

To:	Board Meeting	
Date of Meeting:	14 September 2011	Item: Paper (11) 63

Title:	Legal professional privilege
Workstream(s):	None
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Status:	Restricted / Privileged

<p>Summary:</p> <p>The Supreme Court is hearing a case in 2012 on whether common law (court granted) Legal Professional Privilege (LPP) should be extended to accountants or continue to be restricted to Solicitors and Barristers.</p> <p>LPP is currently justified by the courts in part on consumer protection grounds. These grounds have not been articulated by the courts to a standard of proof, reasoning and documentation that we would have to use, for example, in recommending the making of a Statutory Instrument.</p> <p>The case has the potential to create difficult to resolve regulatory impediments to competition within the legal services sector.</p> <p>The decision could also easily put the LSB into a position (explained below) where our statutory duties and the court's judgment might appear to contradict each other leaving us in a position where we are forced to do things which appear to be at odds with the judgment in order comply with the Legal Services Act 2007 ('the Act'). This would leave us very open to challenge.</p> <p>Consequently, this paper recommends that the LSB intervenes in those proceedings. Our aim in intervening would be to ensure that the Supreme Court is aware of the aspects of the case that may give rise to issues for us. Our purpose would be to seek to persuade the court to show regard to these issues and hand down a judgment that both gives strong encouragement to Parliament to legislate promptly on the issues and also sets down a position that is not problematic for us in the period until any such Parliamentary scrutiny occurs.</p> <p>The courts regard LPP as being an important part of the support that the legal system gives to several of the Regulatory Objectives that we are obliged to consider, in particular, in our statutory decision making functions.</p> <p>The content of the Court of Appeal decision in this matter in 2010 raises the real possibility that the Supreme Court case will create, potentially irreconcilable, difficulties for the LSB by making comments in the judgment which affect five areas of our decision making responsibility (which are identified in a table in the Board paper) .</p> <p>Those issues set out in the table could arise most particularly in relation to:</p> <ul style="list-style-type: none"> - our review of reserved legal activities (starting with Will Writing); - handling SRA and BSB rule changes consistently with those of other ARs; - handling the two accounting bodies (ACCA and ICAS) that are already

Approved Regulators; and

- handling ICAEW, another accounting body, that is a party to the case and is likely to apply to us seeking to become an Approved Regulator next year.

We have a duty under the Act to act in a way which we consider most appropriate for meeting the Regulatory Objectives specified in the Act. We explained our views on what we think that this means for us in a paper in July 2010.

We also have better regulation duties in acting to ensure that what we do is transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed. It is clear that we cannot fulfill our duty in relation to regulatory objectives properly and in compliance with our better regulation duty if we are making decisions about regulatory arrangements that underpin LPP on an unclear, inconsistent and ambiguous footing.

None of the participants in the case have interests which are aligned with our own and so we cannot expect them to identify the issues that we are concerned about and to ensure that they will be addressed effectively in the hearing.

In consequence, this paper explains the Executive's belief that there is a need to intervene (participate) in the Supreme Court hearing.

Risks and mitigations

Financial: External advisors costs of approximately £20,000, some or all of which may subsequently be recoverable from Ministry of Justice (MoJ) - detail in the main report.

FoIA: Disclosable in line with publication policy.

Legal: See report.

Reputational: Limited risk of unjustified criticism of seeking to expand our role.

Resource: Limited use of internal legal resource with the majority of the work performed by external advisors within the costs mentioned above.

Consultation	Yes	No	Who / why?
Board Members:	✓		Steve Green, Ed Nally and David Wolfe.
Consumer Panel:		✓	N/A.
Others:	External Advice sought from Philip Havers QC.		

Recommendation(s):

The Board is invited:

In the light of this paper, and taking account of comments made in the meeting, to authorise the Chairman, the Chief Executive and the General Counsel:

- (1) to finalise correspondence to the parties to the "Prudential Supreme Court Case" substantially in the form of Annex 1 to this paper seeking those parties' views on the LSB's intention to apply to intervene in the case when it is heard in the Supreme Court;

- (2) to identify and correspond informally with key stakeholders who will not be party to the case including the MoJ;
- (3) to communicate with the parties to the case;
- (4) to subsequently file an application with the Supreme Court unless the responses to the correspondence referred to above give rise to substantive issues that mean that a substantial alteration to the planned intervention or a discontinuance of it would be merited;
- (5) to progress with such steps as are needed to have the application considered and, if successful, to participate in the hearing of the case as a written submission intervener (but seeking to reserve the right to make oral submissions as well if necessary depending on the content of the other parties' submissions) on the basis detailed in Annex 1;
- (6) to incur such legal fees and other costs as are reasonably necessary to achieve the foregoing (detailed in the full paper); and
- (7) to keep the Board briefed throughout (including as to levels of fees and costs incurred) wherever material progress or changes occur and to recommend to the Board a discontinuance of the application at any stage if changes in circumstances or in the progress of the case or levels of fees and costs that would be incurred materially alter in a way that makes such a recommendation merited.

