Consultation response

Legal Services Board: Enhancing consumer protection, reducing regulatory restrictions

Overview

1. **The Panel's vision is a market where everyone can access high quality and affordable legal services that meet their needs. The best way of achieving this is by empowering consumers to drive competition between diverse providers. Regulation is sometimes needed to support consumers in playing this role due to inherent features of the market, for example the critical impact of legal services on the lives of users and others and the wide imbalance of power between consumers and lawyers. These factors will often create a bias towards regulation at some level, but rarely by restricting types of provider. In short, the LSB's role should be promoting competition between diverse providers within a regulated market place.**

2. **The Legal Ombudsman's jurisdiction should be proactively extended.**

3. **The flaws in the existing framework are a legacy of a system that has evolved in an unplanned way, but also one which has been designed from the perspective of providers instead of consumer needs. Market developments are exposing these flaws in sharper relief, creating an urgent imperative to build a modern regulatory framework suitable for the newly liberalised market place.**

4. **There should be a shift to risk-based regulation focused on the activity and on entities. However, there should remain a strong focus on individual responsibilities including the ultimate sanction of withdrawing practise rights.**

5. **The Legal Services Act provides the flexibility to achieve this, but much depends on the appetite, capacity and capability of the approved regulators to change. Their response will influence views on the sustainability of the current model as opposed to starting afresh with a single regulator which is entirely independent of the legal profession.**

6. **A key challenge in this more flexible approach is developing a simple and coherent regulatory landscape that consumers can make sense of. This is likely to involve rules requiring providers to make clear to consumers which activities they are authorised to offer and the different protections that are attached to each.**

The proposals

7. The Discussion Paper is about how the Legal Services Board will assess the boundaries of legal services regulation and connected regulatory decisions. It covers:

- The themes that the LSB has put at the core of its vision for legal services;
- The purpose of regulation;
- Analysis of flaws of the existing systems;
- The role of the Legal Ombudsman;
- Allocation of title to authorised persons and activities-based regulation;
- The choice between a general recasting of the boundaries of regulation versus a case-by-case approach;
- The LSB's proposed approach for assessing if regulation is needed;
- The implications for professional privilege;
- Which, if any, of the current reserved legal activities should be reviewed;
- The concept of a 'regulatory menu' – a set of tools for regulating legal services that can be deployed depending on the legal activity in question; and
- Other areas that might be reviewed in 2012-15.

The Panel's response

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

8. The LSB intends the following three themes to be at the core of its vision:

- Consumer protection and redress should be appropriate for the particular market;
- Regulatory obligations should be at the minimum level to deliver regulatory objectives; and
- Regulation should live up to the better regulation principles in practice.

9. The Panel considers the three themes are appropriate. On the second, the preference to rely on general consumer law rather than new obligations is desirable but should be seen with a strong dose of realism. Our work on will-writing found poor sales practices which breach the Consumer Protection Regulations but consumers lack a private right of action and thus must rely on public authorities to enforce these laws. This has meant that significant advances in consumer rights have not been matched by developments in accessing redress. Moreover, at local level, Trading Standards must juggle a large number of priorities and make difficult decisions about what not to address. Legal services will often be a second-order priority compared to other fair trading issues, while current funding cuts place even greater constraints on resources. Therefore, the LSB should seek to influence policy decisions related to the wider consumer landscape to create the

conditions that will enable this aspect of its vision to be realised, and to nurture relationships with front-line bodies responsible for enforcing consumer law.

10. The inclusion of better regulation as a core theme is supported. As well as addressing gaps in regulation it is important to improve the quality of existing regulation so it can enjoy public confidence. As the LSB identifies, linking together its work on regulatory boundaries and regulatory standards is key. The LSB is requiring the approved regulators to adopt more sophisticated approaches through its emphasis on outcomes and menu-based regulation, but are the smaller bodies in particular equipped to meet this challenge?

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

11. The Panel's vision is a market where everyone can access high quality and affordable legal services that meet their needs. We think this is best achieved by empowering consumers to drive competition between diverse providers. We also recognise the potential downsides of regulation in terms of limiting choice, adding costs that consumers ultimately pay for and stifling innovation. However, there are limits to consumer power given the asymmetries of information that result from inherent features in this market – e.g. the technical nature of law, infrequent use, vulnerability of some users and distress purchases. Another characteristic of legal services is the possible serious nature of consumer detriment – e.g. loss of liberty, high financial impact or emotional trauma. Furthermore, the consequences of legal services may be detrimental to third parties, whose avenues of redress are limited, and/or conceal detriment for many years or, indeed, which may never be revealed.

12. The consumer vulnerability dimension is important. We encourage stakeholders to use the BSI standard on this as a starting point for thinking about these issues.[1] This makes clear that all consumers are different with a wide range of needs, abilities and personal circumstances. These differences can put some consumers in a position of vulnerability or disadvantage during certain transactions and communications, potentially putting them at risk from financial loss, exploitation or other detriment. The standard identifies 'risk factors' related to a person's circumstances – such as bereavement, illiteracy, illness or disability – which could increase the likelihood of a consumer being at a disadvantage or suffering detriment.

13. These factors prompt regulation of legal services to some degree in order to assure consumers about the quality of advice they can expect to receive and ensure access to redress should this not happen. Moreover, the actions of lawyers often have an impact beyond those who purchase their services creating a wider public interest case for regulation. Yet no matter what factors are encouraging regulation, they should rarely justify limiting entry to legal markets to

certain types of provider. Instead, regulation should be seen as enabling and supporting consumers to choose between a mix of suitable providers with confidence. In short, the LSB's role should be promoting competition between diverse providers within a regulated market place.

