

LEGAL SERVICES
OMBUDSMAN

Response to the Consultation paper on the Review of the Regulatory
Framework for Legal Services in England and Wales

Response from:
The Legal Services Ombudsman for England and Wales

3 June 2004

Introduction

The *Review of the Regulatory Framework for Legal Services in England and Wales* provides an unprecedented opportunity to address the central issues arising from the way in which legal services are organised, and the extent to which those services and/or the providers of them are held accountable, both to those who are their customers and to the public in general.

I would wish to acknowledge, at the outset, that the perspectives I bring to bear on these issues reflect my own experience as Legal Services Ombudsman, an Office in which I review the handling of complaints by the five legal professional bodies, charged with the primary responsibility for investigating complaints against their own members.

Whilst problems with the current arrangements for dealing with complaints have played a key role in instigating the present review, regulation is not, of course, limited to the issues arising from the way in which complaints are investigated. Thus, although one dimension of this response reflects the experiences gained over the thirteen-and-a-half years during which the Office of the Legal Services Ombudsman has been in existence, I shall also seek to address a number of the wider regulatory dilemmas.

In framing my response, I have drawn on the experience of my predecessor Ombudsmen, as revealed in their Annual Reports and other published sources, and on the collective wisdom of the staff of the Ombudsman's Office, who have learned much from contact with many thousands of dissatisfied users of legal services and who have lived through and adjusted to the numerous changes in the complaints-handling arrangements of the professional bodies. In the course of our deliberations there has been no attempt to seek a 'self serving' solution which, if adopted, would ensure that the Office becomes embedded in a new structure. Those discussions have unambiguously reflected a commitment to a 'public interest' solution.

Finally, I have concluded that, rather than respond to the consultation paper by preparing replies to each of the numbered questions it contains, it would be more appropriate and, I hope, of more assistance, for me to respond to the broad themes.

Part A: Objectives and Principles

The 'Objectives' and 'Principles' identified in Part A of the consultation document are, in my view, uncontentious and I endorse them. In addition I would like to emphasise four important dimensions which should inform the debate:

- The importance of ensuring the continued independence of the legal profession.
- The need to address the loss of public trust and confidence in professional self-regulation, particularly in the area of complaints handling. Any new regime that fails to address this as a priority is unlikely to provide a lasting solution.
- The duty to deliver fair outcomes for all users of legal services, including lawyers

- The necessity of allocating appropriate weight to the perspective of the 'high street client'. It was gratifying to note Sir David Clementi's own view that *'It would be particularly useful to hear from those who are consumers of legal services.'* (Page 6 xviii). I am anxious that the views and experiences of individuals (as well as those of the organisations that represent some of them) may be under-represented in the responses received. I consider it crucial that the high street client's view of the legal world should not be lost.

Part B: The Regulatory Models

In considering the models developed in the Consultation Paper, I am conscious of the repeated assurance that these do not represent proposals between which respondents are expected to choose; rather they are illustrative constructs included to stimulate reaction and to encourage further thought. I have, therefore, approached the models in this spirit, and whilst I have concluded that none of them offers a wholly convincing paradigm for a new regulatory system, each provides important insights that have influenced my thinking.

I propose, in the following sections of this paper, to discuss my preferred variant (or at least the framework assumptions that I consider should influence any new structure that might emerge). Looking at this issue from a consumer's perspective it is clear that model A provides a wholly independent solution to the problems encountered and would be broadly welcomed. However taking a pragmatic position a regulatory regime could be developed which would allow the professional bodies to retain those aspects of regulation necessary to ensure continuing professional autonomy, whilst ensuring their public accountability through an overarching independent regulator was adhered to.

Although the following proposal may appear to offer an alternative model to those outlined in the consultation document, my primary intention is to suggest a regime which will reflect a division of responsibility between its component parts, and which will have the potential to deliver a regulatory system characterised by a public supervisory authority (with powers that are adequate and proportionate to its task), continued professional autonomy and independent complaints handling.

I acknowledge that it is in the public interest for the legal professions to continue to take an effective role in the regulation of their members but I similarly acknowledge that this role must be subject to public scrutiny. I have concluded that an **independent regulatory body** (working title, the Legal Services Authority), which stands at the apex of a new regulatory regime, offers the most appropriate way forward.

