



## **The OISC's response to "An agenda for quality: A discussion paper on how to assure the quality of the delivery of legal services"**

### **Question 1. How can we best ensure that consumers are able to access high quality and good value legal services?**

The Commissioner believes that the best way to ensure that consumers are able to access high quality and good value legal services is for there to be sufficient providers of such services to be and that consumers know where to find those that meet their needs.

She considers that the introduction of a professional standards framework will help to deliver this, especially if it is combined with other measures to aimed at making solicitors aware of the standards they are expected to meet, such as the publication of clear written guidance, training events to introduce the framework and a programme of audits to ensure compliance.

It is crucial for firms to see it as being in their best interests to meet these standards

The Commissioner is of the view that the introduction of firm-based regulation requires the SRA, not so much to shift its focus as to broaden it. The regulation of the conduct of individual solicitors remains important. What has changed is that legal services reform now requires the SRA to pay increased attention to the firms in which solicitors work.

She believes that there is a risk that the SRA's approach, as outlined in the paper, may confuse support and development with regulation. Even worse, it may end up unnecessarily increasing administrative burdens on firms that are already acting competently and in good faith, while neglecting the taking of action against those that are not.

The OISC has been involved in firm-based regulation since 2001, and the Commissioner is aware that ultimately the delivery of high quality legal services by firms depends on the conduct of key individuals.

Further, while it is true that even where there is such a commitment, there is an important role for further support and development as firms may lack the skills to put the necessary quality controls in place.

### **Question 2. Are there any particular consumer groups whose specific needs should be concentrated on by the SRA as a priority?**

The paper correctly notes that the need for regulatory intervention is low where clients are well informed and can readily make informed choices between different providers of legal services.



This tends not to be the case with immigration clients, particularly illegal entrants, overstayers and asylum-seekers. They tend not to be familiar with UK law or the UK legal system, and probably not have English as their first language. Further, they may have little money and limited mobility. They may be in detention or at least at risk of detention and/or removal.

They are therefore very vulnerable and, may become clients of unfit and/or incompetent advisers simply because these people are in their communities and share the same language or culture. They also tend to be reluctant to complain or change advisers for cultural reasons or because of threats made by the adviser about the possible consequences should they do so.

For these reasons, the Commissioner believes that these groups must be regarded as priority for the SRA.

**Question 3. How can we ensure that the delivery of legal services reflects the diverse needs of consumers and clients?**

The SRA will need to do research to determine what the needs of the different types of consumers and clients are and the extent to which they are currently being met under existing arrangements. It will then need to tailor its Professional Standards Framework accordingly, ensuring that it reflects differences in different types of practise.

**Question 4. Are there any commercial advantages or disadvantages of looking at different consumer groups which may affect competition?**

The Commissioner understands that the SRA is concerned that distinguishing between more sophisticated and less sophisticated clients may lead to a greater regulatory burden being placed on smaller organisations which typically work with the “less sophisticated” clients (e.g. immigrants and asylum-seekers).

It is suggested that this may give a competitive advantage to larger firms. The Commissioner’s view, (and clearly she is looking at the issue primarily from the point of view of the immigration field), is that most of the larger organisations have little interest in “less sophisticated” clients or their types of matter, so the two types of firm are not in competition. These clients tend mainly to go to the smaller firm or voluntary and community organisations for advice and assistance.



**Question 5. How far do the factors set out in paragraph 16 above provide a clear rationale for reviewing the SRA's regulatory requirements? Are there any other factors which we should consider?**

The factors, which seem good, set out in paragraph 16 are reasons for regulating the quality of legal services rather than reviewing the SRA's regulatory requirements. The Commissioner has nothing further to add.

The Commissioner strongly agrees with the statement in paragraph 15 that, "in the case of legal services...client satisfaction does not necessarily mean quality, and dissatisfaction does not necessarily mean an absence of quality".

