

To:	Board
Date of Meeting:	25 January 2012
Item:	Paper (12) 02

Title:	Rationalising the scope of regulation
Workstream(s):	Workstream 3E: Improving access to justice – rationalising the scope of regulation
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Status:	Protect

Summary:
<p>The responses to our discussion paper were largely supportive of our overall approach of individual risk- and cost-benefit based studies on different parts of the market and the need to balance regulatory protections with the burdens that regulations impose on providers and consumers.</p> <p>In principle, we support the Legal Ombudsman's view that rights to <i>redress</i> are appropriate for all consumers, but do not believe that this means we should also support the SRA's view that it is proportionate to extent the existing <i>regulatory</i> framework to all legal advice. Given this we are proposing to start with a review of the appropriate minimum regulatory standards that could be introduced for all general legal advice given to individual consumers.</p> <p>We propose to return to the Board later this year with a proposed plan for this work.</p>

Risks and mitigations	
Financial:	Low
Legal:	Low
Reputational:	High
Resource:	Medium – can be managed within existing resource.

Consultation	Yes	No	Who / why?
Board Members:	X		Steve Green and Barbara Saunders
Consumer Panel:		X	

Recommendation(s):
<p>The Board is invited:</p> <ol style="list-style-type: none"> (1) To comment on our proposed conclusions to be published in April 2012. (2) To agree our proposal to carry out an initial assessment of general legal advice for individual consumers commencing in Autumn 2012.

Freedom of Information Act 2000 (Fol)

Para ref	Fol exemption and summary	Expires
N/A	N/A	N/A

LEGAL SERVICES BOARD

To:	Board		
Date of Meeting:	25 January 2012	Item:	Paper (12) 02

Rationalising the scope of regulation Executive Summary

Recommendations

The Board is invited:

- To comment on our proposed conclusions to be published in April 2012.
- To agree our proposal to carry out an initial assessment of general legal advice for individual consumers commencing in Autumn 2012.

Background

1. We published our Discussion Paper – Enhancing consumer protections, reducing regulation¹ on 28 July 2011, and the consultation closed on 4 November 2011. We have published all 25 responses on the LSB website². A full summary is included at **Annex B**. In the consultation document we outlined our approach to assessing changes to the scope of reservation (see Annex A, paragraph 4). Following the consultation a summary of our revised proposed approach is included at **Annex A**.

Conclusions

2. We are unconvinced by the SRA's assertion that to reduce consumer confusion the existing regulatory protections should be extended to all legal advice. But we do, in principle, accept the Legal Ombudsman's view that there should be consistent access to redress. Given this, we propose to carry out a review of general legal advice for individual consumers to consider whether common minimum standards could be introduced across this category of law.

Analysis

3. Following the consultation, the LSB has three options for taking forward this work:
 - a. Take no further action and intervene only in response to specific problems such as will-writing;
 - b. Seek to tackle problems in market in a segmented approach focusing on risks;
 - c. Regulate everything based on the existing solicitor model currently covered the majority of the legal services market.
4. It is our view, and the view of all respondents to the consultation, that the current reserved activities are no longer delivering the regulatory protections and

¹http://www.legalservicesboard.org.uk/what_we_do/consultations/open/pdf/enhancing_consumer_protection_reducing_restrictions_final_28072011x.pdf

²http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/submissions_received_to_the_consultation_on_enhancing_consumer_protection.htm

certainty that consumers and the public require. Stephen Mayson's paper³ illustrated the lack of a consistent rationale for the existing reserved activities. We believe that the LSB must therefore take a leadership role in ensuring the effectiveness of the regulation of reserved activities going forward. We do not believe that these problems can be tackled through voluntary codes alone as they do not provide the certainty that consumers require and, by definition, will not be implemented in practice by those organisations most likely to behave unprofessionally.

