

To:	Legal Services Board	
Date of Meeting:	21 January 2016	Item: Paper (16) 02

Title:	The emerging market in authorisation: more choice for providers, more competition between regulators?	
Workstream(s):	Performance, evaluation and oversight	
Author / Introduced by:	Kate Webb, Head of Regulatory Reviews and Investigations kate.webb@legalservicesboard.org.uk / 020 7271 Ext. 0090	
Status:	Official	

Summary:

Changing your legal regulator

There are now wider opportunities for legal services providers to choose and switch between regulators, and greater competition between regulators as a result. This is a relatively new and qualitatively different influence and driver of regulatory development to those the sector has been accustomed to since 2010 (such as the better regulatory principles, regulatory objectives, best regulatory practice, and changing risks in delivery of legal services).

This Board paper summarises recent statements from legal services providers who have taken the opportunity to choose their regulator, and from regulators seeking to attract new providers to regulate. It then goes on to identify some of the risks and benefits that may emerge from these developments, for the LSB as oversight regulator and for others.

Above and beyond the LSB's role in assessing applications to approve changes to regulatory arrangements and applications to be designated as an approved regulator or licensing authority, [REDACTED]

This paper is not seeking a decision in relation to any rule change.

Recommendation(s):

The Board is invited to :

- note and discuss the issues described in the paper

- [REDACTED]

- revisit this topic with a further Board paper and discussion in six months' time.

Risks and mitigations

Financial: N/A

Legal: The paper is for discussion and no decision is required. No specific legal risks in the paper.

Reputational: Subject to the development of choice and competition as a driver for change in legal services regulation, there is a risk that the extent of the LSB's responsibility to oversee variation that emerges may be misinterpreted.

Resource: This work has arisen through general oversight activity and there is no specific project for work in this area identified in 2015/16 Business Plan

Consultation	Yes	No	Who / why?
Board Members:		x	Early thinking by the executive
Consumer Panel:		x	Early thinking by the executive
Others:			

Freedom of Information Act 2000 (Fol)

Para ref	Fol exemption and summary	Expires
<p><i>Summary:</i> Second half of third paragraph; <i>Recommendations:</i> Second bullet point; <i>Main paper:</i> Second bullet point of paragraph 3; Second sentence of para 10; Paragraphs 18 and 19; Second sentence of para 22; Last sentence of para 23; Last two sentences of para 24; Para 27 Para 29;</p>	<p>Section 36(2)(b)(i): disclosure of information would inhibit the free and frank provision of advice</p>	<p>N/A</p>

Second half of para 32		
---------------------------	--	--

LEGAL SERVICES BOARD

To:	Legal Services Board	
Date of Meeting:	21 January 2016	Item: Paper (16) 02

The emerging market in authorisation: more choice for providers, more competition between regulators?

Introduction

1. This paper summarises recent statements from legal services providers who have taken the opportunity to choose their regulator, and from regulators seeking to attract new providers to regulate. It then goes on to identify some of the risks and benefits that may emerge from these developments, for the LSB as oversight regulator and for others.
2. The extent of choosing and switching may be limited in practice at present, but recent changes have meant this issue has gained a higher public profile. This is reflected in the greater prominence given by regulators to legal service providers' opportunities to choose who they are authorised by. This is what we mean when we talk about an "emerging market in authorisation".
3. The Board is invited to
 - note and discuss the issues described below,
 - [REDACTED]
 - return to this discussion topic in six months' time.
4. This paper is not seeking a decision in relation to any rule change.

Why now?

5. The Legal Services Act 2007 (the Act) introduced reforms that could facilitate competition between regulators for authorised persons, and in particular for authorised firms (both lawyer and non-lawyer owned (alternative business structures, ABS)). This included the opportunity for an individual authorised by one regulator to own or manage an entity that is authorised and regulated by another. In terms of practicalities, regulatory conflict provisions in the Act help to smooth some of the potential problems that authorised individuals may experience if they work in firms regulated by another regulator.
6. The Act also allowed regulators to apply for designation for additional activities and the power to regulate firms and license ABS. Since the Act's commencement in 2010 one new approved regulator (ICAEW) and four new licensing authorities (CLC, SRA, ICAEW, IPReg) have been designated. CILEx Regulation has been designated for three new reserved activities (conduct of

litigation, probate and reserved instrument activities). In addition to this two regulators have begun authorising lawyer-owned entities (BSB, CILEx Regulation). See Annex A for a table summarising the changes since 2010.