In the field of immigration it is not unknown for an application to succeed despite the shoddy work of the practitioner, simply because of the merits of the client's case or for it to fail because of weaknesses in the client's case or a perverse judgement.

**Question 6. Do you agree that individual competence, the management of the environment and the quality of the service experience together help determine the overall quality of the delivery of legal services?**

**Question 7. How far do you think we can rely on the above factors without routinely measuring the standard of legal work itself?**

The Commissioner agrees that the factors cited – the quality of management and supervision, individual competence and quality of service – help to determine the overall quality of legal service delivery. However, the question is how the SRA will ensure that any requirements it introduces in relation to supervision, competence or quality of service are met.

The Commissioner considers that, apart from requirements such as qualifications or CPD, which can be confirmed by the submission of relevant documentation, the only way to ensure this is through auditing how the firm works in practise.

**Question 8. How far do you think the current framework assures the quality of the delivery of legal services?**

**Question 9. Are there any areas of good practice which we should look at immediately?**

The Commissioner feels that the initial qualifying process, (i.e. up to and including the issuing of a practising certificate), may provide a good general grounding in legal work, though she is mindful of concerns expressed recently by the Head of the College of Law that law schools are currently not adequately preparing students for practise.



However, she notes that individual qualified solicitors can work in any specialism regardless of their training or experience. Through her oversight of complaints made against solicitors she has seen that this can lead to solicitors providing incompetent advice and services.

She is also concerned that there are no competence requirements placed on non-solicitor advisers employed by or working under the supervision of solicitors. Again, through her oversight of complaints made against solicitors the Commissioner has seen many examples of poor advice given by non-solicitor advisers who are inadequately supervised by their solicitor employer.

In the OISC scheme an immigration adviser who wishes to give advice in any particular category of immigration matter at any level must first demonstrate that they are competent to work at that level and category. If they wish to gain experience of working in new areas, they must first demonstrate that adequate supervisory arrangements are in place.

While the Commissioner is not recommending that the SRA necessarily adopt the OISC's approach, she believes that there is scope for some further regulatory intervention in this area.

Regarding the first issue, she considers that the SRA might think about putting in place arrangements along similar lines to those of medical practitioners, whereby solicitors could opt either to go into general practice or to specialise. In any case, there should be specific competence requirements tailored to the particular option chosen.

Regarding the second issue, she considers that there should be some system of competence requirements (or at least guidance for supervisors) in place for non-solicitors. For example, a training or experience requirement or a test for determining who is allowed to conduct asylum casework with minimal supervision.

Ideally, there should be some system of staged progression from direct to minimal supervision, with tests at landmark stages.

**Question 10. What do you think about our proposal to develop a professional standards framework?**

**Question 11. Have we identified all the areas that such a framework should cover?**

The Commissioner strongly supports the SRA's proposal to develop a Professional Standards Framework and the areas to be included.



**Question 12. How can we best make a co-regulatory approach work?**

**Question 13. How far do you think we should provide assurance to consumers and others about the quality of legal services?**

The Commissioner considers that it is right for firms to take responsibility for delivering a quality assured service, and agrees that they should be given a certain amount of flexibility as to how they do this. She also agrees that many firms already have in place appropriate quality assurance mechanisms, and that it is appropriate for the SRA's Standards Framework to build on those.

At the same time she recognises that there are firms that do not have adequate quality assurance mechanisms in place, and she considers that it is for the regulator to ensure, as far as practicable, that this is corrected. This will involve giving guidance and encouragement using through both audit and issuing of guidance documents, as well as using the regulatory stick. We believe that not all firms will see the development and application of Professional Standards as being in their business interests. The Commissioner's staff know through their regulatory and oversight work that some firms see it in their interests to spend as little time and money as possible on training, resources and quality control.

Where this is the position, the regulator will need to have mechanisms in place in order to become aware of it and the willingness to step in either to ensure that the firm puts things right or to close it down. The consumer will need to have a set of clear, basic standards against which to judge the firm.

