Chief Executive's address to Westminster Legal Policy Forum

We are at a fundamental tipping point in the legal services market, as we await the first ABS firms opening their doors. But that tipping point has only been reached because of an equally fundamental change in the nature of legal regulation. And it is those changes that I want to explore today – because they are going to be reinforced over the next three years as the LSB and the bodies we oversee continue to both shape and respond to a legal landscape that's starting to change and develop at the same pace as other parts of the economy.

The changes emerged from a broad consensus that the previous regulatory regime was no longer fit-for purpose. Consumers were not being properly protected. Parliament concluded that it was wrong that lawyers ran the regulatory environment as well as their trade associations. Restrictions over who could own and run firms limited innovation and choice. Most strikingly, routes to complain about a lawyer were not seen as independent. At worst, they left consumers bewildered in a time consuming labyrinth.

Fast forward four years and the reality is very different:

- The first wave of ‘Alternative Business Structures (ABS)’ will begin to emerge next month, as will the implementation of Outcome Focussed regulation.

- We have a set of Internal Governance Rules to ensure the independence of the regulators – against which we are currently in our second annual round of certifying compliance.

- Last October, we saw the opening of the Legal Ombudsman. With almost a full year of operation under its belt we are beginning to see patterns in complaints that tell us about the market. And we may be seeing the first tentative indications of improvement in lawyers’ own handling of complaints.

That has been achieved by pro-active regulation by both the LSB and approved regulators, very different from the professional registration and disciplinary models of the past. But where do we go from here?

Who regulates and why?

Let's first revisit why regulation is needed at all when there is general agreement across all political parties on the need to do away with unnecessary regulation and increase transparency. We share that agreement – that's why many of our goals are about liberalisation and de-reregulation. But that doesn't mean that there's no role for professional regulation.

The most obvious need is to protect consumers – whether from bad advice, delay, unethical conduct or unfair costs. People and businesses employ the services of a lawyer at key transitional moments – mergers and acquisitions, divorces, when protecting a reputation or when answering criminal charges. Critical life moments and sensitive commercial junctures often mark the points when we need legal support.

In almost all of these cases, the stakes are so high for the consumer that they are unlikely to change lawyer mid case or exercise any other real buyer-power; and, crucially, they are vulnerable to price and work being bid up by the lawyer while

quality remains unchecked. Consumers need to be able to tell when that happens. And, importantly, there needs to be redress when it does – as it sometimes will as in any industry.

There has already been discussion today about “consumers” and “clients”. Consumer is the word used in the Act. “Client” implies to me equality of arms and information. I hope that we can move more buyers of legal services up to that level – but most aren’t there. They expect what any consumer expects – quality service at a fair price and honest, clear advice when there’s genuine uncertainty. In the vast majority of cases, that’s what a strong professional ethos delivers – but regulation is there to underpin that delivery. Regulation exists to protect consumers, not lawyers.

The previous system of self-regulation simply didn’t maintain public and consumer confidence. Its perceived lack of independence damaged the otherwise deservedly world-class reputation of the legal profession. As recent episodes, such as the Parliamentary expenses scandal and the hacking saga, have shown, self-regulation alone rarely offers the level of visible independence needed to maintain public

confidence. So, regulation needs to be – and be seen to be - demonstrably independent of professional interests.

This also means that it cannot be the function of the judiciary. While the Bench offers a vital check on issues of legality and makes an important contribution to regulatory debate, the role of Judges would be compromised if they took on a regulatory function, as happens in some jurisdictions. Their contribution in identifying poor performance is key – hence their vital role in the new Quality Assurance Scheme for Advocates - but the regulation needs to happen separately to the profession in all its forms – judicial as well as practitioner.

But independence matters for citizens as well as consumers. The LSB and the approved regulators have a duty to support the constitutional principle of the rule of law and a duty to protect and promote the wider public interest. Lawyers' independence from the state is a key constitutional tenet. The model of oversight regulation opted for by Parliament respects that principle. Far from bringing lawyers under the control of the state, the new model embeds statutory independence of legal regulation. The LSB upholds that independence unequivocally and will continue to do so.

The innovative model of regulation set out in the Act – free from both profession and state - may offer lessons for other industries – although, for the avoidance of doubt, I am under no circumstances bidding to take over either the supervision or direct role of the Press Complaints Commission!