LEGAL SERVICES BOARD


To:	Board Meeting	
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Legal professional privilege

Executive summary

1. This paper relates to the executive's belief that there is a need to intervene (participate) in a Supreme Court hearing to seek to ensure that the court judgment:
 - does not create barriers to the provision of legal services by providers that are not justified by appropriate standards of evidence of resulting consumer protection or other justifiable ground for the barrier; and
 - encourages a prompt and effective resolution by Parliament of the issues raised in line with the Court of Appeal judgment; and
 - does not inadvertently create irreconcilable issues for LSB in the period between the date of the judgment and the effective date of any ensuing legislation in the LSB's performance of five different processes that the LSB is required by the Legal Services Act ('the Act') to perform.
2. The judgment could easily create a position whereby the LSB would be forced to act in a way that appeared to go against the Supreme Court judgment in order to comply with explicit requirements on the LSB in the Act. The Court of Appeal judgment concluded:

*"...To which accountants should [LPP] apply, given that "accountant" does not by itself denote membership of any particular professional body, or the obligation to comply with any, or any particular, professional obligations? To which other professional advisers would it apply? To what areas of the law would it apply as regards the advice of any adviser who is not a lawyer as such? These questions are serious and important, and would require a clear answer in order that the scope and application of the extended LPP should be known and understood. **In my judgment, only Parliament can provide the answers to such questions as these.**"* (my emphasis)
3. However we have two accountancy bodies already existing as Approved Regulators and a third one which is known to be likely to apply so the LSB is going to have to provide answers to questions such as these even if the Supreme Court follows the Court of Appeal's judgment above.
4. The court's determination is likely to impact on these issues whether we participate or not but none of the parties to the action have the same concerns that the LSB does and so a resolution that provides LSB with the clarity that we need, rather than additional problems and ambiguities, is unlikely without our participation [REDACTED]

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5. The hearing relates to Legal Professional Privilege (**LPP**) - a 400 year old court sanctioned privilege for the benefit of consumers of legal services. It allows the consumers to communicate with certain types of regulated legal adviser about the consumer's rights and duties, remedies and liabilities and what ought to be done about them and to require the adviser to keep that communication confidential.
 6. The courts have consistently held that LPP is a fundamental aspect of improving access to justice. LPP granted by the courts is founded in the common law ('**common law LPP**'). There are also some contexts in which LPP is granted by statute ('**statutory LPP**') – such as s190 of the Legal Services Act which grants "solicitor like" privilege to any authorised person providing 4 of the 6 reserved legal activities ('**privileged RLA**').
 7. The courts have consistently held that common law LPP should be restricted to Solicitors and Barristers because of (unspecified) aspects of their codes of conduct and duties to the courts.
 8. The Courts have not evidenced or analysed the case for LPP and the potential restrictions on competition in the market to the standards that would be required of a regulator if that regulator was seeking to make similar regulatory impositions on the operation of a market on consumer protection or other potentially justifiable grounds.
 9. A case was brought to the Court of Appeal in 2010 seeking clarification about whether common law LPP could be extended to accountants. The court held that this was a decision for Parliament. However leave to appeal to the Supreme Court has been granted.
 10. Consequently the Supreme Court needs to decide in 2012 whether to extend common law LPP or to continue to restrict it and leave any further decisions on whether it should be extended to Parliament to be performed by statutory change.
 11. The grounds for this decision are likely to involve consideration of the appropriate Regulatory Arrangements required of a regulatory body (an Approved Regulator) in order for its regulatees (Authorised Persons) to be allowed to offer LPP protected legal services as this issue has already arisen in the lower court judgments.
 12. Five of the activities that we are required to perform under the Act within specified time limits relate to the appropriate Regulatory Arrangements which are required to underpin common law and/or statutory derived LPP. These activities are detailed in the table at **Annex B** to this paper.
 13. Three of these activities may be engaged at any time by either of the two accounting bodies that are already Approved Regulators under our regime. Two of these activities are likely to be brought into play in 2012 by ICAEW if it

applies to us to become an Approved Regulator for Probate if press reports are accurate.

14. The LSB therefore needs the court to be conscious of our position when making its judgment so that, at a minimum, the Court does not make determinations that are inconsistent with the statutory framework and factual setting within which we must operate – we do not want to end up being in a position where we must either break the Act or disregard a Supreme Court judgment because the Act and the Judgment end up being incompatible.
15. It is also important that the Supreme Court does not just leave the matter to Parliament to deal with at an indefinite date in the future and with the situation being unhelpfully ambiguous in the meantime (rather than recognise that it should be left to the LSB) as all of our activities are time limited and it is unlikely that any inconsistencies would be remedied by Parliament within the timeframe that we would need in order to comply with the timetables specified in the Act.
16. It is possible that the Court may even form its judgment in a way that is positively helpful to us in our decision making and we will ask for this but the realistic hope is simply that it makes a judgment that does not create problems for us.
17. A helpful outcome, although this may be too much to expect from a case where we are intervening rather than being a claimant or defendant, would be that the court would identify some workable criteria that would:
 - a. guide us within the framework that the Act requires us to use in assessing the relevance of LPP to reservation/de-reservation decisions; and
 - b. provide that privilege could be granted to Authorised Persons for a Reserved Legal Activity so long as their Approved Regulator's regulatory framework for that activity:
 - i. clearly identified duties to the court;
 - ii. explained privilege entitlements and limitations;
 - iii. had disciplinary sanctions for abusing privilege as an advisor or allowing the client to abuse it; and
 - iv. otherwise was generally acceptable to the LSB under the Act's approval framework; and
 - c. provide clear encouragement to Parliament to address this issue promptly through legislation.
18. Consequently this Board paper is seeking permission for the LSB to seek to intervene in the proceedings of the Supreme Court (an established procedure of the court) to seek to ensure that the considerations of the Supreme Court are informed by our needs and that, as a result, a judgment is handed down which is sufficiently clear to allow us to fulfill our statutory obligations effectively and without risk of challenge on our decision making.