7. The opportunity for regulators to authorise a wider range of activities and/or a wider range of persons may mean there is less need felt by incumbent service providers to switch regulator: by lifting restrictions on the business models and types of activity they regulate, regulators have reduced the need for their communities to go elsewhere in order to deliver the models and services they want.
8. And yet recently, we have seen increased discussion of the opportunity for legal services providers to switch and choose regulator, both by providers and by regulators (see below and Annex B). We are calling this “the emerging market in authorisation”. By this, we mean, increasing choice for legal service providers over who is their regulator, and competition between legal services regulators for the opportunity to authorise firms, and to a lesser extent, individuals. Such choice and competition for the opportunity to authorise is unusual.¹
9. In theory, the Act’s approach is a means by which, over time, lower risk activities could migrate to less intrusive or costly regulators. It may also help to identify where a particular regulatory approach is unnecessarily burdensome for the risk it concerned, ie, it is disproportionate. Over time, as regulators introduce competencies for an activity, such as advocacy, it may matter less in regulatory terms what professional title an individual may have acquired at initial authorisation (although it may still matter significantly in market terms). This would help us reach a point where the burden of regulation on the legal services sector may reflect, to a slightly greater extent, the level of risk that needs to be managed to deliver the regulatory objectives. Within a single regulator different approaches could be adopted for different activities to achieve a similar outcome.
10. The likelihood of this scenario needs to be balanced against the brand power of a particular regulator. [REDACTED]
[REDACTED]
[REDACTED]
11. Given the Act’s focus on reserved legal activities, up until now the extent of opportunities to switch/choose has been limited to those carrying on reserved legal activities. This is a relatively limited group of firms. However, a recent proposal outlined by the SRA goes beyond this.² By seeking to grant authorisation to carry on reserved legal activities without an accompanying obligation actually to carry on (or establish intent to carry on) reserved legal activities, one effect of the SRA’s proposal will be to widen the range of potential applicants, thereby broadening the potential supply of candidates for authorisation under the Act (although the scale of this additional supply is as yet unclear). The SRA has stated that this “may encourage some existing providers

¹ Examples include some EU product safety regulation, also competition between ADR schemes has been facilitated by the recent Directive

² SRA. 2015. Looking to the future. Flexibility and public protection – a phased review of our regulatory approach. Available at: <https://www.sra.org.uk/sra/news/press/futures-position-paper-launch.page> (accessed 12 January 2016)

of legal services who carry out non-reserved legal activities only and do not have to be regulated to enter regulation for the first time.”

12. These developments are viewed against the background of a broad expectation across Government and wider society that a regulator demonstrates the principles of better regulation, and reducing burdens on business (the Business Impact Target has been set at £10bn over the lifetime of this Parliament). More specially, there is greater attention on the cost of regulation through LSB project work. There is renewed interest in reviewing regulation of the legal services sector, with discussions underway to explore independence for those regulators who currently operate at arms-length from the approved regulator.

Opportunities to choose: legal service providers’ views

13. Those legal services providers who have taken advantage of the opportunity to choose regulator have cited the following reasons in support of their choice:

- easier authorisation processes
- insurance arrangements
- more proportionate regulation
- offer a wider range of services to consumers
- regulator “easier to deal with”
- simpler rule books
- value for money.

For example:

- Kingston Smith switch from ICAEW to SRA - “The move allows the top 20 accountancy practice to offer a wider range of legal services.”³
- New BSB entity run by two solicitors: “They chose the BSB as regulator in part because it was ‘more user-friendly to deal with’.....the choice of the BSB as regulator was less that he was ‘allergic to the Solicitors Regulation Authority’ and more ‘being positively inclined toward the BSB’....Both solicitors agreed that the BSB’s entity application process was ‘probably just as tough’ but the BSB had been ‘more user-friendly to deal with’ and had an easier-to-understand Handbook.”⁴
- New BSB entity run by barrister and solicitor: “The interesting thing is that now we have an option as to who regulates us. We did not comparison shop, but because the BSB is new to this, they’re enthusiastic about what they’re doing and the application process was

³ 16 September 2015 - Leading accountants become first to swap ABS regulator

<http://www.legalfutures.co.uk/latest-news/leading-accountants-become-first-to-swap-abs-regulator>

⁴ 1 October 2015 – BSB-regulated entities reach 32, with pro bono and solicitor-run start-ups.