The drivers for change

But independence alone, in the absence of strong standards and performance, doesn't protect consumers or help citizens. That is why we are now starting to work with approved regulators to build their capability and capacity.

Regulators need to be adept at detecting risks of consumer detriment, as well as quick to intervene to address it. As the market has changed, so have the risks. Most consumers expect their lawyer to use a mix of face to face, correspondence, telephone and on-line advice. As many as 50% of individual consumers make their initial contact by telephone; half of these never receive face to face advice. Technology means that the lawyer-client relationship can span countries and continents. Outsourcing and off-shoring have become much more important.

And consumers have much higher expectations. They no longer defer to the advice of their lawyer in the same way as, perhaps, their GP. They have an appetite to compare services and to exercise greater choice – although we are short of the instruments and information to help them do this effectively. But those instruments are coming.

Pressures are external as well. As public funding of legal aid falls, the sector needs to find ways to ensure access to justice. New and more flexible models of delivery must be a part of the answer.

Each of these changes brings opportunities and threats. New ways to deliver services bring with them different risks of consumer detriment that regulators need to address. We need to make sure that when the service does fall short - which inevitably it sometimes does - consumers identify the problem, know how to complain and can get redress. For those areas where regulators see consistent cause for concern, they need to react strategically – whether through rule changes or greater intervention or a combination of the two.

The challenge, then, is to constantly refresh regulation to fit these changed conditions. Where new practices have created new risks, we can't be bogged down in regulatory responses to the market conditions of ten or twenty years ago.

That doesn't necessarily mean more regulation. Sometimes consumers are already sufficiently protected through consumer or criminal law – and regulatory action shouldn't duplicate the general law. This is not about imposing unnecessary compliance burdens. Instead it's about targeting regulation most sharply at where there is greatest risk of harm.

So proportionality is core. We will intervene only so far as is required to ensure that protections in different parts of the market are adequate to offset risk of consumer detriment – and we expect the approved regulators to be similarly measured.

Access to the market

Opening up the market to Alternative Business Structures (ABS) has been just such a demonstration of proportionate and modernised regulation. The old restrictions over ownership didn't protect consumers. Instead, they dampened competition and sustained artificial professional boundaries, preventing lawyers from learning about innovative practices and cultures across other sectors.

But that doesn't mean a regulation-free zone for ABS. Building the licensing regime for ABS has been one of the core early priorities for the Board. That's about proper fitness-to-own tests, proper compliance within individual firms and – importantly – ensuring a level playing field that isn't rigged either in favour of new entrants or incumbents.

That framework allows much greater flexibility for both new and old law firms to shape their offer to consumers. External investment from a variety of sources is an option. And legal services providers will be free to deliver integrated services with other professionals – accountants, insurers, surveyors and maybe others. Experience from other sectors will add to

collective knowledge in relation to HR, IT and marketing. As an important footnote, I should add that we hope that the joint review of legal education and training will bring similar diversity and innovation, shaping a more diverse profession fed through more diverse access routes.

'How different will the world feel on 7 October?' Not very on 7 October 2011, but very different indeed by October 2015, I'd suggest. A combination of the innovation of providers and the appetite of consumers will determine the answer. Suggestions of a 'big bang' may prove overblown, but a swift pace of change will be set by the first and second waves to take advantage of the new freedom to innovate. Consumer demand – and how it is met – will decide which firms end up being winners.

Some have questioned the quality of compliance in a legal services provider which is managed by non-lawyers. The truth is that ABS has already created a dynamic for higher governance standards –in existing law firms as well as new entrants. The new roles – HOLP and HOFA – created by the Act have been adopted by the SRA for existing firms as well. These roles have clear duties to report to Licensing

Authorities and regulators. Our major priority in shaping the licensing regime has been to ensure no diminution of standards, professionalism or ethics. I'm confident that we've achieved it and that the putative Licensing Authorities will be equally rigorous in enforcing it.

Regulatory rules themselves

ABS will not only open the market, but is a pre-cursor for more effective regulation generally. Licensing Authorities will take an 'outcomes focused' approach which is grounded in the real consumer outcomes that are needed to meet the regulatory objectives.

Let me just comment on the concern expressed by the Law Society and others that a proliferation of Licensing Authorities might reduce standards, creating a "Gresham's Law" situation where bad regulation drives out good. That would be a real risk in the absence of the Legal Services Board holding the ring and guaranteeing standards. Let me be clear. We do not regard a multiplicity of regulators as a policy goal in its own right. We will be rigorous in assessing possible new regulators against the policy and managerial tests we have

defined. If they pass those tests and continue to perform effectively, they will have a role to play. But, if not, not.

