

A vision for legislative reform of the regulatory framework for legal services in England and Wales

September 2016

Contents

Chairman's foreword	3
Introduction	6
The regulatory objectives	9
The scope of regulation.....	14
The focus of regulation.....	19
Regulatory independence	24
Consumer representation.....	30
Future shape of the regulatory infrastructure.....	34
Annex A: the case for sector-specific regulation of legal services	38
Annex B: the problems with the Legal Services Act and the current regulatory framework..	40
Annex C: future developments and regulatory agility	42
Annex D: the current regulatory objectives and professional principles	43
Annex E: legal professional privilege.....	44
Annex F: the role of judges in the ecclesiastical courts	46

Chairman's foreword

1. The Legal Services Board is the independent body that oversees the regulation of legal services in England and Wales under the Legal Services Act 2007.
2. In carrying out our statutory duties we gain unique insight into the successes and failures of the current legislative framework. Our research and experience tell us that legislative reform is vital if the legal services sector is to address current challenges and make the step change needed to better meet the needs of consumers, citizens and practitioners.
3. We want a legal services sector in which:
 - consumers are well informed and able to choose from a range of services that are of appropriate quality and value for money
 - there is prompt and effective redress for consumers when things go wrong
 - vibrant, diverse and professional legal service providers compete and innovate to offer services that collectively support wider public interest objectives including the rule of law and access to justice for all
 - there is a regulatory framework that commands the confidence of consumers, providers, the public and all those with an interest in legal services.
4. Our landmark market evaluation report published in July 2016¹ shows there have been positive developments since the 2007 Act. For example, quality of services has improved in most areas against a background of substantial changes in the market. However, our research and analysis shows that improved outcomes have been slow to emerge. Consumers are still not driving competition by shopping around and levels of unmet need remain stubbornly high. Perceptions of high cost remain a barrier for some and most small businesses do not view lawyers as cost effective. In addition, according to the Competition and Market Authority's (CMA's) recent Legal Services Market Study Interim Report², legal services markets are not functioning as well as they might and there are indications that the potential gains from greater competition may be substantial.
5. The existing legislative framework contributes directly to these problems. The current framework is not properly risk-based. There are blanket consumer protections in some lower-risk areas that unnecessarily increase costs for providers that are then passed on to consumers. Some high-risk activities fall beyond the reach of regulation. Users of such services often do not realise that they are not buying regulated legal services and that they do not have the protections (such as access to redress) that they might assume they have. The ongoing links between representative bodies and regulators slow the pace of reforms that would otherwise free up providers of legal services to innovate and grow and to deliver benefits for consumers. This lack of independent regulation also

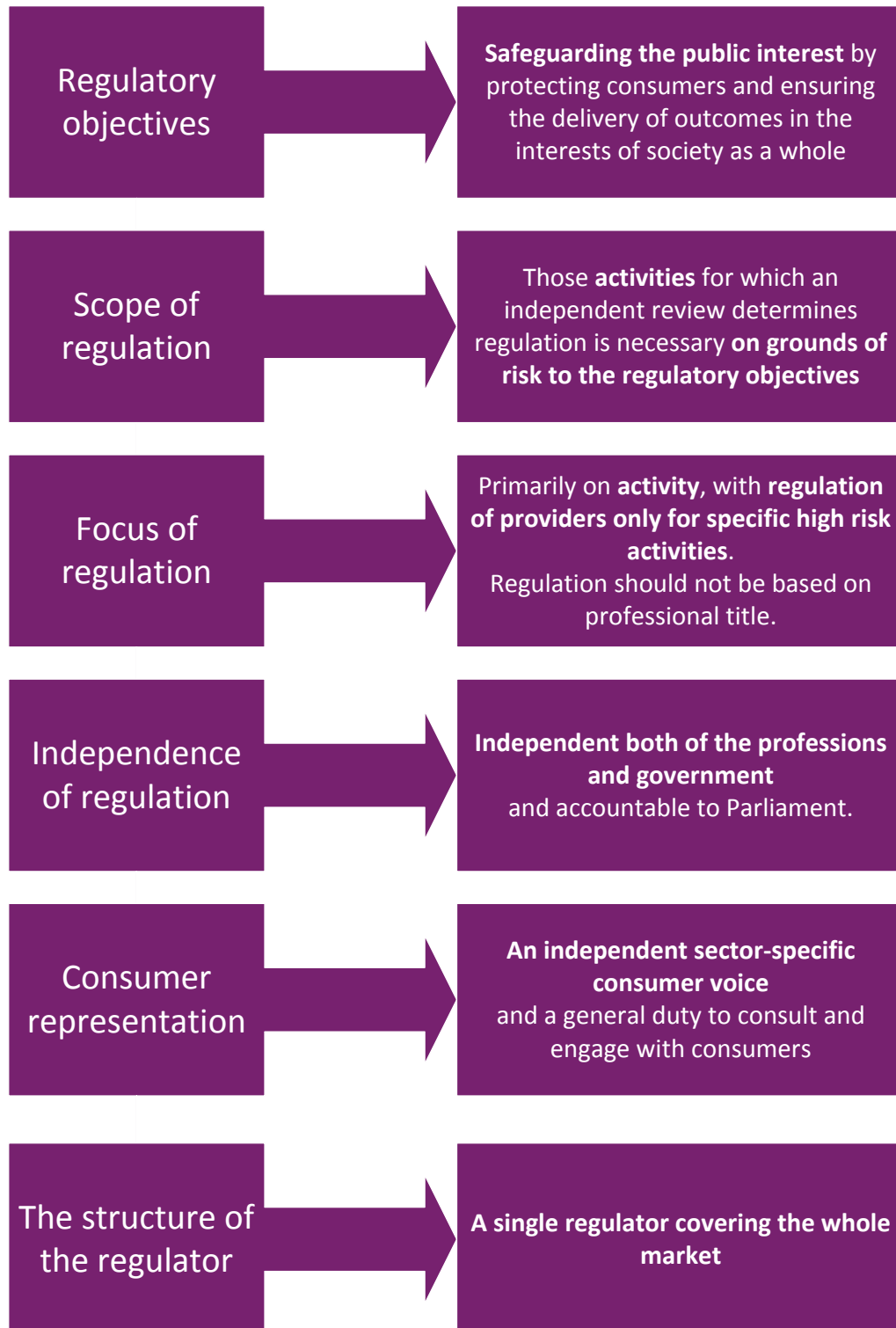
¹ <https://research.legalservicesboard.org.uk/wp-content/media/2015-2016-FINAL-Market-Evaluation-Main-report1.pdf>

² <https://assets.publishing.service.gov.uk/media/577f76daed915d622c0000ef/legal-services-market-study-interim-report.pdf>

increases the costs faced by providers and acts to undermine public confidence in regulation.

6. A programme of deregulation within the existing legal framework is gradually making the market work better for consumers. However, in our view more fundamental reform is needed to address the problems with the existing framework fully. Reform will also secure the important public interest outcomes that the legal sector should deliver and strengthen the contribution the legal sector makes to the reputation of the UK as a good place to do business. We think a new legislative framework should put safeguarding the public interest and protecting consumers 'front and centre' by taking a risk-based approach to regulation, and focusing on the activities undertaken by providers and not the title they hold. Regulation should be fully independent of the professions and Government. We believe that a single regulator covering the whole sector would best deliver the independent and activity focused approach to regulation that we are proposing and would better serve a sector in which distinctions based on titles and types of provider are becoming increasingly blurred.
7. Together these changes would contribute to lower costs for providers and consumers, more freedom for providers to grow, innovate and deliver better services for consumers, and greater confidence in regulation and legal services – and the important benefits they deliver for society – more broadly. In the meantime, the LSB will continue to focus on its core regulatory remit and the strategic objectives that we have set. We believe a new framework could deliver more for consumers and citizens but we will also continue to make sure we work within the existing framework to improve access to justice, break down regulatory barriers and oversee the performance of the existing regulators. There is more that can be achieved within the current rules and this remains the focus of our work.
8. I am extremely grateful to my Board for the time it has devoted to analysing, discussing and weighing up its views on these critical issues. These issues are complex and interrelated, and my Board has taken the time to understand the evidence and to develop a coherent and principled position. We now want to contribute our thinking on these important matters to the government's considerations of reform of the legislative framework and any future independent review.

Summary of proposals



Introduction

Background

9. **This paper sets out our ideas on what should underpin a future legislative framework for the regulation of legal services in England and Wales.**
10. Legislative change is a matter for government and ultimately Parliament. In July 2015, the then Lord Chancellor committed to a review of the Legal Services Act 2007 (LSA) in the lifetime of this Parliament. It is in this context that we want to contribute our ideas and experience for consideration, as the oversight regulator under the current legislative framework.
11. Given our strategic position and experience, **we are uniquely well-placed to provide evidence of the problems caused by the current framework and suggest reforms – based on research and analysis – that could help resolve these issues.**
12. This paper builds on the paper on legislative options that we published in July 2015 (the July 2015 paper) following cross-regulator discussions chaired by Professor Stephen Mayson³.
13. The July 2015 paper:
 - set out the continued case for sector-specific regulation of legal services (summarised in Annex A);
 - identified the chief problems with the Legal Services Act 2007 (LSA) framework (summarised in Annex B); and
 - explored options for its reform.
14. This paper should be read in conjunction with the July 2015 paper, and takes the analysis in that paper to its conclusion. In preparing this paper, we have given these issues detailed consideration and explored the available evidence over a number of months, through both formal and informal Board sessions. As part of this process, we have updated our thinking on these issues as previously set out in our ‘Blueprint’ document published in 2013⁴. While the views expressed in the current paper are ours, Professor Mayson has helped us to develop this next phase of our policy thinking. We are extremely grateful to him for sharing his experience and insight with us, and for his expert facilitation of the journey we have been on.
15. There have been three other recent developments that have put even greater focus on legislative reform:

³ Centre for Ethics and Law, Faculty of Laws, University College London; independent non-executive director and adviser to a number of law firms and law-related organisations.

⁴ The Blueprint was our response to the Ministry of Justice’s 2013 call for evidence on legal services regulation, and can be found here: http://www.legalservicesboard.org.uk/what_we_do/responses_to_consultations/pdf/A_blueprint_for_forming_legal_services_regulation_final_09092013.pdf

- in November 2015, HM Treasury announced in its competition plan⁵ that the government would consult in spring 2016 on making legal service regulators independent from their representative bodies.
- in January 2016, the CMA launched a market study into the supply of legal services in England and Wales. One of the three core themes of the CMA's study is the impact of regulations and the regulatory framework on competition. According to the CMA's July 2016 Interim Report, legal services markets are not functioning as well as they might. In the report, the CMA states that (i) the CMA is open to the possibility that moving to an alternative regulatory model may generate longer term benefits to competition; (ii) there may be merit in a systematic review of which legal services or activities should be regulated and how; (iii) a key principle should be to ensure full independence of the regulator from the providers it regulates; and (iv) reducing the number of regulators may be beneficial.
- in July 2016, our market evaluation report concluded there has been incremental improvement for consumers since the 2007 Act, but a step change is needed to unlock growth. Legislative reform is one measure that would help to achieve the transformational market change that consumers need.