Available at: <http://www.legalfutures.co.uk/latest-news/bsb-regulated-entities-reach-32-with-pro-bono-and-solicitor-run-start-ups> (accessed 4 December 2015)

straightforward. The impression I get is that the Solicitors Regulation Authority's systems are more developed and burdensome.’⁵

- New BSB entity, owned by solicitor: “... he wanted ...to be regulated by the BSB rather than the Solicitors Regulation Authority (SRA) because of access to Bar Mutual indemnity insurance and the Bar's ‘simpler and more transparent’ rules. ‘They have one handbook, which is relatively easy to read, compared to volumes and volumes of SRA material you need to be aware of – most of which is over the top for a small business.’ ... described the solicitors’ insurance market as ‘turbulent’ and said the way insurance was offered was ‘shrouded in mystery’, with the risk that insurers could substantially increase premiums or pull out altogether.”⁶
14. There are known barriers to switching regulator in the level of run-off cover that must be maintained under current regulatory arrangements as switching is equivalent, in regulatory terms, to closure of a firm. A CILEx Regulation report, published on 1 December 2015, discussed this further. Indirectly, this report also provides a useful example of the potential impact of this change in emphasis in a regulator's thinking, focusing as it does on providers' needs for easy switching, and by implication, the benefit to the regulator of gaining additional authorised firms. There is very little consideration in the report of consumers' interests and how these are protected and promoted by removing a barrier to switching.

Opportunities to choose: regulators' views

15. Annex B provides a summary of recent comments by some regulators on this issue. This is an indication that they see competition for authorisation as a feature of current and future regulatory activity. Attention is predominantly focused on those actually carrying on reserved legal activities – but the recent SRA proposal (see paragraph 11) goes further than this in that it proposes authorising to carry on reserved legal activities without an obligation to actually carry them on (or establish intent to carry them on).
16. Regulators describe benefits as more proportionate regulation for providers, better fit for new business models, becoming the default regulator for particular skills or activities, offering value for money for providers, offering career development options for individuals. These all reflect that opportunities are opening up both for existing firms to switch regulator or for new firms to choose who authorises them.
17. Not many (if any) direct benefits for consumers are noted by regulators. There may be indirect benefits if lower regulatory costs to providers are passed onto consumers. Less attention is perhaps drawn to the risks of consumers that may emerge in these situations. There may be greater risk of consumer confusion as

⁵ 9 September 2015 - Barrister and solicitor set up groundbreaking BSB-regulated firm. Available at: <http://www.legalfutures.co.uk/latest-news/barrister-and-solicitor-set-up-groundbreaking-bsb-regulated-firm> (accessed 4 December 2015)

⁶ 29 April 2015 - Solicitor who is not an advocate sets up one of first BSB entities. Available at: <http://www.legalfutures.co.uk/latest-news/solicitor-who-is-not-an-advocate-sets-up-one-of-first-bsb-entities> (accessed 4 December 2015)

greater notice is paid to the regulated title than the entity regulator. The implications of this will only become clear if something goes wrong.

Risks and benefits of opportunities to choose: providers, regulators and consumers