5. We also reject the option to regulate everything based on the existing solicitor model as this makes no differentiation between the rules applying to advice to individuals and that to large businesses. Such an inflexible and untargeted code based approach does not seem appropriate as a starting point for future developments. We simply do not accept the SRA's position that a broad extension would be consistent with better regulation principles or our regulatory objectives. Informal discussion with MoJ officials also suggests that recommendations from the Board to extend the scope of regulation broadly would be received with some scepticism by Ministers given current government policy.
6. The approach we favour is to seek to tackle problems in a risk based approach segmenting the market where common risks are identified. This approach is not without risks or problems. At an implausible extreme, such an approach would result in regulation tailored for each individual transaction based on its risk of harm. Clearly some aggregation is appropriate to make regulation practical and proportionate. In some cases, such as will-writing, activity based segmentation makes sense. In other cases we will look for a higher level aggregation, such as for all general legal advice to individual consumers.
7. We propose to use as a starting point for discussion a definition of "general legal advice" that uses terminology from the definition of legal activity contained in the Legal Services Act 2007:
 - a. The provision of legal advice or assistance in connection with the application of the law or with any form or resolution of legal disputes;
8. To target the work further we propose to exclude from our concept of "general legal advice" all litigation and advocacy activities. Furthermore we would also seek to exclude all advice to the majority of businesses. It may be sensible to include advice to self employed people and some small businesses, given this we will need to consider where we draw the boundary between those businesses covered and those outside of the regulatory protection. This will be considered with reference to the problems that regulation is seeking to address and the regulatory protections likely to be introduced. The existing boundaries for complaints to the Legal Ombudsman may provide a useful model for this work.
9. In drawing a definition in this work we will also need to be careful that we avoid creating rules that prevent the provision of help, for example in filling out benefit forms by creating an unnecessary degree of exclusionary "professionalization" for activities that are currently delivered at relatively low risk by non-lawyers. We will need to draw a careful line in this work and test the definition carefully for unwanted impacts on the market. During the analysis we will analyse further the problems caused by any boundaries resulting from the definition we use.

³http://www.legalservicesinstitute.org.uk/LSI/LSI_Papers/Discussion_Papers/Reserved_Legal_Activities__History_and_Rationale/

10. As set out in the “Enhancing consumer protections, reducing regulation” discussion paper we expect to focus on regulatory solutions favouring entity based regulation as we believe this best matches the consumer experience in purchasing a legal service and enables more effective risk monitoring and intervention by regulators. Similarly we will look for definitions of reserved activities focused on broad services provided to ensure consumers are clear about the protections they can expect.
11. The application of additional regulatory protections above an agreed minimum for all general legal advice would be subject to an assessment of specific risks to the regulatory objectives within an outcomes focused regulation framework. We are not convinced that the existing legal services regulators are currently able to deliver such a tailored regulatory solution. We expect our work on regulatory standards to be able to support a formal judgement about the fitness for purpose of the existing ARs once the basic minimum regulatory protections have been agreed. This may lead to further questions about the future role of the LSB or the need for changes to the architecture of legal services regulation.

Next steps

12. We are planning to develop Annex A further to form a short decision document outlining our conclusions from the consultation for publication in April. In Autumn 2012 we will commence a full review of general advice to individual consumers.
13. We propose to return to the Board outlining our strategy and timetable for a review of general legal advice to individual consumers, following the process outlined in the Discussion Paper, in Autumn 2012. This is a major project, the implications of which will stretch well into 2014-15.

12.01.2012

Paper (12) 02 ANNEX A

Reserved Activities – LSB conclusions

Summary

1. Following the close of our consultation on 5 November we have reviewed all of the responses we received and concluded that we should prioritise a review of general legal advice for individual consumers.
2. The responses we received were clear that the potential problems caused by consumer confusion over regulatory boundaries were significant and should be addressed. Consumers were unsure over the protections offered by regulation and often presumed a greater level of protection than was in fact present. We believe that by considering general legal advice for individual consumers first, we can start to address many of the key areas where consumer confusion currently arises.
3. Our paper outlined our proposed cost-benefit approach to analysing the need to extend reservation. We continue to believe that this is the approach most consistent with better regulation principles and likely to deliver the correct balance between our desire to increased consumer protections and reducing regulatory burdens.

Analysing Regulation

4. In line with the processes set out in Schedule 6 to the Act and taking into account the Government's principles of regulation and guide to reviewing regulation⁴, we set out in our consultation the following approach to reviewing the scope of regulation:
 - a. *Identification of the area of legal services for review:* This may emerge from a request by the Lord Chancellor, the Office of Fair Trading ("the OFT"), the Legal Services Consumer Panel ("the Panel") or the Lord Chief Justice, bodies explicitly given this right by Schedule 6, or any other body. It may also emerge from our own assessment of risk in the market or significant public interest concerns derived from research, analysis and a wide ranging intelligence base. This may include approved regulators, the Office for Legal Complaints ("the OLC"), bodies responsible for different aspects of the administration of justice, practitioners or any other party.
 - b. *Identification of issues:* From a review of the initial evidence base, we will begin to identify the actual problems that are causing concern, the possible causes and the potential detriments. We will begin to define the specific activities which may need regulation. We will begin to identify the areas of the regulatory objectives which may be materially threatened by the absence of explicit regulation. We will consider the sophistication of customers within the area covered to assess the extent to which they need additional protection or have the ability to

⁴ <http://www.bis.gov.uk/policies/better-regulation>

effectively assess their own interests. Consideration will be given to the public interest and whether this is wider in its implications than the consumer interest alone in relation to the specific issue. Competition and access to justice concerns are also likely to be prevalent.