16. We will feed our thinking as set out in this document into the government's considerations of reform of the legislative framework and any future independent review. We will also discuss these proposals with the MoJ and with the CMA in the context of its market study. We believe that it is critical that reform of the legislative framework proceeds on the basis of evidence and reasoned analysis, and that full regard is given to the well-established principles of best regulatory practice that have proven to be effective in other areas of the economy.

Six questions

17. There are six key questions for us to address in this paper. These questions were posed – and a range of possible answers identified – in the July 2015 paper.
- What should be the number, nature and presentation of any regulatory objectives?
 - What should fall within the scope of regulation? How should that be addressed?
 - Should regulation be focused on activities or the providers who carry them out?
 - How can the independence of legal services regulation from both government and representative bodies best be assured?
 - Does the regulatory framework need to give consumers a voice? If so, what is the best way to achieve that?
 - How should the legal services regulator(s) be structured?
18. We address each of these questions in turn in this paper. It is not our intention to consider every issue that legislators would need to tackle, not least because the finer detail can only be developed once the key principles are agreed. However, we think our suggestions in response to the six questions could establish sound and effective foundations on which the detail can be robustly developed later.

⁵ HM Treasury, A better deal: boosting competition to bring down bills for families and firms, November 2015

19. **The suggestions in this paper are intended to represent a durable solution rather than a further 'stepping stone' to liberalisation.** Given this, any future framework based on these suggestions could benefit from building in regulatory agility as one of its fundamental over-arching principles. This will allow regulators to respond effectively to the significant changes taking place (and that may take place) in the legal services sector without further large scale legislative review. We discuss future developments and regulatory agility further in Annex C.

The regulatory objectives

What the July 2015 paper said

Key issues

What should be the number, nature and presentation of any regulatory objectives?

Options

1. Continue with the current objectives
2. Introduce a new set of objectives
3. Introduce an overarching objective
4. Introduce a hierarchy of objectives
5. A combination of the above

Our views on reform

We think the overarching regulatory objective should be to safeguard the public interest by protecting consumers and ensuring legal services deliver outcomes in the interests of society as a whole.

A small number of other objectives could be secondary or subordinate to the overarching objective, and could be used to highlight particular facets of the public interest that Parliament wishes to emphasise. These could include for example:

- promoting competition
- preserving and enhancing the overall economic and public value of the sector to the country
- promoting and maintaining adherence to the professional principles
- empowering consumers by enabling informed choice of legal services provider.

In more detail

20. We believe that the regulatory objectives⁶ should be derived directly from the rationale for sector-specific regulation of legal services as set out in Annex A. While the precise phrasing of the objectives may need to be refined, we believe that there should be an

⁶ We considered whether these should be framed as duties or regulatory objectives. We noted that the Law Commission, in its report on the Professional Standards Authority's Regulatory framework, said that it attached 'no particular significance to the difference between the terms'. We have therefore proposed that the regulator(s) of legal services continue to have regulatory objectives rather than duties, noting that there is likely to be little material difference in the outcome whichever term is chosen. See Law Commission, Scottish Law Commission and Northern Ireland Law Commission, Regulation of Health Care Professionals; Regulation of Social Care Professionals in England, April 2014.

overarching objective to safeguard the public interest by protecting consumers and ensuring legal services deliver outcomes in the interests of society as a whole.

21. The first element of this objective is important in view of the risk of significant harm or loss for consumers, the inherent power imbalance between consumers and providers and the lack of choice about using legal services in some situations (as described in more detail in Annex A) which mean that the market would be unlikely on its own adequately to protect consumers or equip them to make informed choices and drive competition. The second element of this objective would encompass outcomes such as the rule of law, access to justice and the effective and efficient administration of justice, and recognises the scope for poor legal services to cause harm to society more broadly.
22. A small number of other objectives could be secondary or subordinate to the overarching objective. These secondary objectives should not, in our view, be in any hierarchy as it would be for the regulator(s) to resolve tensions between them, but could be used by Parliament to emphasise particular facets of the public interest (such as the promotion of competition and the overall economic and public value of the sector to the nation).
23. Such a framework would help give the regulator(s) a strong and clearly defined purpose, promote consistent decision-making and contribute to securing regulatory independence from both government and the profession (see paragraphs 69 to 87).
24. In our formulation consumer protection is one element of the public interest rationale for regulation. The interests of consumers are wider than simply being protected from harm, but our idea is that these additional issues would fall under the secondary objectives.
25. As now, existing cross-economy regulatory obligations, such as adherence to the better regulation principles⁷, could sit alongside these legal sector-specific objectives (whether set out explicitly in any new statute or 'read in' from other existing statutes).

Our experience of the regulatory objectives⁸

26. It is important to have clear regulatory objectives. Such objectives:
 - define the boundaries and determine the purpose of a regulator's work;
 - provide objective criteria for decisions and safeguard against improper influence by external interests;
 - enhance transparency and accountability for these decisions; and
 - help explain the purposes of regulation to the public, regulated community and others⁹.

⁷ The five 'better regulation' principles are that regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed. They are enshrined in the Legislative and Regulatory Reform Act 2006 and in section 3 of the LSA.

⁸ The current regulatory objectives, as listed in section 1 of the Act, are set out in Annex D.

⁹ For a discussion of regulatory objectives in a legal services context, see Laurel S. Terry, Steve Mark, Tahlia Gordon, *Adopting regulatory objectives for the legal profession*, Fordham L. Rev, Vol. 80 (2012).

27. The LSA is constructed so that the LSB promotes the regulatory objectives through the exercise of a limited set of statutory functions¹⁰. We have very limited scope to promote the regulatory objectives where our statutory functions are not closely related to these objectives (as is the case in relation to the current objective concerning public understanding of citizens' legal rights and duties, for example). The regulatory objectives are best understood as a series of considerations that we must keep in the front of our mind when carrying out our statutory functions, rather than goals that we can pursue independently of our functions.
28. Our experience of working with the existing set of regulatory objectives in the LSA is that:
- having a large number of objectives can be problematic. They do not offer a clear focus, there is a risk of scope creep and they may give too much latitude to regulators in justifying their decisions, resulting in regulatory uncertainty for providers and consumers;
 - on the other hand, while it is inevitable that multiple regulatory objectives will overlap or conflict with one another from time to time, experienced regulators are capable of balancing some tension between a limited number of objectives. This can permit greater flexibility of regulatory response in a market that is characterised by wide diversity in the consumer and provider base; and
 - it is viable for regulatory objectives not to be closely defined in statute so long as regulators clearly articulate their interpretation of them – this will naturally evolve as the operating context and risk environment changes.
29. As set out in paragraphs 20 to 25, we consider that a number of the existing regulatory objectives may continue to be appropriate in some form in a new regulatory framework, whether as part of the overarching objective or as secondary objectives¹¹.
30. However, we consider that some of the current regulatory objectives are unlikely to be appropriate in a reformed regulatory framework.
31. Public legal education underpins the rule of law. It is at least as important as financial capability and media literacy, in relation to which the FCA and Ofcom respectively have objectives. However, the FCA and Ofcom also have functions which are closely related to these responsibilities and they have the resources to deliver them. In designing a new legal services regulatory framework, thought must be given as to which organisation(s) are best placed to pursue the crucial goal of public legal education. A body with a tight focus on its core regulatory functions in an environment of close scrutiny of public spending and burdens on business is unlikely to have the resources or infrastructure to provide a leadership role in this area. Further, the current objective to increase public

¹⁰ Regulatory functions are currently defined in section 27 of the Act by reference to regulatory arrangements, which are defined in section 21 of the Act and include arrangements for authorisation, practice rules, conduct rules, disciplinary rules, qualification regulations, indemnification, compensation, licensing rules and any other rules or regulations other than those made for the purpose of representative functions.

¹¹ In relation to the professional principles in particular, we note that other regulators have objectives relating to professional standards (for example, the Professional Standards Authority has an objective "to promote and maintain proper professional standards and conduct..." for the professions it oversees).

understanding of the citizen's legal rights and duties is broad in scope and perhaps better pursued as a public policy goal by government or agencies other than a regulator. Instead, a more narrowly defined role focused on empowering consumers by enabling informed choice of legal services provider might be appropriate for a regulator, especially in light of the CMA's interim finding that gaps in information are limiting the ability of consumers to drive competition in the market.

32. Improving the diversity of the profession is an important policy objective, and regulators can make a contribution to this¹². However, the inclusion of this objective in the LSA predates the Public Sector Equality Duty¹³, and consideration should now be given to the on-going appropriateness of this objective. In particular, thought needs to be given to whether – and, if so, what – specific issues in the legal sector justify an additional duty or obligation in this area over and above the Public Sector Equality Duty.
33. The element of the objective of 'encouraging an independent, strong, diverse and effective legal profession' that relates to the strength of the profession is problematic. It does not appear to stem from the fundamental justification for sector-specific regulation set out in Annex A, namely the public interest and consumer protection. There will be occasions when the profession's concerns will not coincide with these interests. It is highly unusual for a regulator to have such an objective¹⁴. Furthermore, it does not reflect the make-up of the supplier base in the modern legal services market – where other professionals, such as accountants, are authorised to provide reserved work, and unregulated providers have gained some market share in areas such as will writing and intellectual property. This element of this objective is also at odds with our proposed shift away from title-based regulation, because it is proposed that regulatory interventions will not apply to professional groups but to activities, making it difficult for regulators to pursue measures to encourage a strong legal profession specifically (see paragraphs 53 to 68).
34. The legal professions in England and Wales have high international standing. An effective and fit-for-purpose regulatory framework will support and reinforce this position. However, for the reasons outlined above, in our view, this is best implemented through an overarching public interest objective (and/or a secondary objective expressed in terms of preserving and enhancing the economic and public value of the sector) rather

¹² In light of the existing regulatory objective that the LSB shares with legal services regulators of "encouraging an independent, strong, diverse and effective legal profession", the LSB's business plan includes a commitment that during 2016-17 the LSB will continue to champion the contribution that regulators can make to increasing diversity.

