

## **Research Specification: Developing a benchmark of application of professional principles<sup>1</sup> by legal professionals**

### **Purpose**

The LSB would like to develop a benchmark to enable the LSB to track the state of professional principles in the legal services market. In the first instance we would like to commission research that would develop a framework which could be rolled out to a full benchmarking study in 2012/13. We will commission this mainstage research after the completion of this framework study.

### **Background**

The LSB has been set up to reform and modernise the legal services market in the interests of consumers, enhancing quality, ensuring value for money and improving access to justice across England and Wales. The LSB will achieve this by pursuing its regulatory objectives<sup>2</sup> and providing regulatory oversight for the approved frontline regulators<sup>3</sup>.

We have been set up to improve outcomes for consumers dealing with legal services. In our early years, we are focusing our efforts on the delivery of three particular reforms to the legal services market:

- Ensuring regulation is independent of legal services professional bodies and vested interests
- The introduction of Alternative Business Structures (ABS) to open up legal services firms to investment and ideas from non-lawyers
- Improving consumer redress when things go wrong by improving first tier complaints handling and introducing a new independent legal complaints ombudsman

Reforms such as these will have a number of complex impacts on the market that are difficult to predict at the outset of the reforms with any certainty. In evaluating the impact of reforms we will therefore need to obtain a significant amount of data about the way legal businesses provide legal services in order to understand how the market changes over time. The majority of this data is not easily available at present, and will require significant activity to gather. For example Alternative Business Structures could result in more legal services being provided:

- by stockmarket listed companies
- online
- by non-lawyers with fewer lawyers in support
- with new charging structures at lower costs.

In response to the challenges to deliver more focused regulation better targeted on the risks posed by regulated individuals, regulators have started to move to 'Outcomes Focused Regulation' where clear rules are replaced with broader guidelines about the types of behaviour expected but allowing firms and individuals the flexibility to interpret how they are implemented in particular

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<sup>1</sup> As defined in the Legal Services Act 2007 section 1(3) - <http://www.legislation.gov.uk/ukpga/2007/29/section/1>

<sup>2</sup> <http://www.legislation.gov.uk/ukpga/2007/29/section/1>

<sup>3</sup> The Law Society, General Council of the Bar, Council for Licensed Conveyancers, The Institute of Legal Executives, The Chartered Institute of Patent Attorneys, The Institute of Trade Mark Attorneys, Association of Law Costs Draftsmen, Master of the Faculties, Association of Certified and Chartered Accountants, Institute of Chartered Accountants of Scotland.

circumstances. This change will put increased focus on the behaviour of individuals and systems developed by firms to assess and manage the risks that they face.

The move to outcomes focused regulation brings in a set of regulatory outcomes in place of traditional rules. Regulators by making this change will require businesses and individuals to consider in much greater detail the principles that underpin regulation in order to maintain compliance with the regulations. It is expected that this will inevitably lead to a greater reliance, in the first instance, from regulators on the core professional ethics of the profession supplying legal services. Furthermore, this fits closely with the approach outlined in the June 2011 Department for Business Innovation and Skills consultation on transforming regulatory enforcement<sup>4</sup>. Where professional principles fail, greater regulatory oversight will be required. The need to understand whether professional ethics changes over time thus becomes a matter essential developing an effective regulatory compliance regime. Professional principles and regulatory outcomes are thus entwined in the new Outcomes Focused regulatory world.

The LSB is committed to evaluating the impact of the Legal Services Act 2007 on the market and in particular understanding the extent to which we have met our regulatory objectives. We set out our expectations of a market post reforms in our evaluation framework<sup>5</sup>. It will be particularly important to be able to judge the extent to which changes in the market structure are altering underlying behaviour while regulation becomes more reliant on systems and individuals to be able to make difficult ethical decisions. Any significant decline in underlying ethical standards of behaviour by lawyers would have a significant impact on the role regulators need to take in monitoring and enforcement.

### **Aims and Objectives**

This research is designed to draw together academic literature with other sources of information to develop a robust and useable approach to benchmarking professionalism and ethics among providers of reserved legal services<sup>6</sup>. The research should carry out a pilot of the methodology to test and adjust the methodology where necessary, but the full survey will follow in 2012/13 following a full tender, which may need to include further testing.

Our aim is to produce a benchmark which can help us track the extent to which the profession holds a common set of underlying ethics which can be relied upon to support the delivery of the outcomes set out by the regulators. We believe that the current transition from rules to outcomes focused regulation and the introduction of Alternative Business Structures present a rapidly changing regulatory environment in which high standards of professional ethics supported by systems and control will be vital to protect the consumer and public interest.

