

To:	Legal Services Board	
Date of Meeting:	10 October 2012	Item: Paper (12) 67
Title:	Reviewing regulation of general legal advice for individual consumers – approach to scoping exercise and timetable	
Workstream(s):		
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Status:	Protect	

Summary: The Board asked the Executive to plan an initial assessment of regulating general legal advice for individual consumers commencing in Autumn 2012. This paper sets out a suggested approach to reviewing general legal advice and seeks the Board's agreement on the broad approach and indicative timetable.

Recommendation(s):

The Board is invited to agree to:

- the proposed approach
- the proposed timetable

Risks and mitigations

Financial:

Legal: Potentially some legal reputational issues going forward, especially at the discussion document stage and beyond e.g. whether we have the legal powers to complete Stage 4.

Reputational:

Resource: N/A . Work to advance the project between now and March 2013 can be absorbed within current resource. Project work post-March 2013 will need to be reviewed in the next business planning cycle.

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

Freedom of Information Act 2000 (Fol)		
Para ref	Fol exemption and summary	Expires
Paragraph 13, second bullet point	s.36 exemption to allow free and frank discussion of an area of exploratory work.	

LEGAL SERVICES BOARD

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Reviewing regulation of general legal advice for individual consumers – approach to scoping exercise and timetable

Context

1. The LSB's paper *Enhancing consumer protection, reducing regulatory restrictions*¹ set out our view that the current pattern of reserved and unreserved work is no longer fit for purpose. Consultation showed consensus with this view and with the proposal that the Board must take a leadership role in reviewing the appropriateness of the reach and nature of legal services regulation.
2. Following the conclusion of the consultation the Board determined that the activity-by-activity approach to regulation originally proposed by the LSB may prove unmanageable in resourcing terms for the Board and, more substantively, could result in unworkable levels of detail and prescription for each activity. Such a solution may further complicate the regulatory landscape and create greater consumer confusion.
3. In the light of this, the Board agreed with our proposal to carry out a more wide ranging review of general legal advice given to individual consumers to identify whether it was practicable to consider a more generic approach to questions of reservation. By general advice we mean legal advice falling outside of the narrow definitions of the reserved activities.
4. This proposed review aims to identify what the current risks are to the Regulatory Objectives from the provision of general legal advice and determine whether such risks are material enough to warrant further consideration by the LSB. This does not presume a regulatory solution is necessary or desirable. Analysis will be guided by the principle of looking for the minimum level of common protections, whether regulatory or other, that are required to mitigate any common risks identified.
5. The Act provides a definition of legal activities beyond those reserved (at s.12(3)(b)):

¹ Legal Services Board *Enhancing consumer protection, reducing regulatory restrictions*, November 2011.