Drawing on the cumulative experience of the Office of the Legal Services Ombudsman, I have also developed a clear preference for a regulatory system in which consumer complaints are investigated by an **independent complaints-handling organisation** (working title, Legal Services Complaints Office). I shall address each in turn; however, I would reiterate that my observations are not intended as concrete proposals, they are rather a vehicle for revealing the principles that I consider should be enshrined in any new regulatory structure.

Legal Services Authority

The Legal Services Authority would be independent of government and accountable to Parliament. Its membership would probably consist of executive and non-executive directors, appointed in accordance with 'Nolan standards'. The size of the Authority would need to be manageable, not representative of the industry, and in order to maintain public confidence in the Authority's independence, the Chair and Chief Executive Officer should be non-lawyers.

The Legal Services Authority would be a strategic body required to work in partnership with major stakeholders in order to ensure high standards in the delivery of legal services to the public. Its remit might well include the provision of public information on the operation of the legal system and the professional conduct and service standards which customers might reasonably expect.

The Legal Services Authority's duties and powers could include:

- The responsibility, in co-operation with the major stakeholders, for developing and disseminating appropriate standards for legal services in England and Wales and monitoring, at the strategic level, compliance with those standards
- The responsibility for establishing appropriate guidelines within which the Legal Services Complaints Office would direct the payment of compensation
- The establishment of performance targets for the professional bodies and for the independent Legal Services Complaints Office
- The duty to co-operate with the professional bodies in the establishment of their conduct rules, with particular responsibility for encouraging maximum consistency between the rules of the various professional bodies, whilst taking account of the differences in the legal services provided by their members
- The statutory powers currently available to the Legal Services Complaints Commissioner under the Access to Justice Act of 1999, in relation to all the professional bodies
- The duty to monitor and report on the standards and performance of complaints handling by the Legal Services Complaints Office (if established) and the professional bodies, and to benchmark the work of these organisations
- The duty to raise public awareness of consumers' rights with regard to the provision of legal services and to develop a strong public education role
- The duty to undertake, commission and monitor research and to report regularly on issues of public interest

- Acting as custodian of reserve powers in respect of complaints handling (in relation to the Legal Services Complaints Office, and of the professional bodies if they retain this role)
- Responsibility for the preparation of an Annual Report to Parliament on the operation of the regulatory arrangements

In the event of the professional bodies retaining responsibility for complaints handling, the existing powers of the Legal Services Complaints Commissioner and the Ombudsman could be transferred to the Legal Services Authority.

Part C: Complaints and Discipline

The cumulative experience of the Office of the Legal Services Ombudsman has led me to conclude that complaints handling should pass to a body that is independent of the professions. A Legal Services Complaints Office could provide the single point of entry for all complainants for whom the lawyer's internal complaints-handling arrangements had failed, or for those complainants who it was felt should not be required to complain directly to the lawyer concerned. The major characteristics of the Legal Services Complaints Office might include:

- Independence from the professional bodies
- A non-lawyer chief executive
- A single point of entry for all legal service complainants
- A complaint investigation service in respect of all regulated providers and regulated services
- Procedures that are fair, simple, accessible, transparent and customer friendly
- The power to make decisions which are binding on both parties and enforceable through the courts as a civil debt
- Investigative powers and access to documents, as these are currently available to the Ombudsman under Section 25 of the Courts and Legal Services Act 1990
- Clearly established powers of financial and other redress (which the Legal Services Authority would keep under review)
- An arbitration service for minor negligence claims up to prescribed financial limits
- A duty to co-operate with the Legal Services Authority in its supervisory role

Clearly, complaints of poor service would provide the major focus for the work of the Legal Services Complaints Office; however, as the single point of entry, complaints of professional misconduct and complaints that raised both conduct and service issues would 'enter' through this single gateway. The role of the Legal Services Complaints Office would be to sift complaints and to forward those, which raised conduct issues to the professional body for adjudication. Thus, the professional bodies would retain their traditional role of setting and enforcing ethical standards and conduct rules and of imposing appropriate disciplinary sanctions when those standards and rules are breached.

A simple distinction between poor service and misconduct is not always easy to draw. Whilst I acknowledge that this is a potential difficulty, I take the view that appropriate working relationships could be established and that it would be possible to ensure that issues of serious misconduct could continue to be dealt with by the professional bodies whilst service complaints could be addressed by a body that is manifestly independent of the professions.