- c. *Compilation and analysis of further evidence:* Where the initial analysis indicates the need to continue the investigation we will build a more complete evidence base and assess the prevalence and impact of any consumer detriment or public interest concern in practice. This may involve undertaking empirical assessment, a call for evidence and wide ranging consultation. The importance of appropriate and targeted consultation is particularly important in the context of difficult to define public interest concerns, about which we will seek views. It is also particularly relevant to reaching vulnerable groups, whose needs may be different to other parts of society.
- d. *Analysing existing mechanisms and non-statutory interventions:* We will assess the extent to which the existing broader legal framework (e.g. consumer law) and infrastructure (e.g. small claims machinery) does or could address the apparent detriment. We will be wary of introducing sector specific regulation if this simply duplicates existing protections. Analysis of the effectiveness or potential effectiveness of non-statutory safeguards such as voluntary schemes operated by trade bodies and increased consumer education will also be considered where relevant.
- e. *Option appraisal:* In the absence of effective alternatives to statutory regulation, we will consider what forms of regulatory arrangements might be triggered if the activity was reserved to address the issue in the most proportionate way. Cost-benefit analysis techniques and considerations of practicability will underpin this assessment.
- f. *Identifying impacts:* We will identify and assess the impact of proposals to introduce changes to what is regulated and how it is regulated on the broader regulatory framework (e.g. concerning professional privilege and the responsibilities of existing approved regulators) in the legal services sector and beyond. We will consider likely impacts on the courts and the wider administration of justice. We will seek the views of practitioners. We will need to be alive to any unintended consequences for the overall quality of services provided to the consumer, the simplicity of the regulatory environment to aid consumer understanding, the culture and norms of the professions as well as confidence in regulated services for consumers (including for “UK plc” as a whole).
- g. *Recommend reservation:* We will publish and invite comment on a provisional report setting out where we are minded to make a recommendation to the Lord Chancellor that the list of reserved activities is extended (or reduced) under the Act if this is the most proportionate response. We will also set out our high level analysis of what regulatory arrangements should flow from that decision.

Dependent on any changes in our analysis as a result of feedback received, we will then make the appropriate recommendation.

- h. *Optimum standards*: Where reservation is recommended we will consider issuing guidance under Section 162 of the Act on the high level regulatory arrangements that are most likely to proportionally address the problems and protect against the detriments that have been identified.
- i. *Application from potential approved regulators*: Where there is reservation, we will receive applications from bodies wishing to be designated to regulate the new reserved activity. This will include applications from existing approved regulators whose members currently provide the legal activity that is being reserved. In assessing such applications, we will take account both of our general guidance on the issue and any specific S162 guidance which we have issued.

5. We are not proposing to change this overall approach.

Responses to the Discussion Paper

- 6. There was a broad consensus in responses to our discussion paper that the current boundaries of regulated activities were no longer fit for purpose. The existing reserved activities were not designed with any reference to the consumer or public interest. Although some elements of the framework can be justified on this basis, the current application of reserved activities is highly detailed and thus misses many of the activities in the associated legal service that might be considered equally worthy of regulatory protection.
- 7. Many of those responding were also concerned that consumers were adversely impacted by problems occurring with legal services that sit outside altogether of the reserved activities when undertaken by unregulated providers. This concern has been expressed particularly by the Legal Ombudsman given their emerging experience of complaints about services which have proved ineligible for its consideration. (We will shortly issue a formal request under Section 120 of the Act to LeO to seek more detailed evidence.)
- 8. Respondents also agreed that there was a case to assess whether the existing scope of reservation and regulations attached were adequately protecting the public interest. Increasing numbers of consumers are choosing to buy legal services from outside of the current legal professions or from individuals without specific legal qualifications within legal firms. These consumer and market trends have put increasing strain on the ability of the current regulatory framework to deliver adequate regulatory protections.
- 9. Despite our concerns respondents were keen to stress the many strengths of the existing professions and the high esteem in which they are held by their many millions of clients. We must ensure that changes to regulation do not undermine the many strengths of the profession.