“Any other activity which consists of one or both of the following –

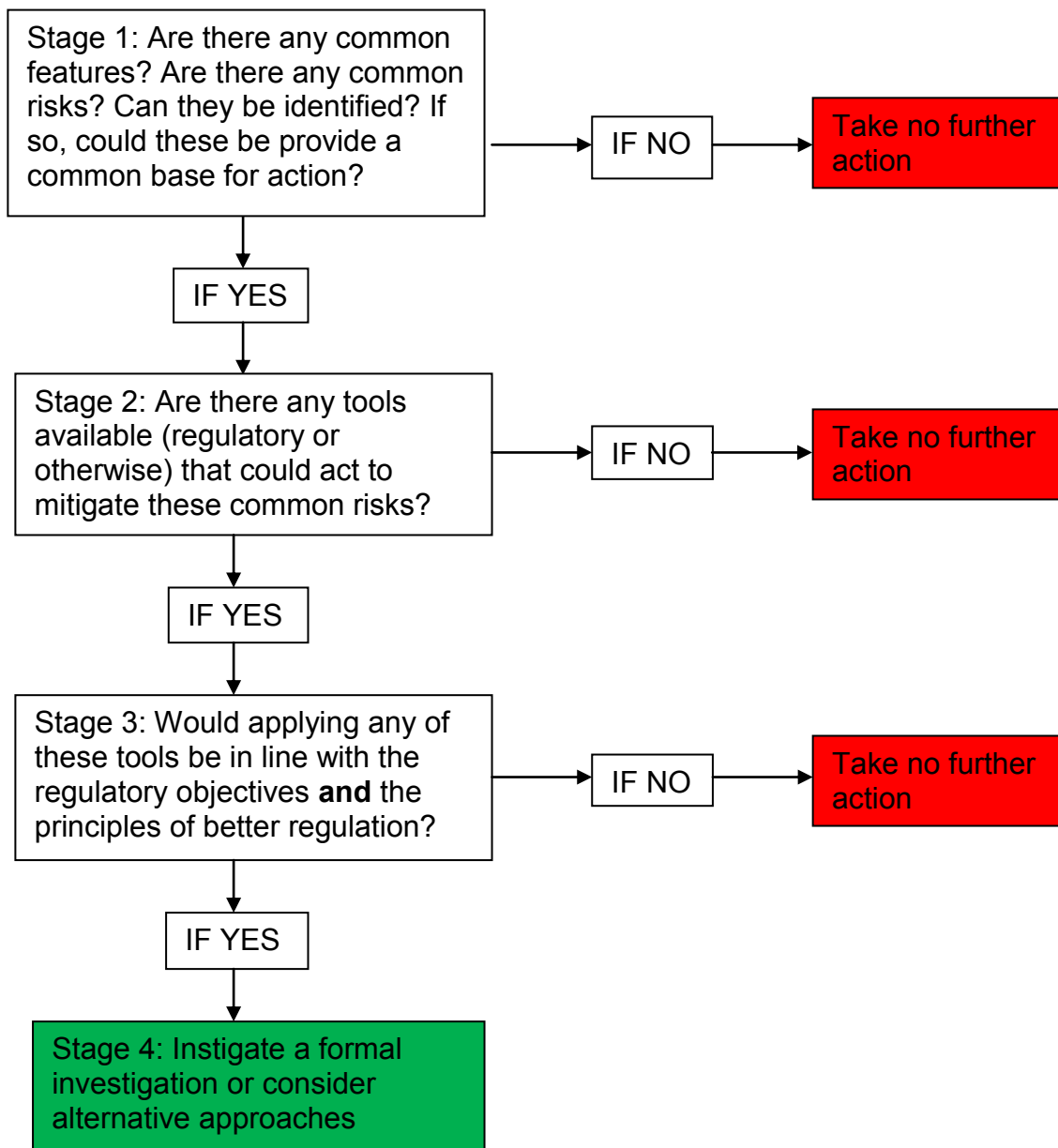
- **The provision of legal advice or assistance in connection with the application of the law or with any form of resolution of legal disputes;**
- **The provision of representation in connection with any matter concerning the application of the law or any form of form of resolution of legal disputes”**

This can be used as a baseline for looking across a potentially wide range of areas of law in the market.

6. We envisage that our review would encompass different consumer problems, such as those involving housing, family, debt and small claims issues. The review would also consider different types of legal service activities such as advocacy, though we note that within advocacy rights of audience is already a regulated activity. Only if common risks are found across this wide range of consumer problems and legal activities will we continue to the next stage and assess further the suitability of interventions, whether regulatory or other, to address these risks.

Process for determining whether general legal advice should be regulated

6. Our proposed process for determining whether general legal advice could and should be regulated can be split into four stages, as illustrated in the diagram below. This approach is guided by the principles set out in our November consultation *Enhancing consumer protection, reducing regulatory restrictions*.