19. Before committing to this course of action we would consult informally with the MoJ and with other key stakeholders and would also consult, as court process requires, with the other parties to the case. We would review, in the light of this consultation, whether to continue with our application to intervene.

20. Our application would be on the basis of the LSB bearing and not seeking to recover its own costs and also it being agreed that we should not bear any of the costs of other parties in respect of our intervention. Further details on costs estimates are provided below.

21.

[REDACTED]

22.

[REDACTED]

Background / context

The reason for the 'Prudential' case

23. The present case arose because the Inspector of Taxes served statutory notices under the Taxes Management Act 1970 (**TMA**) on the Prudential demanding documents. The documents sought included legal advice that had been prepared for the Prudential by their national and overseas lawyers and by their accountants.

24. The Prudential sought to deny disclosure of some documents on the grounds of a provision in the TMA which permits legally privileged documents to be withheld from a response to the Inspector's demand. The Prudential sought to include legal advice that had been prepared by the accountants in the documents that they withheld on grounds of common law (court granted) Legal Privilege.

25. The Inspector refused to accept this withholding of documents and Prudential then sought to Judicially Review the Inspector's decision not to withdraw the notices.

26. The case came before Charles J and he gave judgment on 14/10/2009¹. Charles J gave a clear summary of the outcomes of 400 years of judicial determination on this court created concept of common law privilege before refusing the Prudential's case for reasons that are summarised below.

¹ [2009] EWHC 2494 (Admin) (<http://www.bailii.org/ew/cases/EWHC/Admin/2009/2494.html>)

27. The case was appealed and the Court of Appeal comprising Mummery LJ, Lloyd LJ and Burnton LJ decided, with Lloyd giving the sole substantive judgment, on 13/10/2010² that the court was not capable of prescribing the conditions subject to which an accountant would qualify as regards LLP and therefore determining that it was Parliament's responsibility to do so.
28. However the matter was subsequently appealed to the Supreme Court who, in 2012, will have to determine upon the issue.
29. ICAEW, The Bar Council and The Law Society intervened in the Appeal and have all also been granted leave to intervene in the Supreme Court.

What is LPP and what legal advice does it apply to?

30. The courts have consistently held that LPP is a fundamental aspect of improving access to justice³. LPP's purpose and form were summarised succinctly by Lord Hoffmann in *R (Morgan Grenfell & Co) v Special Commissioner of Income Tax* [2002] UKHL 21 (*Morgan Grenfell*), at paragraph 7 as follows:

"LPP is a fundamental human right long established in the common law. It is a necessary corollary of the right of any person to obtain skilled advice about the law. Such advice cannot be effectively obtained unless the client is able to put all the facts before the adviser without fear that they may afterwards be disclosed and used to his prejudice...., if a balancing exercise was ever required in the case of legal professional privilege, it was performed once and for all in the 16th century, and since then has applied across the board in every case, irrespective of the client's individual means".

31. In *Balabel v Air India* [1988] Ch 317, Taylor LJ said, at p 330, explained further what 'legal advice' was for the purpose of attracting LPP and provided further context for LPP:

"legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.... There will always be borderline cases in which it is difficult to decide whether there is or is not a "legal" context. But much will depend upon whether it is one in which it is reasonable for the client to consult the special professional knowledge and skills of a lawyer, so that the lawyer will be able to give the client sound advice as to what he should do, and just as importantly what he should not do, and how to do it. We want people to obey the law, enter into valid and effective transactions, settle their affairs responsibly when they separate or divorce, make wills which will withstand the challenge of the disappointed, and present their best case before all kinds of court, tribunal and inquiry in an honest and responsible manner.... to extend privilege without limit to all solicitor and client communication upon matters

² [2010] EWCA Civ 1094 (<http://www.bailii.org/ew/cases/EWCA/Civ/2010/1094.html>)

³ Charles at 31(1) and Lloyd at 7 (n.b. all references are to paragraph numbers in the court of Appeal Judgement "Lloyd" and the First Instance Judgement "Charles")

within the ordinary business of a solicitor and referable to that relationship [would be] too wide".

The Court of Appeal Judgment on the current case

32. The Court of Appeal's decision, in a judgment given by Lloyd LJ with the other two judges assenting, was that LPP should not be extended to accountants principally because, for unspecified reasons, the court did not think:

"...that it would be possible for the court to prescribe the conditions subject to which an accountant would qualify as regards LPP" (LJ Lloyd at 86)

"As applied to members of the legal professions, acting as such, it is sufficiently clear and certain. If it were to apply to members of other professions who give advice on points of law in the course of their professional activity, serious questions would arise as to its scope and application" (ibid at 83)

"In my judgment, only Parliament can provide the answers to such questions as these. It is not a proper task for the courts to undertake" (ibid at 84).