¹³ Under the Equality Act 2010, public authorities must comply with the public sector equality duty in the exercise of their functions. The duty requires public authorities to have due regard to the need to: (i) eliminate unlawful discrimination, harassment and victimisation; (ii) advance equality of opportunity between people who share protected characteristics; (iii) foster good relations between people who share a protected characteristic and those who do not.

¹⁴ The LSB undertook a survey of the regulatory objectives of some of the UK's largest regulators. There were no other regulators with objectives relating to the strength of their regulated sector as such. While Ofwat and Ofgem have objectives relating to licence holders being able to finance their operations, this relates to infrastructure operators which need to make extremely large investments while also ensuring that they continue to deliver key utility services, a situation which does not arise in the legal sector.

than making the encouragement of a strong legal profession an objective (or part of an objective) in its own right.

The scope of regulation

What the July 2015 paper said

Key issues

What should fall within the scope of regulation?

How should that be assessed?

Options

1. Regulation of all legal activities and providers
2. Limited or no sector-specific regulation
3. Targeted regulation (assessed relative to the regulatory objectives) A combination of the above

Our views on reform

We think there should be an independent review to determine which activities should attract sector-specific regulation in future, on the grounds of risk to the overarching objective of safeguarding the public interest. This would allow regulation to be properly targeted and proportionate to the harm it seeks to remedy. Periodic reviews – conducted by the new regulator(s) – could then follow to ensure the regulatory framework remains risk-based.

In more detail

35. One of the issues with the current framework is that the fixed list of six reserved activities is not the result of any recent, evidence-based assessment of the benefits or risks created by those activities.¹⁵ We consider that an independent and evidence-based review should be carried out to determine from first principles which activities should attract sector-specific regulation in future¹⁶ (as well as making recommendations to government on the other issues set out in this document, which the government can then consider in presenting a Bill to Parliament). For other activities, it would be sufficient to rely on private and public enforcement of general consumer law, and alternatives to regulation such as voluntary schemes.

¹⁵ See Mayson & Marley (2010) The regulation of legal services reserved activities – history and rationale, Legal Services Institute: available at: <https://stephenmayson.files.wordpress.com/2013/08/mayson-marley-2010-reserved-legal-activities-history-and-rationale.pdf>. The reserved activities are: the exercise of a right of audience; the conduct of litigation; reserved instrument activities; probate activities; notarial activities; and the administration of oaths.

¹⁶ The LSB has powers to make recommendations to the Lord Chancellor about changes to the list of reserved activities, but this can only be done on an activity-by-activity basis.

36. Such a review would need to be appropriately resourced and should, in our view, start as soon as possible, given the time likely to be required to give these matters full consideration. The review should start from the presumption that sector-specific regulation is only required on the grounds of sector-specific risk to the public interest, as set out in Annex A. This would allow regulation to be properly targeted and proportionate to the harm it seeks to remedy. Periodic reviews – conducted by the new regulator(s) – could then follow to ensure the regulatory framework remains risk-based.
37. These risks will vary across the legal sector, given the wide range of services and circumstances in which they are provided. At a high level, risks will relate to:
- the competence of those carrying out a legal activity/skill (eg litigation, advocacy)
 - the capabilities and vulnerabilities of different types of consumer (eg individuals, small businesses, corporate clients)
 - inherent features relating to the legal need/area of law (eg the extent of asymmetry of information between consumers and providers).
38. The market segmentation framework developed for the LSB by Oxera could be used as the starting point for analysing these risks.¹⁷ An approach to assessment of harm might employ established risk evaluation techniques, including cost-benefit analysis, as well as research into the likelihood, numbers affected and impact of harm arising.
39. Examples of possible outcomes from this risk assessment might be:
- **high overall risk:** legal advice to asylum seekers. There is risk of significant and possibly irreversible detriment, consumers are likely to be particularly vulnerable, the knowledge imbalance between the consumer and service provider is likely to be very high and consumers have no choice about using legal services to resolve these sorts of problem
 - **some elements high risk, others lower risk (depending on problem type and consumer type):** family. Activities can vary from providing advice in uncontested divorces through to litigation involving vulnerable parties (eg victims of domestic violence) and children, in which significant consumer protection and public interest considerations are engaged. This means that different levels of regulation might therefore apply to different elements of family law
 - **low risk:** legal advice on problems arising from sale of consumer goods. Activities in this area seem less likely to carry the risk of significant or irreversible loss for consumers, or to engage wider public interest considerations.
40. Once identified, the minimum necessary regulation should be used to address these risks, bearing in mind that not every risk calls for regulatory action. The type of regulation might differ according to the nature of the risk. As we explain in more detail in paragraphs 55 to 57, rules could be applied that have effect before (eg entry standards), during (eg continuing professional development) and after (access to ADR) service provision.
41. It may be a useful cross-check in the process of developing these regulatory requirements to relate them to the consumer point of view. For example:

¹⁷ See <https://research.legalservicesboard.org.uk/news/market-segmentation/>

- consumers must have confidence that they are being given accurate and fit-for-purpose advice
 - consumers must feel that their money held by legal service providers is safe
 - consumers must understand their right to complain and, if necessary, seek redress.
42. This will help ensure that regulation is directed most effectively at individuals or entities (see paragraph 57 below), depending on which is best-placed to deal with the risk concerned.
43. Data may not exist to carry out definitive cost-benefit analysis in advance of imposing regulation. Risks can also change over time¹⁸. Trials and piloting of specific regulations may therefore be appropriate to determine whether the expected benefits have been delivered. Periodic reviews conducted by the regulator(s) following the initial independent review mentioned above are also likely to be needed, to determine whether there is a continuing need for regulation. If the framework for such reviews of regulation is transparent and well understood (ie what sort of evidence is likely to lead to alterations in regulation), this should reduce the scope for these reviews to cause regulatory uncertainty and deter entry and innovation in the market.¹⁹
44. We consider that all legal services should be subject to this risk assessment process. When making an initial assessment of the types of services that should attract regulation, it may be sensible to group activities sharing a similar risk profile and/or requiring a similar skill-set. It will clearly be more important closely to define the high-risk services identified as a result of the assessment which attract the highest levels of regulation.

The benefits of a risk-based approach: better regulation

45. A survey of the scope of legal services regulation in other jurisdictions – see Annex 3 of the July 2015 paper – shows that a number of different approaches have been adopted. There are examples of regulation taking place at a variety of points on a spectrum ranging from limited or no sector-specific regulation (as in, for example, the current regulatory model in Finland), through to a position where substantially all legal activity attracts sector-specific regulation (as in, for example, the concept of the ‘unauthorised practice of law’ in the United States of America).
46. We consider that taking a risk-based approach to the regulation of legal services – rather than an ‘all or nothing’ approach – will help ensure that any given legal activity is assessed against a logical and informed framework of benefit and risk before imposing regulation. Such proportionate and flexible regulation in turn supports the reduction of net regulatory burdens and cost, thereby encouraging competitiveness and innovation as well as improving the affordability of services and helping to address unmet need.

¹⁸ For example, the Legal Services Consumer Panel’s Consumer Vulnerability Guide recognises that vulnerability is a dynamic concept and can depend on the characteristics of the market, the particular circumstances of the individual consumer, or a combination of the two.

¹⁹ Periodic reviews of markets are also features of other regulatory regimes, eg for electronic communications.

Scope – further considerations

47. In our Blueprint document, we proposed that there should be universal access to the Legal Ombudsman (LeO) or another alternative dispute resolution (ADR) service for all individual and small business consumers of legal services. This would differ from the current position in which access to ADR is tied to the regulatory status of the service provided and/or the organisation providing it. However, this position was taken at a time when it appeared that the ADR Directive would require cross-economy access to ADR. In the event, this did not happen. Instead, the ADR Directive required signposting to recognised ADR schemes, with the intention that this would create new incentives for providers to subscribe to independent redress schemes voluntarily. Time is needed to assess the impact of the Directive. Further, the establishment of a voluntary scheme within the Legal Ombudsman, already provided for within the LSA, offers an option to encourage voluntary participation in ADR among unregulated providers.
48. In the meantime, we consider that requiring blanket access to ADR would introduce new regulatory burdens and costs on all legal services providers without evidence to justify imposing this burden in the legal sector only. Of course, a requirement to provide access to ADR in relation to specific legal services may be appropriate where there are risks to consumers.
49. Under the current framework, the provision of some legal services which are not reserved activities is regulated under statutes other than the LSA. For instance, immigration advice is not a reserved activity but it is a criminal offence for a person to provide immigration advice or services in the UK unless their organisation is regulated by the Office of the Immigration Services Commissioner (OISC) or is otherwise covered by the Immigration and Asylum Act 1999.²⁰ We believe that the risk assessment process outlined above – and subsequent decisions about the imposition of regulation – should encompass all legal activities so that they are considered on an equivalent basis and that the resulting regulatory requirements are coherent and are not fragmented across multiple statutory frameworks.
50. We have considered whether the scope of legal services regulation should be broadened to include services in the wider market for solutions to disputes and conflict, for example mediation.²¹ In principle, if the risks to consumers and the public interest are the same, then there is an argument that the same regulation should apply. There are also indications that the justice system will place increasing emphasis on non-formal, non-court-based solutions to legal problems.²² Such solutions are, however, different in kind from legal services. For example, legal advice (one example of a legal service) has been

²⁰ The latter case includes some authorised persons under the LSA, such as all solicitors and barristers, who are exempt from having to be regulated by the OISC in order to provide immigration advice.

²¹ Acting as a mediator is explicitly excluded from the definition of 'legal activities' in section 12 of the LSA.

²² See for example, Lord Justice Briggs, Civil Courts Structure Review: Interim Report, January 2016.

defined²³ as “any advice which involves interpreting how the law applies to a client’s particular problem or set of circumstances”. In contrast, mediation (for example) relies on the parties to a dispute being in a position to make compromises to reach a negotiated settlement, irrespective of what the law might say. There is also a risk that regulation could stifle an evolving market. This is clearly a matter which government will wish to consider.

51. We have also considered whether the legal services regulator(s) might need concurrent powers under the Competition Act 1998 (CA98) and the Enterprise Act 2002 (EA02), as updated in the Enterprise and Regulatory Reform Act 2013 (ERRA13).²⁴ All the main UK economic regulators, originally in the infrastructure industries and now also in the financial services and (to a lesser extent) health service sectors, have such powers. Concurrency allows the specialist knowledge of the sector regulators to be applied to competition problems in their field of expertise and promotes consistency of regulatory approach across the economy.
52. The findings of the current CMA market study of legal services need to be taken into account. The extent to which the legal services market develops similar characteristics to markets where there is economic regulation is another factor to monitor. We believe it is currently premature to give concurrent powers to the legal services regulator(s), but that the question should remain open for consideration in future reviews of the regulatory framework.