7. **Stage 1:** The initial step should be to attempt to test whether our definition of general legal advice fits with common risks and features of legal advice in practice. Our starting point will include:

- Definitions of both legal activities and reserved legal activities within the Act;
- A literature review;
- The Civil and Social Justice Survey;

- BDRC's Legal Services Benchmarking report²;
 - Definitions of consumers from the Act and the Oxera report³; and
 - Discounting what already constitutes a reserved legal activity or a legal activity that is regulated through a bespoke regulatory scheme e.g. immigration advice.
8. To further inform this stage we intend to survey both providers and consumers of general legal advice. We will start by exploring the sources of advice highlighted by the BDRC report in several areas of law⁴. These may include (among others) authorised persons, charities, local and national government, the police and non-legal professionals. For example, solicitors, Citizens Advice Bureaus, local authorities, and advice services in other sectors such as the finance and accounting industries all constitute possible sources that we may look at. We will also be speaking to those consultation respondents that suggested a review of this area, to determine how they would define general legal advice and, within that, the areas they would identify as carrying greatest risk. The views and data collected will be examined to identify any features or risks that appear throughout the responses. However, we are not presuming that any such risks will be found. If no commonality of risk is established upon which a characterisation of general legal advice can be built, our work will go no further⁵.
9. **Stage 2:** If one or more common risks are found among the responses the next stage would be to consider whether any tools, either regulatory or non-regulatory, are available that would act to mitigate the risks identified in a proportionate way. These tools could be used alone or in combination, depending upon the risks found. This could include, for example, some form of basic registration, which could be developed into a more explicit fit and proper person test if the risk justified it. Redress arrangements, whether via formal access to the OLC or development of an OLC voluntary jurisdiction would also be relevant. Alternatively enhanced voluntary schemes could be encouraged providing greater coverage of professional indemnity insurance.
10. **Stage 3:** If both common risks and effective tools are identified, stage 3 will be to assess the potential application of those tools against the regulatory objectives and the principles of better regulation. For example, we would not

² BDRC Continental, *Legal Services Benchmarking Report* (June 2012) available at: http://www.legalservicesboard.org.uk/what_we_do/Research/Publications/pdf/individual_consumers_use_of_legal_services_lsb_report_17_07_12_ii.pdf

³ Oxera *A Framework to Monitor the Legal Services Sector* (September 2011), available at: http://www.legalservicesboard.org.uk/news_publications/latest_news/pdf/a_framework_to_monitor_the_legal_services_sector.pdf

⁴ http://www.legalservicesboard.org.uk/what_we_do/Research/Publications/pdf/individual_consumers_use_of_legal_services_lsb_report_17_07_12_ii.pdf

⁵ We note that schedule 6(4)(2) to the Act only allows legal activities to be subject to a section 24 investigation. A clear idea of what constitutes general legal advice is therefore necessary before moving on to the next stage in this process.

take any action that would unnecessarily restrict competition, or would not be proportionate to the detriment being tackled. This stage will help mitigate the risk of the LSB being accused of jumping to over-regulation (see below at paragraph 18).

11. **Stage 4:** If there is a positive outcome to each of the previous three stages in this process, namely that common risks are identified, tools are found that would mitigate those risks, and the use of those tools would be in line with both the regulatory objectives and the principles of better regulation, we would consider the appropriateness of a formal investigation under section 24 of the Act, or consider alternative approaches.

Methodology

12. We intend to publish our thinking on stages 1 and 2 in a discussion document in spring 2013 (see timetable below). This is designed to initiate discussion around the scope of general legal advice and any common risks identified.

13. The timing reflects

- likely resource availability in the light of other priorities, notably the final formal decision on will-writing;
- [REDACTED];
- the complexity of the initial mapping work.

14. We anticipate that the paper will include,:

- Identification of segments for review based on the Oxera and BDRG categories of market segmentation;
- Assessment of the various elements of general legal advice that currently fall within legal services regulation and those that do not;
- Assessment of the elements of general legal advice covered by other protections, regulatory or other, both in the legal services sector and beyond it, and the gaps in those protections; and
- An initial assessment of threats to the outcomes that consumers expect from their use of or interaction with legal services as identified by Opinion Leader⁶ with a view to pointing out common features across legal activities.