10. All respondents agreed that the challenges in the will-writing, probate and estate administration market were such that it remained a priority to tackle this market separately.

Our approach

11. The market is undergoing a period of significant change both in consumers and their purchasing decisions and the way in which providers choose to supply legal services. As a consequence, there was a consensus in responses that the time is right to reduce consumer confusion over the regulation of legal services.
12. In our discussion paper we outlined two possible approaches that we could take to addressing the problems identified – activity based thematic analysis or a single one-off review of the regulation of all legal services. We favoured an activity based approach. Respondents noted attractions in each of these approaches though all agreed that will-writing needed a specific quick solution. We believe that this is consistent with an approach looking at the need for a general minimum regulatory standard above which higher standards are developed for specific activities.
13. We are unconvinced by the SRA's assertion that to reduce consumer confusion the existing regulatory regime should be extended to all legal advice. We believe that the potentially dulling effects on innovation and harmful effects on access to justice of potential price increases caused by the exclusionary effects of new regulation in low risk areas are likely to outweigh the benefits of consistency per se. We also do not believe that such "blanket" new regulation is consistent with the LSB and ARs' responsibilities to pursue better regulation principles, set out in Section 3 of the Act. But we do, in principle, accept the Legal Ombudsman's view that there should be consistent access to redress.
14. We have rejected a whole of market one-off general analysis of regulatory protections for three reasons:
 - a. It is too top down as it starts with an assumption that everything should be regulated in the same way as now.
 - b. It fails to answer how anything should be regulated, in order to meet Better Regulation Principles regulation must be tailored and so inevitably there must be some sector by sector or activity by activity approach even in the one-off scenario.
 - c. It is inflexible to changing circumstances in future: as risks change, so regulation must change.
15. We can understand why many have found it attractive to move quickly in identifying risks and developing regulatory solutions. But we believe that a single solution to regulation risks imposing unnecessary costs on consumers and the public. This, we believe, would undermine our priority to meet our Regulatory Objectives set out in the Legal Services Act 2007.

16. Instead we favour an analysis of the market for general legal advice for individual consumers to see whether similarities in risks can be identified that would allow reservation and an attached minimum level of basic regulation. Analysis by regulators of specific risks through their risk frameworks would then allow a more tailored approach to regulation above this basic minimum. In seeking to address general legal advice for individuals we have rejected our other proposals to look at conveyancing and immigration (see paragraph 35).

Ensuring a fit with regulatory developments

17. We do not believe that the Act or standard regulatory policy would expect or desire us to copy across existing rules (and the accompanying regulatory burdens) to all advice then later assess where such rules could be restricted. Such an approach would first significantly increase regulatory burdens then only later assess areas where such regulatory burdens could be reduced. The Act provides the LSB with power to recommend that the Lord Chancellor makes an order to reserve a legal activity or that an activity should cease to be a reserved activity. The Lord Chancellor can accept a recommendation from the LSB for ceasing to reserve an activity, but there is no current process in the Legal Services Act 2007 for removing reservation, as there is for introducing a reservation. This provides a strong argument for a measured approach to seeking to reserve new areas.

18. It is our view that a general extension of reserved activities would only be possible in a market where activity and outcomes focused regulation was strongly embedded in practice. Decker and Yarrow made clear in their paper for the LSB, on the regulation of legal services, that there are significant differences in the risks posed by different areas of legal activities. Regulation must tailor its approach in dealing with these risks to avoid undermining public interest and access to justice. At present regulators are in the early stages of developing tailored risk based approaches to regulation.

19. In the absence of a strong tradition of risk based regulation we believe that it would be inappropriate at this stage to significantly extend a blanket regulatory protection across all legal services. We will of course be monitoring regulatory developments and adjusting our approach based on evidence of changes in regulatory practice from frontline regulators.

Minimising consumer confusion

20. Respondents to the Discussion Paper rightly highlighted the presence of multiple regulators as an additional source of potential consumer confusion. While multiple regulators are a direct consequence of the Act we accept that it is not in the interests of effective or efficient regulation to continually increase the number of frontline regulators. But, we maintain that what needs to be resolved is consumers' confusion about their rights (whether to complain to the Ombudsman or be served by someone who is supervised by a regulator), rather than uncertainty about the titles attached to the individuals providing their service or their regulators.