²³ This definition was developed by the Advice Services Alliance - <http://asauk.org.uk/wp-content/uploads/2013/08/Definitions-to-helpyou-understand-the-advice-sector.pdf>

²⁴ Under CA98, regulators can take action against (a) anticompetitive behaviour in the industry for which they are responsible (price-fixing, cartels, etc., as set out in EU TFEU Article 101); and (b) abuse of dominance (as set out in EU TFEU Article 102). In addition, under EA02, economic regulators can instigate market studies that can lead to Phase 2 market inquiries, as carried out by CMA Phase 2 Panels.

The focus of regulation

What the July 2015 paper said

Key issue

Should regulation be focused on activities or the providers who carry them out?

Options

1. Regulation by activity
2. Regulation by provider
3. A combination of the above

Our views on reform

We think that the main foundation on which regulatory requirements are built should be the activity undertaken, for those activities where the risk assessment process justifies the imposition of regulation. Before-the-event regulation (eg authorisation of the provider) and during-the-event regulation (eg continuing professional development) could be appropriate for higher risk activities, with only after-the-event regulation (eg access to redress) for lower-risk activities.

Where authorisation of a provider is required, this could focus on the entity unless the risk is sufficiently high that authorisation of an individual would be necessary.

Regulation should not be based on professional title. However, the strong brand power of some protected titles (eg solicitor and barrister) means that transitional arrangements will be required during a further shift to activity-based regulation. Award of professional title should therefore continue to be the responsibility of the relevant regulator for the time being, where this is currently the case.

In more detail

53. As set out at paragraph 36, we believe that legal services regulation should be targeted at the particular risks to the public interest (see Annex A).
54. Consideration should be given to making the activity undertaken the main foundation on which regulatory requirements are built, for those activities where the risk assessment process described at paragraphs 35 to 44 justifies the imposition of regulation. In this context, 'activity' is used broadly, and could be described by reference to the consumer's legal need/area of law (eg conveyancing, probate), the legal activity/skill involved (eg litigation, advocacy), or the importance or consequences of activities given the capabilities and vulnerabilities of different types of consumer (eg individual, SME or corporate), or any combination of these three.

55. Regulatory requirements which apply before service delivery (for example, requiring authorisation of individuals or entities – see next paragraph), or during service delivery (for example requiring continuing professional development) could be considered most appropriate in response to those activities which are classified as posing the highest risk to the overarching statutory objective we are proposing (see paragraph 20). Obligations applying after the event (for example, requiring access to a redress scheme) may be more appropriate on their own for lower-risk activities, while also being available as an additional protection for higher risk activities.
56. Where regulation by activity requires the authorisation of someone to conduct that activity, there will inevitably be regulation focused on a combination of activity and provider (whether the latter is an individual or an entity). We believe that providers could be given specific authorisation to undertake particular higher-risk legal activities. Authorisation could for example be per-activity or (to minimise burdens) for a suite of closely-related activities of similar risk and requiring a similar skill-set.²⁵
57. In relation to authorisation of providers, we believe that authorisation could be on the basis of the entities undertaking the activities. They can, in turn, place the necessary obligations on the individuals they employ, unless the nature of the risk makes individual authorisation essential. For example, this might be necessary where specific high risks are identified that can only be addressed by tests of individual competence and personal accountability.

Activity as the foundation of regulation: some challenges

58. If regulation is largely focused on the activities undertaken, robust definitions of those activities attracting regulation is required. This is not a new issue, in that the existing Act is founded on a list of reserved legal activities and there is further a broad definition of 'legal activity' (see section 12 of the Act). Insufficiently robust definitions of regulated activities can create incentives for 'gaming'. For example, this might occur when an activity is broken down into its component parts and only that part of the activity that meets the strict letter of the definition is performed within regulation. While this may cut costs, it may also allow the provider to continue to charge full price for a service that consumers might legitimately expect to be subject to regulation in its entirety. The resulting risks to the quality of the service, however, need to be balanced with the possible benefits of 'unbundling' of services to allow them to be delivered more efficiently and cost-effectively.
59. The existing problems arise from historic legacy arrangements and it should be possible to develop clearer boundaries in future, although there will always be some grey areas. The definitions of the relevant activities should not be so constraining that they prohibit efficient business models in which the most skilled practitioners can oversee more junior practitioners undertaking the more routine aspects of the activities concerned. Here there is an important distinction between 'supervising' and 'conducting' activities.

²⁵ This approach should avoid the current 'regulatory gap' discussed in Annex B, whereby the same activity (for example will-writing) can be both subject to regulation and not subject to regulation, depending on the provider.

60. Activity-based regulation may be perceived as being unduly elaborate, with too much time and expense required to undertake the necessary risk assessments across the full range of legal activities. We believe that most resource should be focused on developing a robust risk-assessment methodology, which could then be able to be used across different legal activities to minimise on-going demands on resources. We also consider that the provision for authorisation of providers for a suite of related activities (see paragraph 44 above) will reduce the complexity of regulation. There will always be a balance to be struck between the attractions of simplicity and the desirability of targeted and proportionate regulation.

Authorisation of providers: some challenges

61. Where a risk assessment of the need for regulation of a particular activity indicates that authorisation of the provider is necessary (see paragraph 56 above), consideration should be given to:

- flexibility in how the necessary competencies are achieved so that students are not forced to make early choices of career pathways which could hinder transfer between different routes to authorisation;
- arrangements for maintaining and assuring the currency of the provider's competence in respect of legal activities for which authorisation was gained some time ago; and
- the fact that, for certain existing providers (for example, many barristers and some solicitors), individual and entity authorisation may in practice amount to the same thing: regulation should apply proportionately and in a targeted way (for example, the full weight of entity regulation might not need to be imposed on sole practitioners and self-employed barristers).

Title

62. Under the current legislative framework for the regulation of legal services (which includes but is not limited to the LSA), there are a number of professional titles that are protected by statute or other mechanism, including:

- Solicitor
- Barrister
- Registered Trade Mark Attorney
- Patent Attorney
- Licensed Conveyancer
- Chartered Legal Executive.²⁶

63. Some other commonly-used titles do not have such protection, including:

²⁶ Rather than being protected by statute, the 'Chartered Legal Executive' title is protected under a Royal Charter granted in 2011. Under that Charter, only practising Fellows of the Chartered Institute of Legal Executives may use the 'Chartered Legal Executive' title. In April 2016, the Institute of Trade Mark Attorneys was granted a Royal Charter, offering similar protection for the 'Chartered Trade Mark Attorney' title.

- Lawyer
- Notary
- Costs Lawyer

64. The current framework offers authorisation following from title, such as barristers' rights of audience or solicitors' rights to conduct litigation.²⁷ Economic literature suggests that professional titles can play an important role in driving standards up and developing consistent behaviour among providers.²⁸
65. We do not consider that regulation should in future be based on professional title – in other words, regulatory rules should not be targeted at particular practitioners solely on the basis of their professional titles. However, some – although not all – legal professional titles currently have extremely strong brand power for consumers (eg solicitor and barrister) in a market where there are few other signals to help consumers choose between providers.²⁹ Title therefore acts at the moment as a barrier to sustainable entry to many parts of the market for legal services because a prospective market entrant without the title in question may find it difficult to gain market share.
66. We are concerned that, at present, handing control of the award of protected titles (where this is not already the case) to representative bodies could result in gold-plating of entry standards, less competition and choice for consumers, and might even provide opportunity for de facto rolling-back of liberalising reforms in the market. On the other hand, there are benefits in consistency in the longer term in the handling of protected titles across different professional groups where this is possible (for example, clarity for consumers).
67. In light of the issues above, we believe that transitional arrangements for handling award of title will be required as part of the move to activity-based regulation. Award of professional title should therefore continue to be the responsibility of the regulatory arm of the approved regulator for the time being, where this is currently the case. We do not anticipate additional titles becoming the responsibility of any regulator(s), where this is not currently the case.

²⁷ While the Solicitors Regulation Authority currently awards the title of solicitor, it is the Inns of Court that currently award the title of barrister, not the Bar Standards Board (although a barrister must also be on the Bar Standards Board register and hold a practising certificate from the Board in order to practise).

²⁸ The important role of professional norms is explored in Dr Christopher Decker's and Professor George Yarrow's paper: Understanding the economic rationale for legal services regulation, Regulatory Policy Institute, 2010 (page 5).

²⁹ The Legal Services Consumer Panel's Tracker Survey has found that reputation is the most important factor when choosing a legal services provider (75% saying it is a factor) followed by price (68% saying it is a factor). The LSB, Law Society and Legal Education Foundation survey on individual legal needs found that only 49% of respondents checked whether their provider was regulated; among those who did not check, the most common reason was that they just assumed they would be regulated (55%).

Privilege

68. Legal professional privilege is not a regulatory responsibility, but it is an important public interest issue. Privilege belongs to the client not the lawyer, and it prevents lawyers who have given legal advice to a client in the course of a professional relationship from being compelled to disclose any communication between them for that purpose. Regulators may take an interest in privilege because (i) the extent to which privilege applies and in what circumstances may affect the market for legal services; and (ii) regulators are responsible (amongst other things) for entry standards to professional groups in relation to which privilege applies. We believe that reform of the legislative framework for legal services provides an important opportunity to rethink the appropriate extent of privilege. We set out our views on this issue in more detail in Annex E.

Regulatory independence

What the July 2015 paper said

Key issue

How can the independence of legal services regulation from both government and representative bodies best be assured?

Options

1. Regulation and representation functions in one body (with safeguards)
2. Partial separation of regulation and representation functions (with safeguards)
3. Full separation between regulation and representation functions

Our views on reform

We think regulation should be structurally, legally and culturally independent of the professions and government. The independent review to determine which activities should attract sector-specific regulation should also decide the organisational status of the regulator(s), that is, whether it is a public body or not. Reform of the regulatory framework for legal services should include arrangements for any new regulator(s) to be accountable to Parliament rather than to government.

In more detail

69. We believe that regulation should be structurally, legally and culturally independent of the professions and government. This will deliver confidence:
- to **consumers** to use legal services, safe in the knowledge that their interests will not be overridden by professional or commercial interests, in an environment in which most consumers are unable to judge for themselves the value or quality of what is being provided;
 - to **providers and investors** to grow their businesses and innovate without fear that politically-motivated interventions or the interests of incumbent providers will undermine their investments; and
 - to **society** more broadly, that regulation affecting vital public interest outcomes such as the rule of law is transparent, accountable, proportionate and consistent, and is targeted only at cases in which action is needed.
70. In particular, as well as independence from the profession, we consider that reform of the regulatory framework for legal services should include arrangements for any new regulator(s) to be accountable to Parliament rather than to government (see paragraphs 81 to 85).