Although the details of these arrangements are for a later planning stage, I am persuaded that financial redress should be available in cases of misconduct, but that compensation (as distinct from any fine imposed) should be awarded by the Legal Services Complaints Office, following a finding of misconduct by the appropriate professional body or the relevant tribunal. I am also persuaded that complainants dissatisfied with the decision of a professional body in respect of a complaint of misconduct should have the right to request a review by the Legal Services Complaints Office. In these circumstances, the powers available to the Legal Services Complaints Office should be limited to a recommendation, or an order, that the professional body reconsider the complaint. This is consistent with my view that conduct matters, together with standards of training and entry, should remain within the remit of the professional bodies.

Whilst the details of the above approach require to be developed, there are several observations that I would wish to make at this stage:

- There are a number of persuasive arguments against an independent complaints-handling service and, in reaching my own view, I have given careful consideration to these. Among the most cogent is the claim that the professions should not be permitted to avoid their responsibilities for resolving complaints of poor service by simply passing the task of investigating them to an 'outside' body. Almost as compelling is the associated contention that only by dealing with their own complaints will the professions improve the quality of the service their members provide. I readily acknowledge that, if an independent complaints-handling service is established, an important part of its role will be to report to the Legal Services Authority and the professional bodies and, when appropriate, to individual lawyers about the quality of service provided. Indeed, repeated examples of poor service would be likely to amount to misconduct, as they do under the present arrangements. Moreover, the experience of the Office of the Legal Services Ombudsman has not, in general, demonstrated that complaints handling by the professions has always resulted in wholly benign consequences for the quality of legal services. My view, therefore, is that these advantages are not incompatible with an independent complaints-handling service

- Whatever the balance of the arguments surrounding the retention by the professional bodies of complaints handling, the idea itself has lost any legitimacy - consumer culture has moved on. I am convinced that an independent overarching regulator and an independent complaints-handling office would be the minimum acceptable outcome of any reform following the present review
- Should it be decided that complaints handling is to remain with the professional bodies, I consider that the Legal Services Authority will require the power to ensure that the complaints-handling arms of the professional bodies comply with appropriate standards (including standards of decision making) and that the Authority should be able, in the final analysis, to remove complaints handling from any professional body that fails to meet the required standards. To do otherwise would be to achieve little more than a re-branding of the present arrangements
- The removal of complaints handling from the professional bodies is likely to generate a measure of resentment from those whose record of complaints handling is satisfactory. There now exists an understandable feeling that the 'good' are in danger of being penalised for the failures of the relatively poor. Whilst I can appreciate this reaction, I consider it misconceived. For reasons of accessibility and consistency, it would be inappropriate to create a system in which some complainants were able to approach a new independent complaints-handling organisation, whilst others were required to complain to the appropriate professional body. As importantly, any new regime should not be perceived as a penalty for failure but rather as an attempt to bring regulation (including complaints handling) into line with prevailing assumptions about consumer redress
- It has been suggested to me that a possible solution to the dilemmas surrounding complaints handling would be to extend the role of my Office to include a sifting function; in other words, the existing Legal Services Ombudsman would provide a single point of entry and would forward complaints to the appropriate professional bodies. Under this variant, complainants would retain their right within the current statutory provisions to ask the Legal Services Ombudsman to undertake a review of the professional bodies' handling of the matter. For reasons that I assume are obvious, I would consider this a wholly inappropriate compromise

Part D: Governance and Accountability

As indicated earlier I consider that the Legal Services Authority should consist of a Board with a lay Chair and a lay Chief Executive

Given the range of powers and duties of the proposed Legal Services Authority, it would seem appropriate to impose an obligation to consult widely. At a commonsense level, it would seem unnecessary to insist on a particular obligation to consult with the judiciary. Whether a public authority has conducted appropriate consultations is a matter to be determined in specific circumstances; the usual test of reasonableness should apply.

I am not currently persuaded that a distinct avenue of appeal from decisions of the Legal Services Authority would be necessary. An application to the High Court would, of course, remain open to any individual or organisation with appropriate standing.

Part E: Regulatory Gaps

It is a commonplace to note that very few legal services are regulated and that many of the providers of legal services are unregulated; indeed one suspects that most legal advice is informal. Nevertheless, legal services are expanding and will, no doubt, continue to do so. New service providers will emerge in the way that claims handlers, will writing services and employment law consultants have developed in recent years. Moreover, every year there are literally millions of legal services encounters that take place in the offices of 'not for profit' organisations which provide services for their members (e.g. trades unions) or for the wider community (e.g. Law Centres, CABx, Age Concern).