21. The regulatory structure is at present a consequence of the historical nature of regulation in legal services i.e. title based. The move to outcomes focused regulation with its analysis of the activities undertaken will start to address this. But we must ensure that where consumers are purchasing a particular service they are clear about the protections that they can expect. This will require a further move to activity and indeed entity based regulation.
22. To avoid exacerbating consumer confusion over regulatory protections we will of course seek to minimise the circumstances where additional regulators are required. The hurdle for new regulations remains high: and for new regulators, even higher.
23. While it is our belief that consumer confusion will be minimised by ensuring that regulation is activity based, we recognise that the Better Regulation Principles require that regulation is targeted to need. Inevitably this leaves some regulatory boundaries. Indeed, even if we extended the reserved activities to a much broader definition of legal advice, regulatory boundaries would remain.
24. The principle behind all changes to regulation must be that the costs imposed by the regulation are outweighed by the benefits. Therefore an approach to consider reserving general legal advice for individual consumers will inevitably be followed by the need for activity based assessments to ensure that where clearly defined risks exist, the regulations attached are proportionate. Whether this analysis is sector by sector, activity by activity or a mixture of both is simply a matter of approach, though any approach must be pursued with a desire to reduce uncertainty for consumers.

Ensuring our approach is flexible

25. Responses to the Discussion Paper have confirmed our initial view that existing protections were no longer appropriate given changes in the delivery of legal services. Technology and practice are moving the market away from the traditional structures of supply supported by the existing reserved activities. This remains a core driver of the need to reassess the reserved activities.
26. But, we should not expect that these changes have or, we suspect, will ever reach a steady state. Regulation must be responsive to changes in the market and the risks posed to the public and consumer interest. Regulators must continually assess how their regulations work in practice and where changes are required.
27. In the absence of a steady state world, it makes no more sense to seek a one-off solution to regulatory problems than carry out ongoing assessments of individual areas or activities. Regulation will need to continually evolve over time, while balancing the needs for consumer certainty and removing unnecessary regulatory burdens.

Fit with Regulatory Objectives

28. We believe an analysis of the scope of regulation fits squarely with our Regulatory Objectives of protecting and promoting the public and consumer interests. Our work and the responses to our consultation have highlighted the concerns that the current regulatory framework fails to provide consumers with the regulatory protections they believe that they have. The absence of regulatory protections can, as demonstrated in our work on will-writing, lead to significant consumer detriment and in turn damage our other regulatory objectives such as understanding legal rights and duties.
29. Our proposed approach to addressing this incorporates detailed analysis of the risks both from leaving areas outside of regulation and through the potential for introducing overly burdensome regulatory requirements. In this, we note in particular of the need to meet our objective to promote competition in the provision of services. Any recommendations would seek to find an approach taking account of each of the regulatory objectives.

Starting with General Legal Advice

30. While we are not persuaded that a single market-wide assessment of appropriate levels of regulatory protection is sensible, we do believe that a strong case has been made for undertaking an assessment to see whether features of the market for general legal advice for individual consumers (given the diversity of legal advice and consumers) have enough similarities to allow reservation with a common minimum standard of regulation. This will allow us to take a relatively high-level assessment of a wide area of legal advice, tackling some of the challenges inevitable with a more segmented approach.
31. Our approach is aimed at assessing the minimum levels of protection required, for example access to the Ombudsman. This will allow ARs to carry out further activity based assessments to place regulatory standards above this minimum for particular market segments or customer types where particular risks are identified.
32. We recognise that a substantial element of the work will be in considering whether we can produce a sensible workable definition, but propose to use as a starting point the terminology used in the definition of legal activity contained in Part 3 of the Legal Services Act 2007:
 - a. The provision of legal advice or assistance in connection with the application of the law or with any form or resolution of legal disputes;
33. We propose to exclude all litigation and advocacy activities from our definition of “general legal advice”. Furthermore we would also seek to exclude all advice to the majority of businesses. It may be sensible to include advice to self employed people and some small businesses, given this we will need to consider where we draw the boundary between those businesses covered and those outside of the regulatory protection. This will be considered with reference to the problems that regulation is seeking to address and the

regulatory protections likely to be introduced. It is possible that the current Legal Ombudsman rules will provide an effective model for this distinction.