Independence from the profession: problems with the current lack of full independence

71. We note that Sir David Clementi, in his work that led to the LSA, found that attempts to combine regulatory and representative powers in a single body did not result in the public interest being consistently placed first and nor did they provide the right incentives to encourage competition or a framework for promoting innovation. However, in the event, the LSA did not introduce full regulatory independence.
72. We consider that the current lack of full independence between the legal services regulators and their associated professions is unlikely to be sustainable because:
- it fosters complex governance arrangements to manage relationships between the regulatory and representative functions of approved regulators, which do not achieve full independence of regulation and which distract senior management attention on both sides from regulatory and representative matters respectively
 - it risks undermining the credibility of regulation in the public perception in that some professions are still seen by consumers to be policing themselves (and therefore – whether true or not – inferentially to be ‘protecting their own’)³⁰
 - it creates scope for representative bodies to delay reforms which would benefit competition and consumers generating regulatory uncertainty and deterring investment
 - it results in lack of transparency of the cost of regulation, as a result of (i) sharing of some resources and costs between the regulators and their representative bodies, and (ii) some costs that should be collected from providers as part of optional professional membership arrangements being imposed as a compulsory regulatory levy³¹
 - it leads to confusion in other parts of government about which body is responsible for wider regulatory functions, for example under anti-money laundering and insolvency regulations
 - market change is reducing the relevance of a structure where regulation is tied to specific representative bodies (see also paragraph 65 above).³²

³⁰ Research conducted by ComRes on behalf of the SRA in January 2016 found that 86 percent of adults in England and Wales believe solicitors should be regulated and 82 percent support the idea of solicitors being regulated independently – see <http://www.sra.org.uk/sra/how-we-work/reports.page#independence>.

³¹ These are the ‘non-regulatory permitted purposes’ under section 51 of the Act. For the year ending 31 October 2015, 30% (amounting to £31.9 million) of the Law Society practising certificate fee was spent on non-regulatory permitted purposes. For the year ending 31 March 2015, 38% (amounting to £3.6 million) of the Bar Council practising certificate fee was spent on non-regulatory permitted purposes. The methodology we used for these calculations was the same as that used in the transparency reports we published for each regulator as part of our cost of regulation project – see http://www.legalservicesboard.org.uk/Projects/Reviewing_the_cost_of_regulation/index.htm.

³² For example, the advent of legal disciplinary practices (combinations of different types of lawyers) and multi-disciplinary practices (combinations of lawyers and non-lawyers) in the market is breaking down barriers between professional groups and thereby undermining regulation structured primarily by reference to those groups.

Maintaining input by representative bodies

73. Bodies representing different types of legal practitioner provide important value to regulators, for example by sharing expert knowledge and offering constructive criticism and a practitioner's perspective on the market and regulation. These benefits can be retained without the need for structural links between the profession and the regulator. As pointed out in a recent London School of Economics (LSE) discussion paper³³, the profession can still participate in the regulatory process in a number of ways, including:
- playing an advisory role, providing information, feedback and opinions
 - in the implementation of regulation, for example outcomes-focused regulation, where organisations apply more general regulatory principles to their own situation.
74. We do not believe that combining regulation and representation functions in one body, even with safeguards (for example organisational 'Chinese walls' and strengthened oversight), is likely to be a viable long-term solution.³⁴ Such a halfway house would not overcome the problems listed in paragraph 72 above. In particular, experience has shown that the tensions generated by the inherent conflict of interest in such arrangements distracts management attention, delays the pace of reform, and does not deliver the clear separation that (at least in relation to some professional groups) consumers, investors and the public expect. In addition, it links regulation to professional groupings, the boundaries between which are eroding over time, and raises questions about practitioners being forced to join specific representative bodies in order to be allowed to practise.
75. The scope for input by bodies representing different types of legal practitioner would be safeguarded by the usual public law (and wider) requirements on public bodies to consult adequately, for example on their draft budgets, business plans and policy decisions.³⁵ We are aware of formal mechanisms in a small number of sectors that offer avenues for representative bodies to enter into dialogue with regulators.³⁶ The case would need to be made for introducing similar structures in legal services – it would need to be demonstrated that these are likely to be effective and that the benefits would outweigh the costs.

Independence from government

76. The core rationale for certain types of regulation that should be independent of government is well-established. As explained in the LSE discussion paper, it allows the regulator to deal with complex issues that are better resolved by organisations that specialise in the issues concerned and that can give the issues dedicated and

³³ LSE Centre for Analysis of Risk and Regulation (2016) Regulatory agencies under challenge, available at <http://www.lse.ac.uk/accounting/CARR/pdf/DPs/CARR-DP81.pdf>

³⁴ This document discusses ideas for a future legislative framework and does not reflect the LSB's approach to its statutory functions under the current framework, in which some regulators are not fully independent of their representative bodies.

³⁵ As a public body, the new regulator(s) would be obliged to follow Cabinet Office guidance on consultations and any legal requirements, eg evolving case law on consultations in judicial review cases. There would be no need for this to be enshrined in primary legislation (save for any symbolic value).

³⁶ An example is the FCA's practitioner panels.

continuous attention. But independence from government has additional significance in legal services:

- from the perspective of a citizen being prosecuted by the state, or pursuing a claim against the state, there can be no suggestion that their legal representative is being controlled by the state through an arm's length regulatory agency
- independence of the legal system from government is also vital for this jurisdiction's international standing, both in terms of a place to obtain legal services, to do business more generally, or to resolve major or complex disputes.

77. Independent regulators can take a long-term view of costs and benefits because they are free from day-to-day political interference. As noted in the LSE discussion paper, this generates regulatory certainty and means that “[t]he notion of independent regulation has remained pivotal for attracting relatively cheap investment into the UK’s utility infrastructure”³⁷, a point reiterated in the UK Regulators’ Network Investor Guide, published in December 2014.³⁸ Whilst there may be less need for large investments in infrastructure in the legal services sector, the ability to take a long-term view and to create a stable business environment is nonetheless important given the increasing involvement of external investors in law firms and the lengthy pipeline for the development of the specialist skills and knowledge required at the most senior levels in the sector, and ultimately in the judiciary.

Independence: the role of the judiciary

78. The judiciary guarantee the independence of the judicial system from government. Judges, as the embodiment of the Crown, control their own courts including who appears before them, in what capacity, and with what effect.³⁹

79. There are existing mechanisms for the involvement of the judiciary in the functioning of the regulatory system, which act to mitigate the risk of government interference in regulation. For example, there are statutory requirements in the LSA to consult the Lord Chief Justice in certain instances, and there is a requirement in Schedule 1 of the LSA for the Lord Chancellor to consult the Lord Chief Justice about the process for appointment of LSB Board members and about the person selected for appointment.

80. The contribution of the judiciary to securing regulatory independence from government must, in our view, be maintained. A future regulatory system should recognise this by clearly defining and ‘hard-wiring’ mechanisms, where appropriate, for on-going involvement of the judiciary in the regulatory system through legislation.⁴⁰ This could include, for example:

³⁷ LSE Centre for Analysis of Risk and Regulation (2016) Regulatory agencies under challenge, p.5

³⁸ <http://www.ukrn.org.uk/wp-content/uploads/2014/07/UKRN-Investor-Guide.pdf>

³⁹ The quality of advocacy and litigation also has a direct impact on judicial processes and is vital for the effective administration of justice and the rule of law. The judiciary will therefore be concerned to ensure that the regulator(s) carries out its authorisation and enforcement functions adequately in relation to those activities, to the extent that failure to do so could impinge on effective administration of justice and the rule of law.

⁴⁰ In any reference to the role of the judiciary in regulation, a distinction needs to be drawn between the roles of judges in the secular courts and those of the ecclesiastical courts. Further details of the role of judges in the ecclesiastical courts are set out in Annex F.

- on-going statutory requirements to consult the Lord Chief Justice
- a role for the Lord Chief Justice in the appointment of the Chair and/or Members of the Board of any future regulator(s) – see paragraph 83.

Strengthening accountability through Parliament

81. The LSE discussion paper also notes that, while the case for arms' length relationships between government and regulators remains, the shifting boundaries and inevitable 'loose coupling' between government and such bodies needs to be accepted, not least because regulators need financial resources. Of particular relevance to legal services regulation, the paper states that “[i]ndependent agencies can avoid direct financial dependence on governments where they are self-funded through levies. However, their decisions have financial consequences that may involve the public purse or have other consequences for the public realm”.⁴¹
82. Independent regulation does not therefore mean that regulators can do what they want; nor does it mean that they should operate in a vacuum. Regulators are entrusted with making significant decisions, can impose tough sanctions on providers, and operate with substantial budgets. Regulators must be accountable for their impact, their cost and delivery against their objectives. Being able to demonstrate delivery against objectives gives regulators legitimacy by showing what they are achieving for consumers and society.
83. A model needs to be developed which will strengthen the accountability of the regulatory system in legal services. One of the key decisions for the independent review of legal services regulation that we propose above will be what the organisational status of the new regulator(s) should be. The regulator(s) may or may not be public bodies, and a full range of alternatives should be considered.⁴² However, due to the need in this sector for regulators to operate – and be seen to operate – independently of the state, in our view it may be best if accountability primarily operated through Parliamentary processes. A body need not be a public body to be accountable to Parliament, although it would need to be named in statute. The status of the body will have implications for (amongst other things) funding (see below) and arrangements for Board appointments.⁴³
84. There is ample evidence from across the UK economy that governance arrangements can and do exist that deliver regulator accountability without facilitating government interference in the substance of regulatory decisions and operations.⁴⁴ These

⁴¹ LSE Centre for Analysis of Risk and Regulation (2016) Regulatory agencies under challenge, p.5.

⁴² For example, in press regulation, there is a small public 'regulator approval body' that approves larger non-public body regulators.

⁴³ There may, for example, be an opportunity to build on recent measures, such as 'confirmation hearings' for key appointments to major public bodies, which are intended to strengthen the accountability of regulators to Parliament.

⁴⁴ The major UK economic regulators are accountable to Parliament rather than government, as is the Professional Standards Authority, the oversight regulator for health and social care professionals in the UK. A government white paper 'Trust, Assurance and Safety - The Regulation of Health Professionals in the 21st Century' set out a series of measures to ensure the independence of the national professional health regulators, including enhanced accountability to Parliament, see https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228847/7013.pdf.

arrangements sit alongside mechanisms which have a disciplining effect on the conduct of regulators and which provide assurance to government about the conduct and efficiency of regulators. Examples include the better regulation principles (see paragraph 25), the Regulators Code and regulatory impact assessments. Legislation might also create specific expectations about the transparency of any new legal services regulator(s), over and above the general expectation of transparency under the better regulation principles, on the basis that transparency is one of the key enablers of accountability.