33. Lloyd also cited approvingly a persuasive but not binding judgment by Tucker J in the Employment Appeal Tribunal (my emphasis):

"In our opinion the privilege should be strictly confined to legal advisers such as solicitors and counsel, who are professionally qualified, who are members of professional bodies, who are subject to the rules and etiquette of their professions, and who owe a duty to the Court. This is a clearly defined and easily identifiable qualification for the attachment of privilege. To extend the privilege to unqualified advisers such as personnel consultants is in our opinion unnecessary and undesirable." [Tucker J [1993] ICR p203]

34. Before going on to comment further that (my emphasis):

"As presently understood, it seems to me that the rule does stand up to that test in practical terms. If it were to be regarded as extending, without statutory help or definition, to the seeking and giving of advice from and by professionals other than lawyers, subject to some criterion as to the status and qualification of the adviser (a point to which I will refer further below), then it seems to me that the scope of the rule would be lamentably uncertain, and that this in itself might fail to satisfy the human rights test of being "in accordance with law" (at 71).

The first instance judgment on the current case and the underlying law

35. Charles J's judgment at first instance is commended for its clarity, its conclusions and for its overview of the history of LPP in the Court of Appeal judgment⁴. It is therefore safe to rely on its content in considering the matter although some of the Court of Appeal's comments might be seen as being tangential to Charles's judgment.

⁴ Lloyd at 3

36. Charles made a few observations as to the role of regulatory arrangements in determining the basis for the grant of LPP which are critical to our understanding of the issue and to our need to address it as a result – these are repeated below (my emphasis):

“...Rather, it seems to me that when considering legal advice privilege a logical application of the underlying principles and purpose that found both parts of LPP includes a consideration of the position and qualifications of the person giving the legal advice and therefore it is permissible, as a matter of logic and principle, to draw a line by reference to that criteria. Indeed part, and in my view a necessary part, of Prudential’s argument focused on the position and qualifications of accountants in giving legal advice rather than simply on the point that they gave legal advice.” [at 59]

37. He comments further:

“The Revenue raised a point (also touched on in the Wilden Pump case) relating to the definition of an accountant for the purposes of the right claimed by Prudential and a linked point concerning the professional duties and regulation of accountants. I acknowledge that these are problems that would have to be faced if LPP (or its equivalent) was to be applied to legal advice (or indeed other advice) given by accountants, but I have not given them weight in reaching my conclusions. This is because it seems to me that if it does not already exist (and some of the material I was shown indicated that it did) equivalent provisions to those for lawyers relating to professional duties and regulation could be put in place, and an accountant whose clients could claim legal advice privilege or its equivalent could be defined or described.” [At 74]

Why are we interested?

38. This paper is about the impact of case law on the LSB fulfilling its statutory duties to make decisions where those decisions will impact directly or indirectly on access to privileged advice for consumers of legal services.

39. LPP granted by the courts is founded on the common law (**‘common law LPP’**). There are also some contexts in which LPP is granted by statute (**‘statutory LPP’**) – such as s190 of the Act which grants “solicitor like” privilege to any authorised person providing 4 of the 6 reserved legal activities (**‘privileged RLA’**).

40. The courts have consistently held that common law LPP should be restricted to Solicitors and Barristers because of aspects of their codes of conduct and duties to the courts⁵. Unfortunately, the courts have also not identified the distinguishing features of the regulatory arrangements of barristers and solicitors which are sufficient to justify the grant of privilege to these lawyers and which are not present in the arrangements relating to accountants.

⁵ Lloyd at 43

41. The LSB has a mandatory role under Schedule 4 Part 3 of the Act in relation to determining the acceptability of changes to the regulatory arrangements of solicitors and barristers – including those which might impact on the aspects of their regulatory arrangements which are necessary to found common law LPP.

42. The LSB also has a substantial mandatory role in relation to determining what regulatory arrangements are competent to support the provision of statutory LPP to other persons who are regulated (authorised) to provide reserved legal activities but who are not themselves solicitors or barristers. This applies in relation to:

- changes to existing Approved Regulators regulatory arrangements under Schedule 4 Part 3;
- approval of the regulatory arrangements in the course of an application from a prospective or current Approved Regulator under Schedule 4 Part 2 to be authorised to regulate one of the four “privileged” Reserved Legal Activities that are specified by s190 of the Act to attract “solicitor like” privilege to authorised persons providing them;
- approval of the regulatory arrangements in the course of an application from a prospective Licensing Authority for designation under Schedule 10 to be authorised to regulate one of the four “privileged RLA”.
- a further two areas where LSB has an unavoidable duty to consider the common law and statutory LPP are when fulfilling its statutory duties to consider whether:
 - to recommend the reservation of further RLA under s24 (as it will be necessary to determine whether any additional RLA should be added to the S190 list); and
 - to recommend the removal from reservation under s26 of the existing 4 “privileged RLA”.

43. As it is clear that an important facet of reserving at least some activities is the need, in terms of access to justice, for consumers of those services to benefit from LPP when receiving those services regardless of which authorised provider they receive the service from – hence the extension of the common law LPP to those other providers by s190 of the Act.

44. In all of these cases the LSB has a statutory framework within which to operate which specifies permissible assessment criteria. However the framework makes allowance for assessing the impact on access to justice of the application as this is one of the Regulatory Objectives to which we must have regard.

45. These areas are explained in more detail in the table at Annex B to this paper.

46. It is important to remember that we have a duty under the Act (s3(2)) to act in a way which we consider most appropriate for meeting the Regulatory Objectives specified in the Act.