34. We continue to believe, as we set out in our discussion paper, that the only practical approach to assessing the need for regulation above the basic minimum will be to prioritise areas for analysis. It is our expectation that developments in the operation of risk based analysis within the ARs will allow such analysis to take place within the ARs. If at such a time as this work is completed and we are not convinced that the ARs are capable of such analysis then this may lead to questions of a need to change the overall architecture of legal services regulation.
35. Initial work that the LSB has carried out on immigration and conveyancing has confirmed that the priority in these areas is to improve regulatory performance within the current framework, rather than to undertake more theoretical work on regulatory scope. We will be proposing that the regulators of immigration services improve their data capture to inform themselves better about the activities of their regulated community. We believe that this will identify whether any risks are sufficient to require a full review at a later date.
36. We are not proposing to carry out any further work on the scope of protection within the conveyancing market at this stage. Instead we will focus our work in this area on improving the working of existing regulations and the use of outcome focused regulation by the existing approved regulators.

Individual versus entity regulation

37. We have seen no evidence to suggest that consumers are able to make distinctions between the regulatory status of individuals within a business. Indeed, as noted by many respondents to our discussion paper, consumers are unable to distinguish between the regulation of different types of businesses. For this reason we continue to believe that regulation at entity level is best suited to minimise consumer confusion about regulatory protections.
38. Entities would have to take responsibility for ensuring all of the work they undertake for clients is compliant with the regulations. This would include any work that they outsource to third party companies. We expect that any changes to reservation are likely to favour a further shift to regulation at entity level.

Boundaries in regulation will remain

39. Despite our best efforts it is inconceivable that we will be able to remove all of the boundaries of regulation that may confuse consumers. Inevitably, in line with the principles of better regulation, some areas of legal services will rightly be regulated more lightly than others, reflecting the risks these activities pose to public and consumer interest. Even if we applied a single level of regulation across the widest definition of legal activities, some services may be perceived as legal by consumers but not captured by our definition.

Instead we propose to seek to minimise uncertainty and wherever possible and provide a route to complain where consumers are unsatisfied.

40. A further area of confusion may exist where providers of legal services e.g. tax advice are regulated by non-legal service regulators, for example accountancy bodies. Where necessary we explore the options available to exempt organisations from specific legal services regulation under Schedule 3 of the Act, to ensure we avoid doubling up regulation imposed. The test must be whether their equivalent regulatory arrangements outside of legal services are sufficiently robust.

Defining activities

41. The existing reserved activities are defined tightly and focused on specific easily definable legal activities e.g. filling in the probate form. This has the advantage of simplicity but leaves much of the real regulatory risk technically outside of regulation. Historically regulation has remained in place through the title based regulation used by the professional regulators. Changes in the market, whether through outsourcing by traditional law firms or the development of new types of firms specialising in non-reserved activities has challenged this traditional model of reservation.
42. In future we may need to consider whether activities can be designed around the broader services provided, to ensure that all relevant elements of the legal service are within the scope of regulation. A good example of this is in the definition of services covered by legal professional privilege⁵. The desire to ensure a broad definition of the legal service must of course be balanced against the need to ensure the definition is robust and legally clear. We expect to carry out further work considering this point over the coming year, but believe such an approach is more consistent with outcomes and allowing ARs to use their judgement in regulation.

Next steps

43. We are planning to develop this Annex further to form a short paper outlining our conclusions from the consultation in April. In Autumn 2012 we will return to the Board with a full plan for commencing a review of general legal advice for individual consumers. This is a major task, the ramifications of which will run up to the next General Election and potentially beyond, but we are building our resource plans on the basis of doing some significant initial ground-clearing in 2012-13.

⁵ For example Part 8, Section 190, Subsection 6 defines litigation services as “any services which is would be reasonable to expect a person who is exercising, or contemplating exercising, a right to conduct litigation in relation to any proceedings, or contemplated proceedings, to provide;”

Summary of responses to consultation

Q1 *What are your views on the three themes that we have put at the core of our vision for the legal services market? If different, what themes do you believe should be at the core of our vision?*

Respondents generally agreed that the three themes put forward were appropriate. The Law Society regarded that the principles of better regulation should be centre stage to the LSB's vision of regulation. They also pointed out that lack of consistency around the scope and enforcement of the regulation of legal services cause confusion for consumers and questioned the LSB's mandate to put consumers at the heart of the regulatory system. The Office of Fair Trading (OFT) supported the three themes and the LSB's approach to assessing the boundaries of legal services regulation.