85. The National Audit Office (NAO) scrutinises public spending for Parliament. In our opinion, legal services regulation should continue to be funded by providers rather than taxpayers, but scrutiny by the NAO would offer an important additional accountability mechanism.⁴⁵ The legislative reform measures suggested in this paper have considerable potential to deliver savings for providers and consumers – the scope for NAO scrutiny would provide assurance to both audiences that cost-effective regulatory arrangements were in place. This would build on our work on the cost of regulation which is encouraging greater transparency of regulatory costs and subjecting these costs to ever-closer scrutiny as part of its statutory responsibility to approve the level of practising certificate fee levied by the approved regulators each year.
86. Accountability can also be enhanced through relationships with other actors representing citizens, including consumer bodies. For a discussion of the latter, see paragraphs 88 to 96.

Wales

87. The devolved Welsh Government was established in 1999. While the LSA applies to England and Wales as a single jurisdiction, the Welsh Government does not have legal services regulation as one of its responsibilities; this remains reserved to Westminster. Nonetheless, any new legal services regulator(s) will wish to engage in a constructive manner with institutions in Wales despite this being a reserved area, not least because legal services interacts with almost all areas of social policy that are devolved. The establishment in 2014 of a specific Justice Policy Unit by the Welsh Government to cover legal services issues demonstrates the Welsh Government's interest in this area. The issue has also been raised as to the extent to which a distinct Welsh jurisdiction may be emerging within the England and Wales jurisdiction.

⁴⁵ Oversight by the NAO would also be important given that the effectiveness of regulation has an impact on publicly funded services such as legal aid.

Consumer representation

What the July 2015 paper said

Key issue

Does the regulatory framework need to give consumers a voice? If so, what is the best way to achieve that?

Options

1. An independent consumer panel
2. A remit for Citizens Advice
3. General duties to consult or establish mechanisms to obtain the consumer perspective

Our views on reform

We think that, as a minimum, there should be a general duty on the regulator(s) to consult and engage with consumers to help promote a consumer-focused regulatory culture. In addition, there should be an independent sector-specific consumer voice to ensure consumer representation through the regulatory framework. A decision on the exact form this voice takes will depend on the wider institutional architecture and should take account of the outcome of the Government's current consumer landscape review.

In more detail

88. We believe that legislation should at a minimum include general duties to consult and engage with consumers but that consumer representation should also be an explicit feature of the framework through a sector-specific consumer voice. The current arrangement in legal services, in which there is a consumer panel embedded within the LSB has been shown to be effective over the years⁴⁶. The precise form that the consumer voice takes in future will depend on decisions relating to the institutional architecture (see paragraphs 97 to 104) and should reflect current thinking on good practice in consumer advocacy. In particular, the Department for Business, Energy and Industrial Strategy is undertaking a review of the consumer landscape.⁴⁷ Whilst the focus of the review is primarily on utilities markets (specifically the energy, communications, water and transport sectors), the outcome of this work will contain relevant insights for the legal services market.

⁴⁶ The effectiveness of the Panel should be seen in relation to changing public discourse on legal services regulation as well as specific interventions that have shaped regulatory policy.

⁴⁷ <https://www.gov.uk/government/consultations/improving-the-consumer-landscape-and-quicker-switching-call-for-evidence>

89. As stated in the July 2015 paper, effective consideration of consumer interests by the regulator requires both direct engagement with the public through a range of mechanisms (for example, consultation and research) and engagement with consumer representatives. Regulators across the economy commonly undertake programmes of research to understand better the attitudes and experiences of consumers. This activity improves the quality of decision-making, helps them to balance consumers' and providers' interests, and increases the legitimacy of the regulatory system. Consumer representatives (individuals or organisations) contribute by filtering such research and other information to present an expert perspective on how the interests of consumers might best be promoted and protected on a given issue. As their name suggests, consumer representatives are not neutral but act on behalf of a specific stakeholder interest and seek to influence the decisions made by a regulator.
90. Setting out general duties to consult and engage with consumers on the face of the legislation should help to promote a consumer-focused culture within the regulator(s). The more difficult issue to address is whether, and if so how, a regulator should obtain the expert consumer perspective. Having an external consumer perspective does not, and must not, stop a regulator taking an independent view on where the consumer interest lies. Nor can a regulator outsource or delegate its responsibility to engage with consumers to the consumer representation body. However, a regulator must balance the interests of consumers with other interests to determine what is in the overall public interest.⁴⁸
91. A useful starting position would be to assume that there is no organised consumer voice and then to consider why legislation should make requirements in relation to consumer representation. There are potential disadvantages to consider:
- the cost of a statutory consumer body will ultimately be passed through to consumers
 - specifying in law the form that consumer representation should take might constrain a regulator from adopting more innovative approaches that could prove to be equally or more effective
 - national consumer representative bodies might be deterred from taking on responsibilities in this area, as they otherwise might do in the absence of intervention to create a statutory body.
92. There is a particularly strong justification for having some form of organised consumer voice in the legal services market for the following reasons:
- consistent with the consumer protection rationale for sector-specific regulation (see Annex A), there is an imbalance of information and power between consumers and providers which often makes it difficult for consumers to identify how their interests are best served by the regulatory system
 - developments such as customer review websites and other collective action mechanisms notwithstanding, individual consumers cannot easily mobilise to represent their collective interests. This contrasts with the position of providers who

⁴⁸ The LSA sets out that appointments to the LSB board should have regard to the desirability of having people with a range of knowledge and skills, including consumer affairs. However, the role of all board members is to pursue all of the regulatory objectives rather than to represent sectional interests. Therefore, whilst it is helpful to have specific consumer expertise on the board of a regulator, this is not comparable to providing a consumer representation function.

self-organise by setting up bodies representing different types of legal practitioner and can thus more readily collectively access and seek to influence a regulator.⁴⁹

93. Without a funded remit, our experience suggests that economy-wide consumer bodies would not fill the gap in the absence of a statutory sector-specific body. This is in no way a criticism of such bodies, but recognises the resource constraints under which they operate and their need to prioritise carefully. The LSB has received helpful input from Citizens Advice, Which? and similar bodies on specific high-profile issues. More generally, however, engagement (as measured for example by consultation responses and attendance at events hosted by LSB) has been intermittent. There are likely to be good reasons for this, including that:

- legal services does not attract the same level or regularity of consumer spending as in other sectors
- the often technical nature of this sector makes it difficult for consumer bodies to dip in and out, meaning that it is likely to be better for a regulator to have access to a dedicated, permanent, discrete consumer voice that can give the issues on-going attention (and such a body, in the form of the Legal Services Consumer Panel, exists)
- the issues generally do not achieve a high media profile.

94. One option could be for the consumer representation function for legal services to be given to Citizens Advice (funded by an industry levy)⁵⁰ as an alternative to replicating the existing embedded consumer panel arrangement. This could result in greater independence between the consumer representative body and the regulator, access to a cross-sector perspective and to its intelligence database from consumer contacts, and the scope to build on a well-recognised and trusted brand. However, there may be disadvantages, including a more remote relationship with the regulator, and dilution of focus on legal services regulation given the wide range of citizen and consumer issues that Citizens Advice works on. Citizens Advice and Which? are also major providers of legal services and this could raise issues of conflict of interests.

95. Statutory consumer panels currently operate in some other regulated areas of the economy as well as in legal services.⁵¹ The principal benefits of the embedded consumer panel model include the concentration of expertise on legal services regulation, ongoing input from the panel members who bring a range of perspectives, and access by the regulator to advice at the early stages of policy development. The location of the consumer body inside the regulator uniquely enables the sharing of documents and discussions during the policy formulation stage based on a relationship of trust supported by a regulatory framework with reciprocal duties and powers. It is also a relatively low-

⁴⁹ For this reason, the LSB considers, as stated earlier (see paragraph 75), that the introduction of practitioner panels or similar formal mechanisms for bodies representing different types of legal practitioners to engage with the regulator(s) should depend on a careful analysis of benefits and costs, informed by evidence of their effectiveness in other sectors, rather than being assumed by default.

⁵⁰ Citizens Advice is in part publicly funded and also already receives funding through industry levies on the energy and postal services sectors.

⁵¹ Statutory consumer panels are embedded within the FCA and Ofcom. Healthwatch England is formally part of the Care Quality Commission although it operates on a different basis.

cost model, especially in the context of consumer spending on legal services.⁵² There may be disadvantages with this model, however, including the risk of restricted thinking which does not take into account wider developments in other sectors, due to the exclusive focus on legal services. Nonetheless, the LSB's experience is that the model has worked successfully and this risk has not materialised.⁵³

96. Based on this analysis, we consider that there are a number of principles that should underpin the design of an independent sector-specific consumer voice. These are that it should:

- be independent of thought and evidence-based;
- combine an expert perspective on the consumer interest with an understanding of regulation;
- provide dedicated attention to legal services regulation issues;
- maintain a relationship of constructive challenge with the regulator(s);
- have access to sufficient dedicated resources but also provide good value-for-money;
- take into account developments and make connections across the economy; and
- have legitimacy amongst stakeholders and the public.

⁵² The LSCP's annual budget in 2014-15 (including salary costs for the secretariat) was £204,000. To put this in context, ONS estimates are that consumer spending on legal services was £32bn in 2015. Analysis suggests that the retail market serving individuals and small businesses represents around one-third of this total. Assuming a retail market of £11bn, the LSCP's costs would account for 0.002% of such spending.

⁵³ For example, the LSCP's recent response to the LSB commission on open data Opening up data in legal services included substantial reference to learnings from other sectors (available here: http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/OpenDataLegalServicesFinal.pdfhttp://www.legalservicesconsumerpanel.org.uk/publications/consultation_responses/documents/SRA%20Changes%20to%20PII%20June%202014%20final.pdf)

Future shape of the regulatory infrastructure

What the July 2015 paper said

Key issue

How should the legal services regulators(s) be structured?

Options

1. Separate regulatory bodies focused on professional groupings, with or without independence from representative bodies, and with or without an oversight regulator
2. Separate regulatory bodies focused on regulated activities, with independence from representative bodies, and with or without an oversight regulator
3. A single regulator with specialist sub-units or divisions (focused on professional groupings or activities, or possibly a flexible combination of both).

Our views on reform

We do not think that changing the institutional architecture should be the sole or main purpose of reform. Rather, the structure of the regulatory body or bodies should depend on the structure of the regulatory system.