**Question 14. How far should responsibility for the quality of legal services rest with the entity as opposed to individual solicitors?**

Firms must take responsibility for ensuring the quality of the legal services they provide by putting in place appropriate policies and procedures for recruitment, induction, training, supervision and staff discipline. They must; also ensure that staff have the resources necessary to adequately support the work they do.

Individual solicitors must take responsibility not only for ensuring that they fulfil their duties and responsibilities in accordance with the firm's policies and procedures, but also for taking all practicable steps directly to ensure the quality of legal services provided insofar as that is within their control.

In other words, firms must provide suitable conditions for good quality service. But, even when they do not, the individual solicitor is not absolved of personal responsibility.

The Commissioner believes that self-assessment might be a useful developmental tool for firms that are basically competent and acting in good faith. It is, however, unlikely to be of any use in respect of those firms who are



profiting from doing as little as they can while exploiting their client's ignorance and simply do not care about quality.

They will simply assess themselves as giving high quality services and carry on as they are, unless there is a real risk that the regulator will check up on them.

There is also a risk that the firms which are already giving high quality services will see this as needless bureaucracy.

The Commissioner does not think it is particularly helpful for the SRA to state that firms should be required to demonstrate the standards of service and delivery of legal services to at least those expected of an experienced practitioner. This is because there can be significant variations in the quality of advice and services provided by experienced practitioners.

The OISC's approach is to acknowledge that there are different levels of competence across different areas of operation and set out the knowledge, skills and competencies that define those levels.

The OISC assesses individuals to determine their level of competence. The firm's level of competence in a particular field is based on the adviser who is regulated at the highest OISC level of competence within the firm. Provided the firm has adequate systems and resources to support the work of that adviser and others working under his supervision.

This means that levels of competence in different areas will vary between firms, and that a firm's level of competence in a particular field may change as its advisers change. The Commissioner believes that this reflects the reality of the legal services sector. Competence across firms is not static, but diverse and fluid.

The Commissioner supports the idea of training and/or specific competency requirements for new supervisors and owners, and suggests that this should be extended to existing supervisors/owners, if possible, if only to ensure that they are familiar with the new Standards Framework and reinforce consistency.

The Commissioner supports the idea of firm-based accreditation. However, she believes that, if it is not to be a misnomer, it must be based on the principle that the presence of an individual practitioner accredited in a particular field may not be sufficient to guarantee the quality of a firm's services in that field.

The firm also needs to put in place adequate systems and resources to support the practitioner and others working under their supervision. Even the most experienced immigration practitioner will still need to access up-to-date information on immigration law to ensure the accuracy and quality of his advice.





The SRA needs to make clear that it is necessary for a firm to have at least one individual accredited in a particular field in order for the firm to continue practising in that field.

She believes that firm-based accreditation must take account of the how the organisation is organised and the firm's processes.

The Commissioner agrees that there could be a role for management standards such as those mentioned in the paper, but, it is her experience that the SRA needs to be careful about their use and will need to satisfy itself regarding what they actually guarantee and how much they can be relied upon.

It may be, for example, that assumptions are made about a particular standard being able to give assurance in a particular respect when, in fact it does not either because it is not meant to do so or because the methods of checking that the standard has been met are not sufficiently robust or reliable.

**Question 15. How far can supervision help ensure that work is done to the right standard?**

Clearly supervision cannot be the sole method of ensuring the quality of legal services, as then the supervisors would need to be supervised.

In order for supervision to be effective the following conditions must apply:

- (i) The supervisor must be competent both to do the work he supervises and to act as a supervisor. If the supervisor lacks experience in the particular field within which the supervisee is working or has little knowledge of supervisory methods, they are unlikely to be able to supervise their work competently;
- (ii) The level and type of supervision must be correct taking into account the supervisee's needs, his ability, as well as the complexity of the work. Even if the supervisor is competent to supervise the work, if the individual is very inexperienced and the work very complex with supervision being only minimal (e.g. occasional file reviews or even just an "open door" policy"), it is unlikely to be effective; and
- (iii) Adequate resources must be available. If resources are inadequate, even a competent supervisor aiming to give an appropriate level of supervision may be unable to do so.