47. We also have better regulation duties (s3(3)) in acting to ensure that what we do is transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed. It is clear that we cannot fulfill our duty in relation to regulatory objectives properly and be in compliance with our better regulation duties if we are making decisions about regulatory arrangements that underpin LPP on an unclear, inconsistent and ambiguous footing.

48. We explained what we think the Regulatory Objectives mean in a paper in July 2010. Annex C analyses how this approach to the Regulatory Objectives is affected by LPP.

Why this matters now

49. It is important to understand that:

- the Institute of Chartered Accountants for England and Wales has publicly announced its intention to apply to us to become an Approved Regulator for Probate probably in 2012; and
- the Institute of Chartered Accountants for Scotland and the Association of Chartered and Certified Accountants are already Approved Regulators for the privileged RLA of Probate.

50. They are both “dormant” at the moment with no Authorised Persons under their supervision providing this activity, but they could at any time decide to become active and submit regulatory arrangements to us for approval in order to allow them to do so; and the presumption is therefore that the Act intends that there must be some formulation of regulatory arrangement rules that would be competent to allow these bodies to provide statutory LPP.

51. Charles J indicated⁶ that he had been shown illustrations of how an accountancy body might become competent to regulate at a standard that would allow LPP to be offered by their Authorised Persons but was bound by higher court precedent and therefore unable to develop the idea further.

52. It is possible that the types of issues that could have an impact could include:

- presence or absence of a requirement for specified training about the purpose, use, and constraints on the use, of LPP;
- presence or absence of sufficient training and guidance about what counts as “legal advice” for the purposes of LPP;

⁶ Charles at 74

- presence or absence of legislative provisions, or comparable effects achieved through regulatory arrangements, to support LPP such as Sections 50-55 of the Solicitors Act 1974⁷;
- presence or absence of specified disciplinary rules and supporting processes and sanctions to enforce against Authorised Persons who are found to have abused LPP; or
- regulatory arrangements to ensure that the Authorised Person owes duties to the Court and to the client in that order in respect of any work performed in their capacity as an Authorised Person even if they owe different duties in different orders in respect of other work that they do under the supervision of the same regulator but not in the capacity of an Authorised Person.

Objectives and Risks

53. The LSB executive believes that it is important that there is a clear, consistent and common base which it can use for its identification and assessment of the regulatory arrangements that underpin both statutory and common law LPP.
54. LSB believes this because it would be inconsistent with access to justice and the rule of law for a consumer of legal services to be faced with different standards of protections underlying the grant of LPP as a result of the consumer consulting different types of regulated legal adviser – you should have the same confidence in the provision of LPP to you as a consumer of legal services regardless of whether the advisor has that privilege as a function of the Court's or of Parliament's decision.
55. The LSB also believes that it is important that this issue is resolved in the longer term by Parliament and that in any intervening period before Parliament legislates, any decisions that need to be made can be made within the parameters set by the Act and having due regard to standards of evidence and analysis that would be required generally to make regulatory recommendations in favour of restricting competition in the provision of services in favour of consumer protection or for some other potentially justifiable reason.
56. This need for consistency, clarity and high standards of evidence in support of restrictions on competition is most particularly pressing given that entity based regulation means that a solicitor and a barrister may both be practicing in future in a firm regulated by the CLC and working on the same matter with the result that three different sets of regulatory arrangements relating to LPP may come into play in the relationship with the consumer if there is inconsistency between the different bodies' regulatory arrangements and between statutory and common law LPP requirements (although the Act provides a mechanism for reconciling this difference in s52, it is clearly desirable that no difference exists when dealing with such an important concept).

⁷ These provisions relate to the power of the Court, with the involvement Of the Law Society, through its regulatory arm the Solicitors Regulation Authority, to order that a solicitor be struck off the roll of solicitors: <http://www.legislation.gov.uk/ukpga/1974/47/section/50>

57. The LSB therefore needs to seek to persuade the court to deliver a clear determination which it can work with – either:

- in the form of clear, consistent and common rules provided by the Court which are capable of being used by the LSB within the statutory decision making framework which the LSB has to use when assessing “LPP competent” regulatory arrangements; or
- in a clear recognition that the LSB can and must set its own view on the regulatory arrangements which are competent to found both statutory and common law LPP on; and
- will also lead to an strong encouragement to Parliament to legislate promptly on the issues involved.

58. For the LSB a helpful and desired outcome is as detailed in paragraph 17 above.

59. The LSB has a pressing need to have common rules (either set by the court or by itself) as there are so many aspects of the LSB’s day to day duties to which this LPP competent regulatory arrangement assessment should be applied. All of these aspects have statutory time limits imposed on them by the Act.

60. In consequence the criteria for assessing LPP competent regulatory arrangements (as opposed to grounds for further extension of entitlement to common law LPP by statute) is not a matter which can sensibly simply be put to Parliament at an indefinite time in the future without some form of competent interim position also being established due to the length of time that would be likely to pass before legislation would be made during which period LSB would still be required by statute to make determinations.

61. LSB needs to be able to fulfill our statutory obligations in this area effectively and without risk of challenge on our decision making.