On that basis, we believe that a single regulator covering the whole sector would best deliver the independent and activity focused approach to regulation that we are proposing. A single regulator would also reflect a market in which distinctions based on titles and types of provider are becoming increasingly blurred. Were Parliament to decide that more than one regulator were necessary, we believe those organisations should not have overlapping responsibilities.

In more detail

97. We do not consider that changing the institutional architecture for legal services regulation should be the sole or main purpose of reform of the legislative framework. Rather, the most appropriate structure for the regulatory body or bodies should flow from the structure of regulation itself and the decisions made about the scope and focus of regulation, as discussed in earlier sections of this document. It should be the structure which creates the most effective and efficient regulatory system, given these decisions. This is why the question of the appropriate institutional architecture in a reformed legislative framework is addressed at the end rather than at the beginning of this document.
98. As set out earlier in this document, we believe that consideration should be given to making the main foundation of regulation the activity undertaken, for those activities where a risk assessment process justifies the imposition of regulation (see paragraph

36). This avoids ‘hard wiring’ regulation around titles or types of provider in a market where such distinctions are becoming increasingly blurred.

99. Once that decision is taken, then an institutional architecture should be sought that:

- creates scope for significant economies of scale and scope by reducing the current duplication of back office functions and fragmentation of regulatory activity amongst eight different regulatory bodies and an oversight regulator⁵⁴
- increases transparency and clarity for both consumers and providers of legal services around which regulatory body to contact, and for the public more generally about the identity and role of the legal service regulator(s)
- increases the accountability of regulation by simplifying governance arrangements and making lines of accountability clearer; arrangements for accountability are discussed further in paragraphs 81 to 86, as part of the discussion of the importance of regulatory independence
- reduces the risk of regulators becoming more likely over time (due to the long term relationships with key providers) to serve the interests of providers rather than consumers or the public, for example a structure in which the regulator(s) are no longer exclusively responsible for, and associated with, one particular professional group
- brings decisions on relative prioritisation of areas for regulatory attention into a more coherent over-arching framework, and avoids a situation where resources are spent on issues of low overall consumer or public impact simply because a dedicated regulator exists for that part of the market⁵⁵
- enhances the consistency of regulation and reduces incentives for providers to ‘shop around’ between regulators to the potential detriment of consumers
- removes organisational barriers to knowledge sharing across the different branches of regulation
- makes it easier to attract and retain a workforce with the necessary expertise, skills and experience, by offering a greater range of responsibilities and opportunities.

100. In our view, a single regulator covering the whole sector would deliver these outcomes. It would be the best fit for the activity-focused approach to regulation that we are proposing and it would work ‘with the grain’ of changes in a market in which the traditional boundaries between professional groups are eroding. A single regulator would in no way force the ‘fusing’ of any professional groups, rather this would be a matter for the market and the professional groups themselves to determine. It is however important that regulatory structures do not entrench increasingly artificial distinctions between

⁵⁴ While the current integration of regulatory and representative functions in some of the Approved Regulators also allows the sharing of resources and costs, this seems to the LSB to be unlikely to generate net economies of scope or scale. This is because any such savings are likely to be more than offset by the costs to practitioners of the compulsory professional membership fees that accompany some of these arrangements, and the unquantifiable costs to practitioners and the public in general of delayed reforms and complex governance arrangements (see paragraph 72).

⁵⁵ On a similar note, we do not believe that it is inherently impossible for a regulator with a wide scope to have access to the necessary specialist expertise (in both legal services and in regulation itself) to regulate effectively across a sector as diverse as the legal services sector. For example, Ofcom as a communications regulator regulates the TV, radio and video on demand sectors, fixed line telecoms, mobiles, postal services, and the airwaves over which wireless devices operate.

professional groups and impede market innovation.⁵⁶ Moving to a single regulator would also be consistent with broader government initiatives relating to efficiency in public spending, streamlining regulatory frameworks and reducing the number of public and arm's-length bodies.

101. A radical reduction in the number of legal services regulators could also deliver – to an extent – some of the outcomes listed in paragraph 99. If Parliament were to decide that a reduction in the number of regulators was preferable to a single regulator, then we believe it is vital that the remaining regulators should not have overlapping responsibilities.

102. Clearly, if there were a single regulator, no oversight regulator such as the LSB would be needed⁵⁷. If instead there were fewer regulators with a more independent regulatory architecture and clearer lines of accountability, the need for an oversight regulator to ensure independence and consistency would also be much reduced or even removed – depending on the number of regulators, their functions and interrelationships.

103. The process for moving to a new regulatory framework and institutional architecture would need to be carefully thought through. For example:

- as set out in paragraph 35 above, there could be an initial independent review of which activities should be regulated and how, while the existing framework remains in place
- the new statute could be developed using the outcome of the independent review, and could set out the new regulatory framework, the new institutional architecture and the requirement for the regulator to carry out periodic reviews to update or recommend the updating of, the list of activities attracting sector-specific regulation as necessary⁵⁸ (see below)
- migration to the new regulator could then commence after a period of 'shadow running'
- transitional arrangements would need to be considered to manage the change from the old structures to the new ones⁵⁹, with use of sunset clauses as appropriate
- as also set out in paragraph 36, the periodic reviews by the regulator of the scope of regulation could be carried out thereafter (perhaps every five years or so, depending on developments in the sector).

⁵⁶ Representative bodies would of course remain free to target their activities at particular groups of providers and to tailor their offerings to those groups.

⁵⁷ Although, as noted above (see paragraph 83), one organisational model could involve a small public 'regulator approval body' that approves a larger non-public body regulator.

⁵⁸ If the new regulator(s) is responsible for updating, or recommending the updating of, the list of activities attracting sector-specific regulation, full accountability to Parliament (as discussed in paragraphs 81 to 86) is even more critical.

⁵⁹ We are conscious of the possible risks of transition to a new regulatory framework. Extra costs and uncertainty in the short term are features of many transitional periods and the key consideration is whether the expected long-term benefits of change are likely to outweigh these costs.

104. As noted above, we consider it likely to be appropriate that legal services regulation should continue to be funded by providers rather than taxpayers. A future legal services regulator would therefore need to collect a levy from the regulated community.

Annex A: the case for sector-specific regulation of legal services

Cross-economy consumer and competition law is designed both to promote and protect consumer interests and to encourage competitive markets which are able to serve those consumers' needs effectively. The justification for sector-specific regulation of legal services therefore needs to be considered carefully.

The primary rationale for sector-specific regulation of legal services is the public interest. This plays out in two primary ways:

1. There are public interest justifications relating to supporting the rule of law and the effective and efficient administration of justice. This includes public confidence in, and the positive externalities⁶⁰ of, the justice system (an example would be the benefit that arises to the entire population from clarification and enforcement of existing laws), as well as the influence that a strong judicial framework has in encouraging and framing the resolution of disputes outside the formal legal process.

Similarly, sometimes there will be a need to guard against negative externalities where third parties experience detriment because of the actions of a provider but have no formal relationship with them (an example would be the children in a family dispute who are adversely affected by incompetent advocacy on behalf of one or both of their parents).

An additional public interest argument relates to protecting and promoting the importance of English law and firms providing legal services to the UK's position in global markets and competition. English law as a governing law of choice in cross-border transactions (even where neither of the parties has any other connection with England and Wales) raises the profile and economic contribution to 'UK plc' of English and Welsh providers and practitioners. It also leads to the courts of England and Wales becoming the jurisdiction of choice for multinational dispute resolution and arbitration. The quality of judges, practitioners and providers, as well as the perceived and actual quality and independence of legal services regulation, is critical to maintaining this competitiveness in global commercial transactions and dispute resolution.

2. There is also a strong consumer protection justification, with several different dimensions. Most importantly, some activities within the legal sector carry significant risk of detriment (for example, holding client money), scope for irreversible loss or harm, or (for example, in criminal law) lack of choice about using legal services.

In addition, there are 'information asymmetries' inherent in the relationship between providers and consumers: the law is often complex in its content or process such that

⁶⁰ An externality arises when a transaction produces benefits (positive externalities) or harm or detriment (negative externalities) to parties beyond the provider and purchaser of a good or service.

lay people need to turn to trained experts for advice⁶¹, and might have very limited experience against which to judge the quality of the service they receive. If there is a dispute about the quality of service received, expert assessment will often be required to resolve it.

In light of these issues, general consumer protection regulation and remedies (such as relying on trading standards enforcement or resorting to formal legal action to resolve a contractual dispute) may be less adequate, satisfactory or timely than sector-specific protection. Given the features of the legal services market outlined in the previous paragraph, sector-specific regulation could even be argued to enable that market to exist, by:

- giving consumers sufficient assurance in the justice system and in the regulation of legal advice and regulation that they have confidence to purchase services;
- ensuring that rogue practitioners do not compromise the quality and credibility of legal services more generally; and
- allowing practitioners to act ethically without putting their reputations or livelihoods at risk.

⁶¹ Indeed, some of our most complex laws – such as those relating to social welfare, housing, and immigration – relate to matters of particular concern to some of the poorest and most vulnerable or disadvantaged members of society.

Annex B: the problems with the Legal Services Act and the current regulatory framework

The problems with the current regulatory framework arise from both its architecture and the widespread inflexibility that this architecture engenders. Chief among these issues are:

1. ***The use of a fixed list of legal activities (the six reserved activities) as the foundation for regulation.*** The current reserved activities are not the result of any recent, evidence-based assessment of the benefits or risks created by those activities. To the contrary, research has revealed that the LSA's reserved activities were largely 'an accident of history' or the outcome of political bargaining⁶². This has meant the regulatory settlement in the LSA represents a contentious starting point for a modern framework for the regulation of legal services.
2. ***The current approach of some of the regulators that, once a provider is authorised for one or more of the reserved activities, all non-reserved legal activities of that provider are then also regulated as a consequence.*** This extension of regulatory reach has some benefits⁶³ in that consumers are given greater protection than the law requires. In so doing, it also potentially covers any shortcomings that would otherwise arise from the current limitations of the approach to the definition and scope of the reserved activities discussed above.

However, this automatic extension of regulatory reach is not required by the LSA. Rather, it is a response to the existence of a fixed list of reserved activities that is not based on any assessment of relative risks. Inclusion by some regulators of non-reserved activities within scope may be justified in individual circumstances. However, the automatic extension of regulation is not explicitly based on targeted or proportionate responses to assessed risks to the public interest or to consumers. As such, although affording blanket consumer protection, it could amount to unnecessary 'gold-plating' of the approach to regulation. It imposes a regulatory burden and cost on providers that the law does not require and is not explicitly proved to be proportionate to risk. As these costs are imposed on all providers across the market, it is likely that they will be passed on, at least in part, in higher prices for consumers.