⁶ Opinion Leader *Developing measures of consumer outcomes for legal services* (March 2011)
http://www.legalservicesboard.org.uk/news_publications/latest_news/pdf/consumer_outcomes_final_research_report.pdf

15. The regulatory menu that will be explored may include:

- Doing nothing (due to the commonality of risks being insufficient to warrant a regulatory solution);
- A non-statutory approach such as voluntary regulation. This could include introducing a system with quality marks to inform consumer preference. To obtain such a quality mark providers may be required to meet regulatory requirements comprising, for example, minimum standards such as having in place separate client accounts, professional indemnity insurance (PII), etc. The governance and institutional home for any such scheme would need detailed study, but at a later stage;
- A consumer education approach which aims to better inform consumers to help mitigate common risks that consumers face when purchasing general legal advice;
- Regulation in the form of registration and recourse to LeO plus an additional regulatory step (or steps) such as the requirement to hold PII; and
- Application of another regulatory model (including any combination of the approaches above).

16. We intend to support the discussion document by open meetings to ensure that all stakeholder views are accounted for and that we have heard views from across the sector, including all of the areas which could be affected by any proposals.

What we hope to achieve

17. We anticipate that the first stages of this work will aim to achieve:

- A degree of consensus on the characteristics that define general legal advice for individual consumers, what characteristics would exclude some services from the scope of general legal advice and whether similar arguments apply in relation to legal advice provided to small businesses;
- A position on how we will seek to fill any evidence gaps susceptible to research and clear identification of those areas where this may not be possible;
- A position on how we will test and evaluate the evidence required to make the case for some minimum regulatory protection for general legal advice for individual consumers;

- A clear and tested view of whether it is possible to conduct a review of general legal advice for individual consumers that could result in enhancing consumer protections where gaps remain and increasing consumer certainty about level of available protections.
18. By Q1 2014 we will present to the Board a developed research and evidence base concerning the feasibility (or otherwise) and approach to tackling the risks identified general legal advice. We will then seek the Board's views on whether to proceed to a formal investigation following the Schedule 6 process to the extent to which this power is available. This process entails us launching a full investigation, subject to statutory timetables, with the intention of producing a provisional report that states whether or not the LSB is minded to make a recommendation to the Lord Chancellor.

Key risks

19. As has been highlighted above, conducting this type of wide ranging review is a new way of working for the LSB when compared with our earlier reviews of specific legal activities. As such, we are aware of the possibility that some stakeholders may wonder if we are looking to over-regulate, which would be to the detriment of the legal services market and possibly to the credibility of the Board. We are also conscious of potential concerns from both voluntary bodies and from non-legal professions that proposals in this area could, whether by accident or design, enable a "land grab" by either current law firms or legal regulators (or both).
20. We believe that the four stage process outlined above will mitigate this risk. In addition, we will ensure that where the evidence is finely balanced between the merits of a potential regulatory solution and a non-regulatory solution we will opt for the non-regulatory solution. This is essential as we recognise that it is much harder to introduce protections only to subsequently take them away when they have proven to be unsuitable. Moreover, this approach is in line with the principles of better regulation.
21. A significant challenge for the LSB team will be to ensure that the review maintains a sufficient level of generality that it can be achieved within the available resources. At the same time, in order to draw meaningful conclusions it is essential that we cover the topic in sufficient detail. This will be a challenging balance to strike and will need to be regularly assessed.
22. Any new minimum protections to be introduced will need careful consideration. In the event that a regulatory solution was considered appropriate the impacts could be substantial. Given this, we would need to consider if primary legislation would be the more appropriate vehicle for such regulatory change. In certain circumstances there may also be opportunities to deregulate and remove existing regulatory restrictions, and the LSB will remain alive to this possibility when reviewing regulatory protections.

23. A further risk is that the LSB's powers will not be adequate to complete the fourth stage. Even if we conclude that we could commence a s24 investigation, Ministry of Justice may conclude that the power does not extend that far.

Indicative timetable post-October 2012

Stage 1 - exploration and analysis;

- **Preparatory work Q4 2012/13;**
- Investigation Q1 2013-14 (definition and case study research);
- Non-Executive Director input into initial analysis Q1 2013-14;
- Discussion document Q3 2013-14;
- Consultation to Q4 2013-14 ;
- Analysis, development, testing Q1 2014-15;
- Board to sign off findings and next steps including whether to proceed to a formal investigation following the Schedule 6 process Q1 2014-15.