When a service is unregulated but the provider is a member of a professional body which regulates its members, there is a measure of consumer protection; when, as is more often the case, neither the service nor the provider is regulated, those affected by poor service or unethical behaviour must seek redress elsewhere.

With the growth of new commercial providers, such as claims-handling companies, there may well be a case for seeking to include them within the complaints-handling and/or the wider regulatory regime. There can, in appropriate circumstances, be a compelling public interest case for bringing new services and/or providers into the regulatory system.

Having said that, I take the view that decisions as to which providers and/or which services should be regulated are extra-regulatory; they are matters of legal policy rather than regulation as such. Whilst the regulator (the Legal Services Authority) may well decide to bring issues of this nature to the attention of government and the public, any decision to bring additional providers or additional services within the regulatory remit is one for the government of the day.

On the plausible assumption that at least some new providers and/or novel services are likely to be brought within the regulatory regime, that regime must be sufficiently flexible and adaptive to be able to encompass expansion. I suggest that an independent overarching regulator and complaints-handling body, along the lines suggested earlier, would be well placed to embrace new areas of activity. Complaints of misconduct, however, might well, in the absence of an appropriate professional body, present some difficulty. Although aspects of this matter would certainly require further thought, my preliminary view is that the Legal Services Authority could be charged with establishing rules of professional conduct in such cases, whilst delegating the handling of conduct complaints to one of the existing professional bodies.

Part F: Alternative Business Structures

I have considered whether, as Ombudsman, I can contribute anything of substance to the debate surrounding alternative business structures, particularly the issue of whether LDP or MDP practices should be permitted. I have concluded that I cannot. Nevertheless, I can appreciate that, from the consumer's perspective, there may well be advantages, due to increased competition, potentially reduced costs and greater accessibility, in permitting innovation. On the assumption that the present restrictions are likely to be eased, it will be necessary to consider whether there are any specific regulatory implications for the new business structures that may emerge.

Whether there is any real appetite among potential alternative providers of legal services, e.g. estate agents, banks, financial advisers, high street chains, etc to expand into the area of legal services, is somewhat speculative. In the event of the emergence of alternative suppliers, a flexible regulatory regime of the kind discussed in this paper would permit, if it were deemed to be in the public interest, the inclusion of these new providers.

Conclusions

Whilst I consider it unnecessary to summarise the earlier sections of this response, there are a number of additional observations that I would wish to make.

Firstly, my response has been guided by a desire to find solutions that address the needs and protect the interests of the high street client. I am anxious to ensure that the debate, which will follow Sir David Clementi's report, is not dominated by those of us who work in the field of legal services. It is clear from the contact that the Ombudsman's Office has had with many thousands of customers of legal services, that very many continue to feel disenfranchised by the legal process itself and disadvantaged in any attempt that they might make to pursue a complaint about a lawyer. In an age in which it is often claimed that consumers are more confident and better informed than ever, I suspect that (despite anecdotes to the contrary) this is much less the case in the area of legal services than in other service sectors. I therefore urge the development of new systems and structures that are characterised by a commitment to transparency, accessibility and inclusivity.

Secondly, it seems probable, although I have no wish to pre-empt the outcome of the review, that the reforms it will presage are likely to be substantial. I anticipate that the transition process will be complex and painful for all concerned and I would therefore urge caution, careful planning and the development of adequate transition arrangements.

Finally, the funding of a new regulatory regime will, of course, raise a range of contentious issues. Once again, without wishing to prejudice the outcome of future debate, it seems probable that the profession will be required to finance much if not all of it (although, of course, ultimately consumers will pay). The sources and method of funding will have important implications for the perceived independence of any regulatory regime, particularly in its complaints-handling activities. In this regard, I have no doubt that the legitimacy of the Office of the Legal Services Ombudsman has been enhanced by its financial independence from the professional bodies. In these circumstances, it may be inappropriate to adopt the relatively simple charging structure that operates in other areas of regulation.

I have welcomed the opportunity to contribute to this important process; my best wishes go with Sir David Clementi and his team in their future endeavours. I look forward to reading their recommendations to the Secretary of State for Constitutional Affairs.

A handwritten signature in black ink that reads "Zahida P. Manzoor." The signature is written in a cursive style with a prominent flourish under the name.

Zahida Manzoor CBE
Legal Services Ombudsman for England and Wales