18. [REDACTED]
19. [REDACTED]
20. Many of these risks are not particularly new, but the prospects of greater switching and choosing, coupled with new opportunities to encourage those not regulated to enter regulation for the first time, may alter their relative impact, especially if they are not assessed, or are not well managed by regulators.
21. Competition, choice, and switching are all based on some variation in approach between the regulators. We know there is not a consistent set of processes across the regulators. Indeed, proportionate and targeted regulation should allow some space for variation in how things are regulated:
- Entry– authorisation process and standards, qualification standards, price
 - Compliance – insurance, CPD, practice management, client money
 - Exit – standard of proof, sanctions, run-off cover
22. Concerns may arise if these differences in approach lead to different outcomes that demonstrate unwelcome variation and a tolerance of poor provider performance. [REDACTED]
- [REDACTED] Do we need to worry about chances of “regulator-hopping” by poorly performing firms? Do different approaches on PII introduce different risks for consumers?
23. The consumer and public interests appear to receive less deliberate attention in current discussions. How can consumers benefit from these developments? How can we avoid their interests being overlooked or side lined? There’s a strong public interest in having confidence in regulation and understanding the protection it offers. This could be challenged by both greater switching, and by encouraging firms who carry out only non-reserved legal activities and do not have to be regulated to enter regulation for the first time. [REDACTED]
24. In a competitive market, regulators may be keener to promote and protect their own particular interests. This may give undue influence to the regulated, thereby

potentially enabling the resurrection of the “self-regulatory” problems that the Act was brought in, in part, to tackle. [REDACTED]

The role of the LSB

25. As oversight regulator, the LSB has been broadly neutral on this issue up to this point. Our exposure is predominantly through the Board’s statutory decision-making functions (alterations to regulatory arrangements and new designation applications). The LSB’s rules governing these processes require regulators (and aspiring regulators) to state how their obligations under the Act to have regard to the better regulation principles and the regulatory objectives have been met. The LSB rules also require regulators to explain whether the proposal affects areas regulated by other approved regulators (to manage “regulatory conflict”). In all of these instances we are responding to individual changes, as they emerge on a case by case basis.

26. If we consider the comments made by legal services providers and regulators, some areas where we may see variation emerging across the range of regulatory arrangements outlined in the Act include

- authorisation to practise requirements
- consumer protection arrangements, such as compensation and insurance arrangements and rules for handling client money
- supervision requirements
- CPD requirements
- enforcement policies.

27. [REDACTED]

28. We need to prevent a “race to the bottom.” We also want to be consistent and fair when assessing rule changes and designations. It may be that our approach to this emerging influence in legal services regulation could become more proactive, challenging and supporting the regulators to become more efficient and effective. In keeping with our commitment to outcomes-focused regulation, this could be managed if a distinction is made between **what** is regulated for, in terms of standards for outcomes and protections, and **how** this is achieved. Such an approach would give the frontline regulator scope to tailor how these outcomes and protections are achieved (ie this would represent legitimate

variation to serve a diverse community of practitioners, rather than inconsistency in regulation), and flexibility in the process of regulation.

29. [REDACTED]

Summary and next steps

30. In summary, evidence suggests that there are now wider opportunities for legal services providers to choose and switch between regulators, and greater competition between regulators as a result. This is a relatively new and qualitatively different influence and driver of regulatory development to those the sector has been accustomed to since 2010 (such as the better regulatory principles, regulatory objectives, best regulatory practice, and changing risks in delivery of legal services).
31. The Board are asked to note and discuss the issues raised in this paper, noting that the draft business plan 2016/17 proposes some work in this area.
32. Above and beyond the LSB’s role in assessing applications to approve changes to regulatory arrangements and applications to be designated as an approved regulator or licensing authority, [REDACTED]
33. Given the relatively rapid pace of development at the present time, we recommend the Board revisit this topic with a further Board paper and discussion in six months’ time.

21.01.16

Extent of legal services regulation: 2010 vs current

The provisions when the Legal Services Act 2007 came into force (2010) versus current opportunities to authorise (shaded)

Regulator	Reserved legal activity	Individual	Entities	LA
BSB	The exercise of right of audience The conduct of litigation Reserved instrument activities Probate activities The administration of oaths	Yes	Yes	Currently applying
CILEx Regulation	The exercise of right of audience The administration of oaths	Yes	Yes	No (currently consulting)
	The conduct of litigation Reserved instrument activities Probate activities			
CLC	Reserved instrument activities Probate activities The administration of oaths	Yes	Yes	Yes
CLSB	The exercise of right of audience The conduct of litigation The administration of oaths	Yes	No	No
ICAEW	Probate activities	Yes – but only within an entity	No	Yes
IPReg	The exercise of right of audience The conduct of litigation Reserved instrument activities The administration of oaths	Yes	Yes	Yes