We have made clear to all the bodies we oversee that we see an outcome focussed approach as a core building block of effective regulation. We think that it's essential to encourage innovation. And we think it shows proper respect for professional skills. Why should we expect those to whom we turn for advice in uncertain situations to have what they can and can't do spelled out as if they were at infant school? Our strong preference therefore is to see regulation based on clear prohibitions, rather than specific permissions, that may restrain professionals' ability to innovate.

Oversight of the landscape

Movement towards outcome focussed regulation underpins our regulatory oversight. As part of that role, we have to approve changes to regulatory arrangements. Increasingly, applications to become designated as new approved regulators and/or ABS Licensing Authorities will emerge. The LSB must ensure that regulators can exercise any new powers consistently if the public are to have confidence in the

overall framework. That's why, in looking at the applications we have received so far, we have concentrated as much, if not more, on the organisational capability of the applicants, as on the intellectual coherence of their rule book.

And we want similar rigour in assessing ongoing performance. We are currently considering comments on how we will satisfy ourselves that the approved regulators are acting consistently with the regulatory objectives. We think that there are four components of this regulatory 'jigsaw': outcomes-focused regulation, clear identification of differing risks in different parts of the market, proportionate supervision of individuals and firms against those risks and proper enforcement action. We want approved regulators to self-assess against these criteria and we'll use the outcomes of those assessments to inform our own view on where there is a need for action.

The scope of regulation

Another long-term piece of work involves a fundamental look at the scope of regulation.

Advice services in England and Wales are subject to different levels of consumer protection. Some - including the conduct of litigation, appearing in court on behalf of a client and conveyancing - are restricted as reserved legal services to certain types of lawyer. Oddly, other services - including employment law, general legal advice, guidance on welfare and will-writing - are not subject to that restriction. They can be delivered by providers who are neither qualified lawyers themselves nor supervised by them. In such cases, there's no recourse available to the Legal Ombudsman when things go wrong.

Many consumers at the moment need to adopt the 'buyer beware' principle – and too few of them know it.

The challenge is to get the balance right. Let's be clear. We are not going to preserve unjustifiable professional monopoly in the name of consumer protection. We are not going to simply read across the existing regulatory codes to all forms of new provider. But we are, for the first time, going to establish a clear framework to determine when to reserve and so trigger regulation.

When we say reservation is justified, we may mean reservation to properly regulated entities, quite as much as to individuals. And to all properly qualified individuals, rather than necessarily to lawyers alone. As with ABS, we want innovation and consumer protection. And it's possible to have both.

But this approach also means not being afraid to deregulate when the case is proven as well. It's right that we respond to the challenge of broader public policy and avoid duplication or unnecessary elaboration of regulation. Regulatory creep is an unpleasant phrase – and a dangerous phenomenon. It's not going to happen in the legal sector.

Our recently-published discussion paper identifies the areas we're considering examining specifically and talks about the investigation into will-writing which Elisabeth Davies described earlier. If regulation is the answer – and it very well may be – the Panel's findings about quality suggests that it may well need to be on a different model. That's an example of how we work – evidence-led, unbiased between old and new models and prepared to use the powers Parliament has given us.

Conclusions

What are the takeaway messages?

First, some priorities remain unchanged. Independence – from state and profession – remains crucial. We'll continue to police it vigorously. We'll continue to push for the profession to become a model for effective complaints handling. And we'll further embed competition.

Second, we're shifting the debate from regulatory architecture to regulatory performance and standards. The better the approved regulators do – on outcomes, risk, supervision and enforcement – the less, long-term need for an activist LSB.

Third, we need to resolve the scope of regulation. Protecting ever more effectively where we need to, removing regulations where the market will work effectively and securing more effective redress.

Above all, the consumer and citizen interest, in particular in relation to access to justice where the two interest align most closely, remain central. And I passionately believe that those interests are protected, rather than threatened, by greater plurality in the market.

Fit-for-purpose regulation regime is crucial to meet all of these challenges. I believe that the LSB and the bodies we are overseeing have shown in the past three years that we can meet them. But none of us are simply going to rest on our laurels. There’s a lot more work to be done. And the regulatory track record shows that we can do it.