3. ***There is a 'regulatory gap' since providers wishing only to provide non-reserved legal activities to the public, and who are not otherwise authorised or licensed for reserved work, cannot be brought within the scope of sector-specific regulation, regardless of the risks posed by the activities undertaken.*** There is a growing alternative 'unregulated' market where consumers are not protected beyond general consumer law. There are benefits due to ease of market

⁶² Mayson & Marley (2010) *The regulation of legal services reserved activities – history and rationale*, Legal Services Institute: available at: <https://stephenmayson.files.wordpress.com/2013/08/mayson-marley-2010-reserved-legal-activities-history-and-rationale.pdf>.

⁶³ These benefits are also reflected in the scope of the jurisdiction of the Legal Ombudsman. By virtue of authorisation or ABS licence, the Ombudsman can consider complaints from consumers in relation to both the reserved and non-reserved legal activities of regulated individuals and entities.

entry and the potential for cheaper services for consumers. However, the corollary of the reserved activities not being risk-based is that some high-risk activities currently fall beyond the reach of sector-specific regulation. Further, although research suggests that consumers navigate the market rationally on the basis of their perception of the complexity of their matter⁶⁴, the users of such services often do not realise that they are not buying regulated legal services and that they do not have the protections that they might assume (such as the benefits of professional indemnity cover, and access to the Legal Ombudsman). The LSA provides scope for approved regulators to authorise providers operating in the unregulated market, while there is also provision for the Legal Ombudsman to establish a voluntary jurisdiction. However, in both scenarios, a key limitation is that it would be still only be voluntary for providers to participate.

4. ***The historic link between representative bodies and regulators has been largely preserved by the LSA.*** This has been the source of ongoing practical difficulties for some bodies as well as leading to perceptions of lack of independence between lawyers and their regulators, undermining the credibility of and public confidence in regulation. It can also mean that mandatory fees for practising are used to fund both regulatory and 'permitted purposes' under the LSA, regardless of the preferences of practitioners⁶⁵.

⁶⁴ See research on will-writing, available at: http://www.legalservicesboard.org.uk/projects/reviewing_the_scope_of_regulation/will_writing_and_estate_administration.htm. and online divorce tools <https://research.legalservicesboard.org.uk/wp-content/media/21104-BDRC-Continental-Online-services-Divorce-case-study-17-03-15-v2.pdf>.

⁶⁵ The Act gives approved regulators a choice whether to collect fees for 'permitted purposes' but clearly there is a natural incentive for them to do so. The lack of full separation between representative bodies and regulators also generates other problems which are set out in the main body of this document.

Annex C: future developments and regulatory agility

A wide variety of suppliers and consumers is a key feature of the legal services market. It embraces global commercial practices serving the wealthiest corporate clients as well as sole practitioners and self-employed barristers dealing with the everyday legal issues faced by families and small businesses, and a great deal else in-between. The sector is also changing in response to developments in technology, greater competition and changes in society.

A future regulatory system needs to be capable of being sensitive to this variety and responding in a nimble fashion to the changing operating environment. Our experience is that the LSA, which is 400 pages long and contains 214 clauses and 24 schedules, is overly prescriptive and does not offer the agility which regulators need to be responsive.

The concept of regulatory agility has been discussed outside the legal services arena, in particular by the Professional Standards Authority in its paper on 'right-touch regulation'. The PSA has suggested that 'agile' is made into a sixth better regulation principle: by which it means that 'regulation must look forward and be able to adapt to anticipate change'. Further, it explains that a regulator should 'foresee changes that are going to occur in its field, anticipate the risks that will arise as a result of those changes, and take timely action to mitigate those risks. At the same time, an agile regulator would not react to everything as changes may occur which do not need a regulatory response'.⁶⁶

To consider how any new regulatory framework could allow for future (possibly as-yet unforeseen) developments in the sector and more generally act in an agile way, we sought the views of a group of external commentators and met an infrastructure regulator with a similar interest in the appropriate extent of flexibility in a regulatory framework. From these discussions, the most relevant points were as follows:

- There is a careful balance to strike between giving regulators the agility to respond to changing circumstances and offering certainty for those regulated to allow for business planning and investment decisions. Regulatory certainty is also important for consumers, to build familiarity and confidence in the services offered.
- The style of regulation can have an equal influence on market conduct, for example choices about taking a rules-based or a principles-based approach, and good practices that make 'safe space' for innovation and experimentation by providers eg the FCA's 'sandbox' initiative.
- Ministerial order-making powers in underpinning legislation should be sparing, as these can compromise regulatory independence. In particular, it is problematic if Ministers have power to add or remove functions from a regulator.
- The more detail that can be provided on the face of any legislation about criminal offences in relation to licensing, the better.
- Greater scope for interpretation of legislation tends to carry a higher risk of litigation.

⁶⁶ Professional Standards Authority, Right-touch regulation: revised, October 2015. <http://www.professionalstandards.org.uk/docs/default-source/psa-library/151020-right-touch-regulation-revised-final.pdf?sfvrsn=0>

Annex D: the current regulatory objectives and professional principles

The eight regulatory objectives for the Legal Services Board, the approved regulators and the Office for Legal Complaints as set out in section 1 of the Legal Services Act 2007 are:

- protecting and promoting the public interest
- supporting the constitutional principle of the rule of law
- improving access to justice
- protecting and promoting the interests of consumers
- promoting competition in the provision of legal services
- encouraging an independent, strong, diverse and effective legal profession
- increasing public understanding of the citizen's legal rights and duties
- promoting and maintaining adherence to the professional principles.

The professional principles are also set out in section 1 of the Legal Services Act 2007 and are that authorised persons should:

- act with independence and integrity
- maintain proper standards of work
- act in the best interests of clients
- comply with practitioners' duty to the Court to act with independence in the interests of justice
- keep clients' affairs confidential.

Annex E: legal professional privilege

Background

Legal professional privilege (LPP) prevents lawyers who have given legal advice to a client in the course of a professional relationship from being compelled to disclose any communication between them made for the purpose of seeking or providing that advice (except where the client is seeking advice in order to commit a crime, or statute expressly provides otherwise). The privilege belongs to the client, not the lawyer (who therefore cannot disclose the communication even if he or she would otherwise wish to).

The privilege rests on the public interest in the rule of law, that is, in promoting access to legal advice so that citizens can understand their legal position or options based on a full disclosure of the circumstances, unfettered by concerns that their communications might subsequently be revealed by their lawyers. Such access is described as a fundamental human right.

The privilege only extends to communications with members of the legal professions, including those qualified in jurisdictions other than England and Wales as well as salaried in-house lawyers. It does not apply (for example) to chartered accountants giving legal advice on tax matters to their clients.

There are two types of LPP: advice privilege and litigation privilege. Advice privilege covers all instructions from, communications with, and advice given to, the client that are both confidential and directly related to the lawyer's performance of his or her professional duties as a legal adviser.

Litigation privilege is broader and applies to all confidential communications made when litigation is reasonably in prospect or has started. The communications in question are those between a lawyer and client, or between a lawyer and another agent or third party (who need not be legal qualified). Such communications must be made in order to seek or provide advice in relation to the litigation, or to obtain evidence for the litigation (or to obtain information that will lead to such evidence).

Privilege and the LSA

At the time of the drafting of the LSA, some thought was obviously given to the implications for privilege arising from the intended liberalisation of the legal services market. Section 190 of the LSA extends LPP to authorised individuals who are not barristers or solicitors who provide the activities of advocacy services, litigation services, conveyancing services or probate services. In these circumstances, any communication, document, material or information relating to the provision of those services will be privileged from disclosure in the same way as if the authorised person had been acting as a solicitor. The privilege is also confirmed to apply where the services are provided through an ABS and the communications are with a lawyer or authorised individual (or with someone who is acting "at the direction and under the supervision of" such a person).

For example, a firm of accountants that is authorised as an alternative business structure (ABS) under the LSA in relation to probate activities will be able to engage in privileged communications with its clients in relation to probate services. Privilege would not extend, however, to tax advice given by accountants which is unrelated to probate services – as

confirmed in the Supreme Court's decision in the Prudential case in 2013.⁶⁷ The Supreme Court decided that the extension of legal advice privilege to cases where legal advice is given from professional people who are not qualified lawyers raised questions of policy which should be left to Parliament.

An opportunity to rethink the appropriate extent of privilege

We consider that the present position conflicts with recent developments in the regulatory system. For example, by becoming an approved regulator and licensing authority under the LSA, the ICAEW has been assessed as having an adequate regulatory framework which is compatible with the regulatory objectives. The LSB considers there should be a level playing field in relation to privilege. Communications with providers who are authorised to provide legal services by approved regulators but who do not have a particular professional title should have the same degree of privilege as communications with members of the legal professions.⁶⁸ Otherwise, this is unfair to the client who has chosen to use such a provider and can distort competition between authorised providers because some communications would attract privilege and other communications of the same nature would not, simply because they were with a different type of provider.

Reform of the legislative framework for legal services provides an important opportunity to rethink the appropriate extent of privilege. We believe that there should be a wide public debate on this issue. If an activity-based approach to regulation is taken (see paragraph 35), then it follows that the extent of privilege may need to relate more closely to the activity undertaken as well as the risk associated with that activity, including whether the activity involves duties to the court.

⁶⁷ See <https://www.supremecourt.uk/cases/uksc-2010-0215.html>

⁶⁸ In this context, we note that the Supreme Court's decision in the Prudential case also contained a minority view that the availability of legal advice privilege depends on the character of advice which the client is seeking and the circumstances in which it is given, and not on the advisor's status, provided that the advice is given in a professional context.

Annex F: the role of judges in the ecclesiastical courts

The senior ecclesiastical judicial posts in England are the Dean of the Court of Arches and Auditor of the Chancery Court of York who preside over the ecclesiastical appellate courts for the provinces of Canterbury and York respectively. Both posts are held by the same person appointed by the Archbishops of Canterbury and York jointly, with the approval of the monarch (Ecclesiastical Jurisdiction Measure 1963, s. 3(2)(a)).

The Dean of the Arches and Auditor is, by virtue of his office, also Master of the Faculties to the Archbishop of Canterbury (Ecclesiastical Jurisdiction Measure 1963, s. 13(1)). The Master of the Faculties has been responsible for the appointment of notaries public in England and Wales (and certain other Crown dependencies and overseas territories) since the creation of his post pursuant to the Ecclesiastical Licences Act 1533 and he is now the approved regulator for notaries under the LSA. He is the presiding judge of the Court of Faculties of the Archbishop of Canterbury which, among other responsibilities, acts as the disciplinary court for notaries, although the Master delegates his judicial role in disciplinary cases to a commissary. His role as regulator is thus an administrative one and consistent with that of the other approved regulators and with the principles of regulation set out in the LSA.