Regulator	Reserved legal activity	Individual	Entities	LA
MoF	Reserved instrument activities Probate activities Notarial activities The administration of oaths	Yes	No	No
SRA	The exercise of right of audience The conduct of litigation Reserved instrument activities Probate activities The administration of oaths	Yes	Yes	Yes

Recent public commentary by regulators

Bar Standards Board:

Sir Andrew Burns, Chair, Bar Standards Board, Speech, 5 October 2015⁷

“I am intrigued that our regulatory regime has been seen as so appealing that we even have a couple of solicitor-led practice switching to the BSB as their preferred regulator, due to the value for money we provide and reduced red tape.”

Patricia Robertson QC, Vice Chair, Bar Standards Board, Speech to Lincoln’s Inn Bar Students, 9 July 2015⁸

“... the boundaries have blurred, in terms of the spheres of activity of solicitors and barristers, the business models it is open to them to adopt, and how and by whom they are regulated.... if over the medium and longer term we are talking about a shrinking rather than growing number of individuals who are regularly providing advocacy services in the higher courts, then on any view we should do all we can to bring ‘into the tent’ those solicitor advocates who are doing the same work we do, who want to be regulated by the BSB and who want to mark themselves and their firms out as adhering to the higher standards of training we consider necessary. How people originally acquired their professional title should, in future, be less important than the job they are actually doing and their willingness to fully commit to the same standards as ourselves.”

Council for Licensed Conveyancers

Dame Janet Paraskeva, Chair, Council for Licensed Conveyancers, Speech to Society of Licensed Conveyancers, 18 November 2015⁹

“A diversity of approaches offers choice to the regulated community too. Choice of the model that is best aligned to their practice.... Ensuring that practices can in fact make their choice of regulator as Parliament envisaged. But there are some practical obstacles to that still – including the supposed need for run-off cover and interruption of access to lenders panels.”

⁷ Available at: <https://www.barstandardsboard.org.uk/media-centre/speeches/bsb-chair-sir-andrew-burns-sets-his-vision-for-the-future-of-the-bar-regulator/> (accessed 4 December 2015)

⁸ Available at: <https://www.barstandardsboard.org.uk/media-centre/speeches/future-proofing-the-bar-lecture/> (Accessed 4 December 2015)

⁹ Available at: <http://www.clc-uk.org/CLCSite/media/Corporate-Docs/SLC-Conference-2015-Janet-Paraskeva-Speech-for-publication.pdf> (Accessed 4 December 2015)

ILEx Professional Standards (now CILEx Regulation)

Alan Kershaw, Chair, ILEx Professional Standards, 15 January 2015¹⁰, discussing the opening of its entity regulation scheme:

“This presents a great opportunity for many new and existing firms, who have a real choice of regulator for the first time. We are very clear about what that choice means. It does not mean a chance to escape scrutiny, or a decline in regulatory standards – it means a regulatory model that is best for your business, giving consumers the protection they need when seeking legal services. It also means that, if they want it, students starting out on the CILEx route are not limited in their career destinations, and can go on to be authorised to provide reserved legal services in one or more branches of the law either running their own practice, or as an employed lawyer.”

CILEx Regulation has devoted a section of its website to supporting existing regulated firms with move to CILEx Regulation, with scenarios and FAQs.¹¹ For example:

“Scenario 2: Jayne Lau is a solicitor working on her own as J Lau Limited carrying out civil litigation regulated by the SRA. She will remain a solicitor, regulated by the SRA individually, but seeks entity regulation from CILEx Regulation. She will demonstrate the knowledge and skills she has gained as part of the application process but will not need to obtain a litigation qualification from us. She will describe herself as a solicitor to her clients but be authorised by CILEx Regulation for civil litigation.”

¹⁰ Available at: <http://www.lawgazette.co.uk/practice/legal-execs-regulator-sets-sights-on-solicitor-firms/5046051.fullarticle> (accessed 4 December 2015)

¹¹ Available at: <http://www.cilexregulation.org.uk/entities/opportunities/scenarios> and <http://www.cilexregulation.org.uk/entities/opportunities/faqs/existing-regulated-firms> (accessed 4 December 2015)