scrutinises the Legal Ombudsman's performance through its oversight of the OLC. Our powers are wider than those currently available to competent authorities, for example setting performance targets and directing the OLC to modify its Scheme Rules. We also approve the OLC's annual budget and make appointments to its board. Clearly, it will be important to avoid duplication and conflicting measures, and to maintain the independence of LSB's oversight role.

17. The consultation is silent on sanctions or other remedial measures should ADR bodies fail to meet the 'minimum service expectations'. This is likely to be an important dimension of ensuring the quality of ADR services in all sectors, and we look forward to hearing more detailed plans in due course.

18. In relation to unregulated services, it is proposed that, as now, the Secretary of State would provide approval as the competent authority. Under the ADR Regulations 2015, the LSB is the competent authority for the OLC only. This risks inconsistent arrangements in different parts of the legal services market, raising issues of an unlevel playing field for providers and uneven consumer protections. As one option, the ADR Regulations could be amended to make LSB the single competent authority for all ADR providers in legal services.

Upper time thresholds for making a first-tier complaint

19. The Government considers there is a good case for halving the upper threshold of eight weeks for providers to respond to first-tier complaints in markets where ADR is mandatory so that businesses are incentivised to settle problems promptly and, if necessary, consumers can take complaints to ADR more quickly. However, it considers a longer period may be justified especially where a single ADR body is investigating complaints in a large market or in markets in which disputes tend to be more complex.

20. Using powers under section 112 of the Act, the LSB has made rules on first-tier complaints handling specifying what regulatory arrangements regulatory bodies must have in place for complaints procedures for their regulated communities. These statutory rules include an upper threshold of eight weeks for businesses to respond to first-tier complaints[12]. We are currently considering whether these rules and the associated guidance should be reviewed, and, if so, on what timescale. We will consider the Government's consultation in our thinking.

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12 https://legalservicesboard.org.uk/what_we_do/regulation/pdf/2016/201607_Version_2_Requirements_Guidance.pdf

Improving consumer awareness and signposting to ADR

21. The consultation signals an ambition to improve consumer awareness and signposting to ADR, although specific proposals are limited to the role of advice agencies in making referrals to ADR services.

22. The LSB's rules on first-tier complaints handling specify that regulatory bodies must require those they authorise to notify their clients of their rights to complain to them and the process for doing so, as well as any rights the consumer may have to complain to the Legal Ombudsman. As above, we will consider the Government's consultation in our thinking on these issues.

23. Legal services underpin economic transactions across the economy. This creates situations, such as property sales and legal services funded by insurance, where consumers might have cause to complain about the legal and non-legal services they received. There can be issues with buck-passing by providers, overlapping redress arrangements or it being confusing for consumers where to direct their complaint. There have previously been discussions about creating an online portal to support consumers to navigate the complex redress landscape. Certainly, the technology exists to deliver such solutions and we would welcome government using its coordinating role to bring fresh impetus in this area.

Other issues

Collective redress

24. The Government proposes to open up further routes to collective consumer redress by allowing a wider range of organisations to bring actions on behalf of consumers. One of our statutory objectives is improving access to justice, so we support the policy aims behind this proposal.

25. A notable development is the increasing role of third-party litigation funders. Historically these businesses have focused on corporate litigation, but they are increasingly funding collective redress claims involving citizens. Without the significant financing these businesses provide it is possible that some recent cases may not have gone ahead. However, there are also concerns, for example: funders controlling the litigation acting in their self-interest rather than the best interests of clients; clients left with little funds once funders have recovered their share of the damages and legal fees are paid; and a lack of transparency.

26. In Australia, following a boom in class actions financed by litigation funders, they have become regulated by the Australian Securities and Investment Commission. We have not reached a view on regulation of litigation funders in this jurisdiction but are monitoring developments as part of our work on the scope of regulation.

Tackling online practices

27. The Government proposes to make it automatically unlawful to pay someone to write, or host, a fake review.

28. The LSB is leading work to improve transparency on the quality of legal services. We are keen to see digital comparison tools and review websites play a bigger role in supporting consumers to make informed choices. Therefore, we welcome this proposal as a contribution to increasing trust in these tools.

Business education

29. The consultation asks whether current business education meets businesses' needs and how it can be improved.

30. The LSB conducts periodic large-scale surveys asking small businesses about the legal issues they face, how they respond to them and if they get the legal support they need. The 2017 wave of the survey[13] found high levels of unmet legal need, including that 50% of small businesses handle legal issues alone. Total annual losses to small businesses due to legal problems was estimated at £40bn, with over 1 million individuals suffering ill health.

31. These findings underline the importance of business education in supporting small businesses to prevent legal issues arising and resolve them effectively. LSB's new sector-wide strategy suggests that small businesses would benefit from a vision and action plan for legal support equivalent to that developed by the Ministry of Justice for citizens[14]. We are currently running a new wave of our Small Business Legal Needs Survey and look forward to sharing our findings.

[13] BMG Research, The legal needs of small businesses 2013-2017.
[14] Ministry of Justice, Legal Support: The Way Ahead. An action plan to deliver better support to people experiencing legal problems, February 2019.