The Bar Council, while agreeing that the three themes identified all made sense individually, suggested that consumer protection and redress should not be the sole focus of regulatory action. Instead they suggested that all of the regulatory objectives must be properly assessed and balanced and in some cases this may mean that the interests of individual consumers must be of lower priority than the regulatory objective of supporting the rule of law. The CLC similarly are concerned that the LSB has identified one regulatory objective (consumer protection) and prioritised it over others. In the CLC's view, identifying a particularly regulatory objective as a separate themes creates the risk that it will assume a priority which was not intended by Parliament.

Q2 *What is your opinion of our view that the purpose of regulation is to ensure appropriate protections and redress are in place and above this there are real competitive and cultural pressures for legal services to deliver the highest possible standards with a range of options for consumers at different prices? If different, what do you consider the role of regulation should be?*

The respondents agreed that regulation can serve the important function of protecting the independence of those regulated. Respondents commented that the LSB's approach to consumer protection and redress should be appropriate to the particular market with simple and accessible regulation helping deliver consumer focused services that are not burdensome in terms of cost. Some respondents, such as the Bar Council, took the view that the approach adopted is too narrowly focused on economic models rather than delivering regulation which is focused more on public interest issues such as access to justice. The Legal Services Institute, in their submission, agreed that there were cultural pressures to deliver high standards, but suggested that those forces can equally apply in the opposite direction and may in fact work against the interest of consumers. The SRA, however, disagree with this

view and suggested that the purpose of regulation is to ensure that market failure, primarily arising from asymmetry of information, is corrected so as to ensure that the public interest is served. In their view, the role that competition and cultural pressures can play is misstated in the question, in that issues which competition will not solve such as obligations to the court can only be secured through regulation.

Q3 *In light of the changing market do you think that specific action may be needed to ensure that more legal services activity can unequivocally be included within the realm of the Legal Ombudsman and, if so, how can this best be achieved?*

Respondents noted that the current regulatory arrangements within the legal services market are confusing to lay people and the key weakness is that many consumers are unaware of the inconsistencies in approach to regulatory coverage. The Law Society believes that difficulties arise where activities come within the remit of LeO without them becoming reserved and that potential risk remains for unregulated providers to voluntarily sign up to the Ombudsman, only to ignore its adjudication at a later date. Other respondents pointed out that a single complaints service would go a considerable way to achieve greater coverage of the Ombudsman's remit. And that the LSB should also consider bringing services such as telephone help lines and generalist advice within the remit of the Ombudsman.

Q4 *What are your views of our diagnosis of the weakness of the existing system and the problems within it?*

Respondents pointed out that one of the other weaknesses are the apparent gaps in understanding the market for legal services. The Law Society believes that the paper places too much emphasis on a view that unregulated providers are the only driving force behind the changes in the market and that there does exist sufficient competition in the market among solicitors.

ICAEW highlights the weakness associated with possible unintended consequences if the impact on Tier 2 activity (such as accountants) is not taken fully into account as an essential and required part of setting regulatory 'boundaries'. The CLC were critical that some of the arguments presented to support the diagnosis of the weaknesses appear to exaggerate the problems at large, and that some of the options presented by the LSB were hypothetical only. Other respondents were content with the LSB's diagnosis of the weaknesses of the existing system.

Q5 *What do you see as the benefits and downsides of regulating through protected titles such as solicitor and barrister?*

Most responses regarded protected title as having a benefit to consumers that include setting entry requirements as well as providing a recognisable brand.

According to the ICAEW, the use of protected title is a key regulatory mechanism and an element of professionalism. The Legal Services Institute pointed out that whilst there are 'consequential' benefits for consumers by way of regulation of all activities including complaints procedures, access to the Legal Ombudsman, indemnity and compensation arrangements, there is a risk that 'blanket' authorisation confers legitimacy to qualified providers to provide all services despite not being sufficiently experienced to do so.

Q6 *What are your views on whether there should be a consistent approach to the allocation of title to authorised persons? What are your views on whether the title should be linked directly to the activities that a person is authorised to undertake or linked to the principal approved regulator that authorises them?*

Respondents displayed a diversity of views on this question. The ICAEW took the view that further analysis is required as it broaches a wider debate as to what constitutes a 'profession' as a collective technical body. According to the Law Society, the use of titles is governed by statutory provision and so the scope for LSB initiatives is limited. They also were not clear what linking titles to activities might mean in practice.