62. In the absence of such clarity being provided by the court there is a risk to the LSB that the court will determine in a way that is incompatible with our duties such as:

- determining for still unspecified reasons that accountants can never attract privilege of any kind; or
- by identifying mandatory considerations in assessing the regulatory arrangements needed to sustain common law privilege for solicitors and barristers that are inconsistent with the framework that we have to use in assessing regulatory arrangement changes put to us for approval; or
- which put us into an inconsistent position where privilege granted by common law to solicitors and barristers has different criteria associated with it than “solicitor like” privilege granted under s190 of the Act to other parties; or

- by requiring us to participate in enforcing restrictions on competition in the market when the evidence to support this to a standard that would satisfy the Office of Fair Trading (whom we have to consult on certain decisions⁸) is not clearly present.

63. The LSB recognises that we may be criticised for seeking to use this case as a means of expanding our role and/or that the action could be perceived as seeking further to dismantle the concept of title based professional regulation. However the case for intervention is so clear cut in the context of our statutory responsibilities that we believe that, while we should recognise and make allowance for these issues in our communications and stakeholder strategies, we should not allow us to be dissuaded from following this course of action by them.

The intervention process

64. The intervention process is documented in detail in the Supreme Court Rules.

65. The key points are that:

- £800;
- the relevant court form;
- proof of having consulted the other parties; and
- evidence of their views;

need to be submitted no less than six weeks before the hearing date (although earlier is better if the intervention is likely to have a material estimate on the duration of the hearing).

66. As at 9 August, the parties have not yet sought a hearing date and so, in the clerk to the Supreme Court's view given by telephone, it is unlikely that the matter will be heard much before next Easter at best.

67. The clerk also stated that any submissions made after the start of July would not be considered until October at earliest due to court terms.

68. The BSB, The Law Society and ICAEW are all parties to the case and so will receive notification of our intentions as part of the formal process.

69. We are not required to engage with anyone other than the parties to the action before submitting our application to intervene. However, as part of our approach to being open and transparent in line with better regulation principles, we intend to ask for informal comments from all of the current Approved Regulators (both regulatory and representative arms), the two will-writing bodies which are known to be interested in becoming Approved

⁸ For example Schedule 4 Part 2 Paragraph 6 and Schedule 10 Part 1 Paragraph 4 relating to applications to become and Approved Regulator and to become a Licensing Authority respectively

Regulators should will-writing become a reserved legal activity, the Lord Chancellor, The Office of Fair Trading and our own Consumer Panel. In the circumstances, we feel that it would not be appropriate to ask for input from the Master of the Rolls.

70. In consequence, the executive recommends writing to the other parties promptly following the September board meeting. We would write initially to key stakeholders such as the MoJ and OFT. Having received their responses and taken account of them, we would then write to the other parties to the case in line with the Court required processes.

71. We will then take account of the informal comments as well as the formal comments before deciding whether to file the intervention application with the court in November.

72. It is difficult to form a precise view over the likely costs of this action as it will depend on:

- how much material the other parties submit and how novel or challenging it is;
- how accepting the other parties are of our right to intervene and of the material within our intervention;
- procedural steps taken by the other parties;
- the final length of the trial; and
- whether we need to make oral as well as written submissions (as this would require someone to be present throughout the hearing in order to be able to understand what will need to be taken account of in the oral submission).

73. The legal team will seek to keep costs at a minimum by:

- performing as much work within the legal team as the team is technically competent and has capacity to perform (bearing in mind other corporate commitments);
- using junior barrister resource wherever possible for work that needs to be outsourced;
- using senior barrister resource as sparingly and efficiently as possible;
- managing the matter as tightly as practicable; and
- ensuring that all work done by barristers remains on the very favourable Attorney General's panel rates that we secured from our panel barristers and chambers when we ran our legal services tender in 2009.

74. Our present best estimate on external costs to be incurred is:

- £4,000 (including irrecoverable VAT) for obtaining permission to intervene (including the cost of the two conferences with Philip Havers that we have had to date); and
- a maximum of £25,000 (including irrecoverable VAT) extra to cover all subsequent work and attendance at the hearing itself (operating on the assumption that an oral submission may be needed and therefore that attendance at court prior to the oral submission is therefore needed).

END

08.09.11

Letter to the Claimants, the Defendants and the Interveners

[REDACTED – s22, FoIA 2000]

Annex B:
Table detailing those of The Legal Services Board's duties under the Legal Services Act 2007 where considerations of Legal Professional Privilege are a mandatory component of the Legal's Services Board's decision making

<u>Purpose of Section/Schedule</u>	<u>Section of LSA</u>	<u>Other relevant provisions within Section/Schedule</u>	<u>LSB role under section/schedule</u>	<u>Impact of LPP on that duty</u>	<u>Illustration of imminent relevance</u>
LSB has a duty to review and approve all changes to Approved Regulators' Regulatory Arrangements ("RA")	Section 20(5)(c)/ Schedule 4 Part 3 – especially Paragraph 25(3)	Section 21 – which defines what RA are; and Section 1 which defines the "Regulatory Objectives" ("RO"). Section 190 that specifies that authorised persons- defined in Section 18 - ("AP") performing 4 of the 6 Reserved Legal Activities ("RLA") that are specified in Section 12 and Schedule 2 will have "solicitor like" LPP when performing that activity ("Privileged RLA").	To ensure that Regulatory Arrangement changes that are proposed are not contrary to the Regulatory Objectives ("RO")	The courts have held: 1: That LPP is granted to solicitors and barristers because of (unspecified) parts of their regulatory arrangements; and 2: that LPP is a fundamental component of several of the RO – such as rule of law and access to justice. So LSB will have to have regard to whether a proposed RA change will impact on the RA which underpin LPP. If the change will impact on the RA which underpin LPP then the LSB will have to determine whether the proposed changes will harm the RO The problem is that we do not know which RA are involved and in what respects a change to those RA would affect LPP in a way that harms the RO As above – we have to apply the same tests to authorising a whole set of RA, including those that underpin LPP, as we do to approving changes to an existing set of RA	Any SRA or BSB rule change application that might affect the RA underpinning LPP. Any application by ACCA or ICAS for approval of their first RA to allow them to move from being approved but dormant regulators for the Privileged RLA of Probate to becoming active regulators of authorised persons in Probate
LSB has a duty to consider applications from bodies to become Approved Regulators ("AR") for the RLA	Section 20(5)(b)/ Schedule 4 Part 2	Section 12 and Schedule 2 which specify the RLA and Section 190 – see above	The LSA provisions assume that any competent application will be approved regardless of who the applicant is or what else they do. LSB's role is to ensure that		ICAEW are likely to apply to us to become an AR for Probate in early 2012