The fitness of the supervisor and their knowledge of the trustworthiness of the supervisee are also important. The Commissioner's staff are very familiar with examples of otherwise honest and diligent employees who have been given bad habits by unfit supervisors or used as scapegoats by them.



Similarly, even if a supervisee knows what they should do, it does not necessarily follow they can be relied on to do it, and the supervisor must ensure that the tasks needed to be done have been delivered appropriately

It follows that, in order for supervision to be effective, there must also be:

- (i) Rigorous ways of determining the fitness and competence of the supervisor relative to the supervisory tasks to be performed;
- (ii) Means of ensuring that those individuals who are not fit and competent to supervise are prevented from doing so;
- (iii) Ways of ensuring that the level and type of supervision is appropriate (such as detailed guidance on supervision and training for supervisors); and
- (iv) Ways of ensuring that adequate resources are available to support the type of work carried out.

**Question 16. How can we best use the talents of solicitors and others within law firms to ensure that consumers and clients receive a good quality of service?**

The Commissioner agrees with the SRA's rejection of the "one-size-fits-all" approach. The approach proposed by the SRA broadly reflects that of the OISC, which, as discussed above, operates a system of "competency requirements" based on different levels of advice giving and involves some requirements which are category specific.

These OISC requirements are set out in the Commissioner's *Guidance on Competence*, which is linked to the *Code of Standards and Rules*.

Please also see our response to questions 8 & 9 relating to the Commissioner's proposal for a general practitioner/specialist distinction.

**Question 17. We have identified a series of roles to explore; have we captured the right roles and how far do you think these individuals could assist in assuring the quality of the delivery of legal services?**

While the Commissioner believes that the roles highlighted by the SRA are all key to the delivery of good quality legal services, she feels that the paper omits the crucial role played by staff working under supervision, in particular, non-solicitor staff.

As discussed above, the Commissioner feels that also for supervision "one size fits all" does not apply. Different staff need different levels of supervision, and this needs to be reflected in the quality framework, for example, by the introduction of some competence levels defined against some broad criteria and implying that certain competence requirements have been met. The reasons for this are:





(i) from the point of view of staff development, it is good for individuals to have recognition that they have progressed.

(ii) from the regulatory point of view, this will help the SRA to determine whether a particular individual was equipped to do certain work; and

(iii) from the point of view of the consumer, it will be easier to know whether the person they are dealing with is competent to do the work.

The Commissioner supports the introduction of specific competence requirements for experienced and independent practitioners; supervisory competence requirements for supervisors and training competence requirements for training principals.

Regarding partners/owners, while the Commissioner supports the introduction of some basic business competence requirements, she feels that it may be more important to ensure that lawyers retain overall control of firms to prevent commercial interests taking precedence over professional duty. She does not see how a Head of Legal Practice can prevent this where non-lawyers control the business.

**Question 18. How can CPD be developed so that it supports a learning profession?**

The Commissioner strongly supports the approach to CPD set out in the paper, i.e. requiring solicitors to ensure that the training undertaken is relevant to the work they actually do or propose to do. Indeed, the Commissioner would suggest that CPD requirements should relate to core work, with any other training being over and above those requirements.

The Commissioner acknowledges that this approach is likely to be more difficult to enforce than the current one, but she believes that it is nevertheless a very valuable development.

**Question 19. Are there any other ways which you would like us to engage with you as we progress this work?**

There are no other ways that the Commissioner would like the SRA to engage with her as it progresses this work.

A handwritten signature in black ink, which appears to read 'Suzanne McCarthy'.

**Suzanne McCarthy**  
**Immigration Services Commissioner**  
**1 September 2009**