The submission by the Legal Services Institute questioned the need for protection of title to be confined to barristers and solicitors. They argued that all of the authorised persons' titles should receive equivalent and consistent treatment and questioned that the entitlement to the use of a title should necessarily and inevitably carry with it the authorisation to perform a reserved activity.

Q7 *What are your views on our proposal that areas should be examined 'case-by-case', using will-writing as a live case study, rather than through a general recasting of the boundaries of regulation? If you disagree, what form should a more general approach take?*

Respondents were generally in favour of the LSB's case-by-case methodology as the most practical way to proceed. But that the LSB should note that such an approach should not be allowed to result in additional inconsistencies or conflicts. The Bar Council expressed reservation about the benefit of regulation in will writing as a live case study as promoting public confidence in the legal system.

The SRA, however, disagreed with the approach as in their view it would not address the current problems and runs a risk of compounding them. Rather, the SRA suggests that the time is right now for a broader examination (rather than a case-by-case approach) and a different approach should be adopted.

Q8 *What are your views on the proposed stages for assessing if regulation is needed and, if it is, what regulatory interventions are required?*

Respondents suggested that where regulation is based on consumer protection the LSB should compile the evidence of harm by involving stakeholders and undertaking empirical research. Some respondents agreed to the LSB's proposal of assessing the impact on the broader regulatory framework. For the OISC, forthcoming priorities include preventing unregulated, illegal activity in the provision of immigration advice.

Q9 *What are your views on the implications of our approach for professional privilege?*

Respondents raised the issue concerning how professional privilege can function adequately in a modern multi-disciplinary practice, with simplicity and clarity for clients. The Law Society regards it crucial that if professional privilege applied to advice given by other types of lawyer that they must be subject to the same level training and regulation, in respect of the advice that they give, as are solicitors.

Q10 *Do you believe that any of the current reserved legal activities are in need of review? If so, which activities do you think should be reviewed and why?*

Several respondents took the view that the current reservation relating to the grant of probate needs to be reconsidered and possibly widened. The ICAEW took the view that probate (in the narrow sense of completing an application for a grant of probate) need not be reserved and is suitable for review. The OFT considered whether the legal services market has the right pattern of reserved or unreserved services. The OFT agrees that a threshold to be met for extending regulation should be a high one and supported by evidence. The OFT recommends any future work in this area include an impact assessment where impacts are shown to affect consumer welfare, and where title or privilege adversely affects competition then evidence is required to show that their presence is justified by public interest considerations.

Q11 *What are your views of our analysis of the regulatory menu, and how it can be used?*

The ICAEW took the view that the regulatory menu was a good place to start but that the LSB should open dialogue with Tier 2 participants and not just approved, and potential approved, regulators. The OFT, for their part, considered that regulatory obligations should be kept to a minimum when looking at the regulatory menu. And that the current regulatory framework is not flexible in its approach to the increased liberalisation that ABS brings to the market. This could especially be the case when there are several layers of regulation or several regulators involved. The Law Society suggested that

certain activities such as advocacy require targeted regulation and that the LSB should consider regulatory arrangements on the basis of their suitability to achieve the proper regulation of authorised persons.

Q12 Do you have any comments on our thoughts on other areas that might be reviewed in the period 2012-15, including proposed additions or deletions, and suggestions on relative priority?

The Law Society viewed it not practical to regulate general legal advice and instead considered that specific areas should be investigated on a case-by-case basis. The Bar council regarded harmonisation of rule book and commissioning research to look at how the LSB could promote the regulatory objectives in the LSA as priority areas for the future period.

The Legal Services Institute expressed concern with the LSB's suggestion of reviewing general legal advice over the timescale 2012-15. They suggest that general legal advice could be too imprecise an area to regulate and they struggled to see where a clear line could be drawn and that the LSB runs the risk of casting the regulatory net too wide, with the risk of being unnecessarily restrictive of competition.

Q13 Do you have any comments on the approach that we have adopted for reviewing the regulation of will-writing, probate and estate administration?

The Law Society questioned the LSB's approach as being too narrowly focused on consumer protection and that the public interest is greater. The Law Society also believes that in order to be effective there is a need to widen the reservation beyond the scope of will writing. They include: preparing a will or other testamentary instrument; preparation or lodging of a power of attorney; administration of an estate following a grant of probate or letters of administration.