<p>LSB has a duty to consider applications from existing AR and from new applicants to become Licensing Authorities ("LA") which are competent to licence Alternative Business Structures to perform the RLA</p>	<p>Section 73/ Schedule 10 Part 1</p>	<p>Sections 71 and 72 which define what an ABS is (essentially an entity which provides RLA and which has persons who are not AP as owners and/or managers)</p>	<p>the applicant's application is competent in the senses specified by the LSA and, within that, to ensure that the RA that the applicant is proposing to use to regulate the RLA if it is authorised are competent As above</p>	<p>As above</p>	<p>ICAEW are likely to apply to us to become an LA as well as an AR fro Probate in early 2012</p>
<p>The LSB may, of its own motion or must on request, analyse whether a legal service which is not presently an RLA should become one and then make a recommendation to the Lord Chancellor</p>	<p>Section 24 / Schedule 6 in particular Paragraph 16</p>	<p>Section 190 which specifies that 4 of 6 current RLA are Privileged RLA Section 3 which requires LSB in all of its actions to "...act in a way... which the [LSB] considers most appropriate for the purpose of meeting those [regulatory] objectives"</p>	<p>The LSB will have to consider whether to make a recommendation that a legal service should become a reserved legal service having full account of this proposed course of action on the RO. In addition at Schedule 6 Paragraph 16 the LSB will have to consider, when making a recommendation whether to recommend that a consequential order is made as well to modify legislation to make it</p>	<p>A key factor in deciding whether to recommend reservation will be whether the interests of the legal consumer and the RO are best served by reservation. As LPP is stated by the courts to be a key consumer right and a key underpinning of many of the RO the decision on whether to recommend will need to consider, among other factors, whether the availability of LPP for all users of that service is in the best interests of the RO and consumers. This decision will also need to take account of whether or not to recommend that an activity becomes a "basic" RLA or</p>	<p>As a result of an externally originated enquiry, the LSB concluded in June 2011 that it is necessary to conduct a formal Section 24 investigation into whether Will Writing and Estate Administration should become RLA. Paragraph 11(3) of Schedule 6 requires that the LSB must make a recommendation within 16 months of June 2011. For the reasons indicated to</p>

<p>The LSB, may of its own motion or must on request, analyse whether a legal service which is presently an RLA should cease to be one and then make a recommendation to the Lord Chancellor</p>	<p>Section 26/ Schedule 6 in particular Paragraph 16</p>	<p>Section 190 and Section 3 as above</p>	<p>The LSB will have to consider whether to make a recommendation that a legal service should cease to be a reserved legal service having full account of this proposed course of action on the RO.</p>	<p>consistent with the activity becoming reserved.</p>	<p>that a recommendation for an order to modify Section 190 is also made to make the activity into a Privileged RLA.</p>	<p>the left this investigation will also have to assess, if recommending that the activities should become RLA, whether to recommend that these activities should become "basic" or Privileged RLA</p>
			<p>A key factor in deciding whether to recommend de-reservation will be whether the interests of the legal consumer and the RO are best served by continuing to reserve the performance of that particular RLA to AP.</p> <p>As LPP is stated by the courts to be a key consumer right and a key underpinning of many of the RO the decision on whether to recommend will need to consider, among other factors, whether the continued availability of LPP for all users of that service is in the best interests of the RO and consumers.</p> <p>This decision will need to take account of whether or not to recommend that an activity stays an RLA and also, unavoidably, whether it should be upgraded to being a Privileged RLA or downgraded (if already a Privileged RLA) to being either a "basic" RLA or to not being an RLA at all.</p>			<p>As a result of an externally originated enquiry, the LSB concluded in June 2011 that it is necessary to conduct a formal Section 26 investigation into whether Probate should continue to be an RLA.</p> <p>Paragraph 11(3) of Schedule 6 requires that the LSB must make a decision within 16 months of June 2011 as to whether to recommend that the Privileged RLA of Probate remain a Privileged RLA, become a basic RLA or cease to be an RLA.</p> <p>This decision is being taken in the context of the review on the related activities of Will Writing and Estate Administration and, in consequence, it is highly possible that a recommendation will suggest that all three activities should be treated consistently with regards</p>

					both whether they should be reserved and whether, if they are reserved, they should be privileged.