This work is linked closely to the LSB's work on quality. Understanding how professional principles are experienced in practice, in particular when professionals experience conflicting duties will help us and the frontline regulators understand better the appropriate regulatory tools required. Furthermore we need to understand not only how professionals resolve conflicts, but also whether they are resolved in a way that delivers benefits to client, public or lawyer.

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<sup>4</sup> <http://www.bis.gov.uk/assets/biscore/better-regulation/docs/t/11-989-transforming-regulatory-enforcement-consultation.pdf>

<sup>5</sup> [http://www.legalservicesboard.org.uk/news\\_publications/publications/pdf/evaluation\\_framework\\_april\\_2011.pdf](http://www.legalservicesboard.org.uk/news_publications/publications/pdf/evaluation_framework_april_2011.pdf)

<sup>6</sup> <http://www.legislation.gov.uk/ukpga/2007/29/section/12>

This research should develop a research plan, including questionnaire, to benchmark existing professional ethical standards of suppliers of legal services. The research should pilot the questionnaire and demonstrate how the proposed approach is consistent with current academic thinking on the monitoring of professional ethics.

We will commission the benchmarking survey resulting from this research separately in 2012/13.

### **Issues and scope**

Legal services are provided by a range of individuals, businesses and organisations, both commercial and charitable. Ideally a ethics benchmark should be able to analyse the state of professional ethics across the full range of providers, both regulated and unregulated. This will provide a significant challenge for the research in considering how best to sample those individuals/organisations which are outside of the traditional legal service providers. For those who are regulated we would expect the researcher to consider how best to build on existing research conducted by regulators or professional bodies their regulated communities/members. Equally the research will have to consider how to incorporate circumstances where legal services are provided alongside other services e.g. financial services. The research may therefore need to draw on experience and collection opportunities from a wider set of regulators than simply the legal services regulators.

As regulation has moved from being designed to regulate individuals to a greater recognition of the role of the firm with entity regulation it may be necessary to consider both the ethical framework and compliance with regulated outcomes from an individual and business perspective. The research would need to identify who within a entity should participate in the research to capture the entity view as well as how to develop a sample of individuals regulated to provide reserved legal services. It is not necessary that those sampled actually carry out reserved legal services but only that they are currently regulated and able should they wish to provide such services. For example a solicitor working in-house within a pharmaceutical firm, may or may not, actually provide reserved legal services for their employer, but we would be interested in them being captured within the scope of our research.

We understand that it may be necessary for the research to use a mixture of methodologies, for example internet based survey and qualitative depth face to face interview. We would expect the successful researcher to guide us on the most appropriate methodology given the design of the survey they recommend. Methodologies could also include file analysis, discussions with key clients, observation or experimentation using scenarios. We believe that it is absolutely key to dig deeper than espoused ethics to get to actual behaviours.

Clearly different methodologies would have significantly different impacts on the cost of any later full survey. We would expect to work closely with the researchers in the development of the methodology to explore alternative options, their costs and benefits and impacts on affordability of a later full survey.

As we would expect the methodology produced to be able to be simply rolled out in a mainstage study in 2012/13 this stage of the research will require piloting to ensure that the methodology developed is robust and effective. The size of the pilot must be sufficient to ensure that the

methodology is effective and any lessons from this stage are fed back into the final methodology contained in the final report.

We would like the report framed in the literature providing the evidence to support the approach taken. We believe that it is essential that the methodology is both robust but also demonstrably grounded in similar testing carried out in other professions or countries.

Research should leave the LSB with a clear map to carry out the research including: questionnaire, methodology, sampling approach, sample size and proposed timetable. This should all be in the form of research specification that can be tendered in early 2012/13

### **Tender Evaluation Criteria**

All projects commissioned by the LSB are subject to our **standard terms of contract** which will be sent out with this tender. Tenders will be evaluated on best value for money and will be assessed on the basis of:

1. Cost. Please include applicable daily rates of staff that would be involved in this project and the approximate proportion of individual staff time that would be spent on the project
2. The extent to which tenders are clearly written, highlighting relevant experience – particularly in studies of professional services markets
3. Proposed team composition, expertise and management and the organisation's diversity policy
4. How diversity issues would be addressed in the research.

### **Deliverables**

#### Output

The output will be a short report, research specification, questionnaire and background briefing paper to support an organisation carrying out the main study.

#### Project plan

Tenders should include a project plan and time schedule for the work that identifies the main task and key milestones that will be used to monitor progress. The plan should be accompanied by a resource profile, giving a breakdown of the resources in person days allocated to each task.

### **Duration**

The initial research will commence in December 2011. The draft final report should be completed by the end of March 2012. A final agreed report should be completed by April 2012.

### **Legal Services Board Contact Details**

Tenders with any queries about the research specification would be welcome to contact Alex Roy (020 7271 0060) or Wendy Harris (020 7271 0089).

**Tenders must be submitted by 5pm on Thursday 1 December 2011**