Annex C

Analysis of the relevance of LPP to the LSB's understanding of the Regulatory Objectives as explained in the LSB's July 2010 Paper

A: Protecting and promoting the public interest

- 1 In our paper we commented that the proper maintenance of and public confidence in legal relationships and process - the rule of law- lead to deserved public confidence in the legal system.
- 2 Clearly LPP is a pivotal element in adviser – consumer relationships in the eyes of the courts and so it is important that the framework through which it is provided is transparently, proportionately and consistently applied.

B: Supporting the Constitutional Principle of the rule of law

- 3 In our paper we recognized that one of the functions of the rule of law is to protect citizens from the state and from their neighbours and also that our role includes a remit to prevent state encroachment into the regulation of individual lawyers and the lawyer/consumer relationship.
- 4 In this context it would be undermining the rule of law if there were to become explicit conflict (or even just unhelpful ambiguity) between the Act's requirements and the requirements created by a future Supreme Court judgment in relation to this key issue both for consumer protection and for LPP's impact as a source of potentially regulatorially entrenched competitive advantage in the legal services market.
- 5 This undermining of the rule of law would be compounded if the issue was remitted to Parliament and then remained opaque for a prolonged period, during which we would have to make decisions under the Act in any event, until Parliament made time to determine upon the issue.

C: Improving Access to Justice

- 6 We state in our paper that "...access to justice is acting out the rule of law in particular or individual circumstances... informing the public about their rights ... acted out in a legal framework of justice. Justice is underpinned by legal knowledge, legislative frameworks, [and] ...securing "just outcomes"". The courts have held consistently that LPP is at the heart of this acting out of the rule of law – but not in all circumstances.
- 7 It seems illogical that the same advice on the same issue for the same consumer provided by two different advisers who carry comparable qualifications but from different regulators could end up being inconsistently treated by the legal framework of justice for unexplained reasons. Yet this is the position that we face without a clear resolution of these issues.
- 8 This does not look like the most appropriate outcome for achieving a clear, transparent, accountable and consistent application of better regulation principles to a core component of this Regulatory Objective.

D: Protecting and Promoting the Interests of Consumers

- 9 In our paper we state that "...our obligation here is tough – it is to protect and promote. That requires strong action from us to ensure that the legal services market offers consumers the opportunity to make informed choices about quality, access and value"
- 10 It is difficult to see how the interests of Consumers and their ability to make informed choices can be helped by a situation where LPP can be used as a differentiator between legal services suppliers in such an ambiguous way as it is at present.
- 11 If Consumers' interests are being protected by LPP – and the court views LPP as a Consumer protection measure - then Consumers need to be clear about when and why they can obtain this protection and that any reduction in access or perceived reduction in value or restriction in choice of advisor that may arise from LPP only being available in certain circumstances and from certain providers is capable of being explained in a clear, transparent, accountable and proportionate way.
- 12 It would not be right for consumers to pay more than they needed to in order to receive LPP when, in fact it is not needed, nor to pay less than they should when actually LPP is needed for their protection and the provider that they have selected cannot provide it.

E: Promoting competition in the provision of services

- 13 In our paper we state that "...providers should be free to respond to commercial pressures confident that regulation will only restrict them where it is consistent with the regulatory objectives and better regulation principles"
- 14 It may be possible to justify restricting access to LPP to only some providers of legal services but, at present, the position appears to create a regulatorially entrenched asymmetry between providers of the same legal advice services which allows some to get a brand and premium advantage for the same work when others cannot without providing a clear and adequate rationale (in the terms that we are allowed by the Act to take account of) for doing so.
- 15 LPP may be a core component of consumer protection but it must also be applied and protected in ways that meet better regulation principles of transparency, accountability, proportionality, consistency and targeting at current need.

F: Encouraging an independent, strong, diverse and effective legal profession

- 16 We say in our paper that "...a client should be confident that his/her lawyer will act without being prejudiced by other factors... their advice should be independent of inappropriate influence"
- 17 The courts have consistently identified LPP as a means of ensuring this independence and therefore effectiveness by giving the client, not the lawyer, the

power to decide whether to allow the contents of the client's dialogues with their lawyer should be disclosed to third parties (including the state).

- 18 Setting clear and coherent parameters to explain which legal services are important enough to merit LPP, and when, is therefore helpful to entrenching that independence and effectiveness of advice when it matters without impeding free choice of provider when it does not. If clear parameters can be set around when lawyers other than solicitors or barristers can offer LPP to their clients then this may help to add to the diversity of supply in the profession.

G: Increasing public understanding of the citizens' legal rights and duties

- 19 In our paper we note that "clarity and transparency about rights and responsibilities can reduce complaints and conflict and increase confidence".

- 19 The courts have held consistently (see quotations above) that LPP is a key component in allowing consumers to have a frank and open dialogue with their lawyer about matters in order to fully understand their rights and duties. It is therefore important to ensure that, in our regulatory decision making, we do not undermine this facility towards public understanding.

- 20 It may also be helpful to understand how and where it might be safe to extend LPP to more legal advisers in more contexts to allow a greater range of advisers (and therefore a greater number of members of the public as consumers of those advisers' services) to have access to LPP. This could lead to fuller and franker discussions between more advisers and more consumers resulting in more consumers having an increased understanding of their rights and duties as a consequence of the advice that they receive.

H: Promoting and maintaining adherence to the professional principles ... independence and integrity...act[ing] in the best interests of their clients

- 21 For the reasons given above, it is clear that LPP is a core component of the professional principles.