14. The case of will-writing is instructive in highlighting that competition is not sufficient to protect consumers. This can be considered a competitive market given low prices and the variety and number of providers, but mystery shopping indicates that the quality of too many wills is poor[2]. The inability of consumers to detect poor quality wills, the potential severity of the consequences and the vulnerability of the client base build a compelling case for a regulatory model that seeks to both prevent detriment and provide redress for consumers, executors and beneficiaries.

15. The need to do more to empower consumers was the main theme of the Panel's Consumer Impact Report[3] – the first of our annual assessments of the legal services reforms. Our research shows that consumers generally do not shop around for legal services, cannot find information about the quality of different providers, approach lawyers with trepidation and lack the confidence to complain. However, this situation is unlikely to turn around by itself. Through opening up the market to greater competition through ABS, the LSB is stimulating consumer power through supply-side reform, but it needs to match this with an active agenda to equip consumers with the 'choice tools' that will enable them to demand more of providers following the lead of the government's empowering consumers strategy.[4]

16. The profession should try not to view such activities as a burden; the more consumers can drive market change through exerting their buying power, the fewer resources regulatory bodies need to spend on supervising firms. Seeing consumers as 'co-producers of regulation' is in fact a very efficient model of regulation.

17. Finally, it is important to remember the interests of other types of consumers who suffer the same imbalance of power as individuals. The Act gives the Panel an explicit role to represent a diverse set of consumers, which we take seriously. Research with small businesses[5] and small charities[6] indicates that they often do not realise how the law can benefit them and experience barriers accessing legal advice. Hence efforts to empower consumers should extend to all those who are less able to give voice to their own interests.

Q3. What are your views of our diagnosis of the weakness of the existing system and the problems within it?

18. The deep underlying flaw in legal services regulation is that it has evolved over time to reflect the way in which providers operate, rather than competition shaping the market and its regulation around consumer needs. It should be no surprise there is a mismatch between how consumers purchase legal services and regulation of the sector. The process of opening the market to new entrants is exposing these flaws in sharper relief, while the wider economic context is of convergence and joined-up service

provision to meet consumer demand for convenience. The LSB's review should align the regulatory landscape with how modern markets function.

19. The Panel agrees with the LSB's diagnosis in the discussion paper, in particular:

- The current list of reserved activities is not grounded in consumer protection considerations, but is rather an accident of history. This means that anyone is able to offer services which can have profound consequences for consumers without any checks on their competence or probity. Furthermore, they must follow no rules outside general law and do not have to offer consumers access to redress outside of the court system.
- There is confusion about what the list of reserved activities covers. This creates a situation where unregulated firms may unintentionally be trespassing into reserved areas without their knowledge and nor probably that of the regulators. The approved regulators have limited resources to police this fuzzy perimeter;
- Similarly, the definition of reserved legal activities is narrowly drawn, again for historical reasons not a consumer protection rationale. This has led to complex business structures which lack transparency and escape regulation;
- Consumers do not appreciate that some legal businesses are unregulated; this means they are not making informed choices and do not realise the risks, in particular the lack of remedies should the service not meet their expectations;
- Reservation until now has been used bluntly: it has been tied to types of individual thus restricting competition; and each legal activity is subject to the same regulatory arrangements with the effect that regulation is not risk-based. Historically, extending the list of reserved activities has been viewed as an extreme or last resort action. In fact, as the discussion paper reveals, the Act offers the approved regulators a good deal of flexibility around the conditions of authorisation they may attach; and
- The multiplicity of regulators 'with overlapping responsibilities for different reserved activities and with different approaches to regulation and different regulatory arrangements' only makes this situation more confusing.

20. The LSB has identified the separate business rule as a weakness in the current system, but it helps to hide the deep flaws highlighted above. The main purpose of the rule is to prevent solicitors from avoiding regulation by establishing a separate entity to conduct unreserved activities. The Panel considers it is vital to retain the rule given the existing reserved activities are very narrowly defined. Without the rule, the logical response of solicitors would surely be to establish unregulated businesses to carry out the majority of their work and sub-contract the small reserved element to separate regulated entities. This might be acceptable if the list of reserved activities was based on consumer needs, but this is patently not the case. Should the separate business rule be removed, consumers would lose the protections they currently enjoy without any proper analysis of whether these protections should be retained. The Panel's strong view is that the rule should be retained at least until such

an analysis has been conducted and the list of reserved activities has been rationalised.

Q4. In the light of the changing market do you think that specific action may be needed to ensure that more legal services activity can unequivocally be included within the remit of the Legal Ombudsman and, if so, how can this best be achieved?

21. The Panel's research shows that consumers assume all legal services are regulated.[7] They are unaware of the complex boundaries of legal services regulation until they experience a problem and try to find their way through the system. In reality, the vast majority of consumers use authorised persons and so their access to redress is simple, and should now be clearly signposted due to the first-tier complaint handling rule. Clearly, however, it is unsatisfactory that the remainder are choosing unregulated legal businesses unaware of the differing levels of protection and under the false impression they can obtain compensation from an independent ombudsman if something goes wrong.

22. We agree with the Legal Ombudsman that the situation is likely to grow in importance as the market becomes more diverse. As consumers get used to seeing non-legal ABS brands, they are even less likely to think twice about the implications for getting redress from unregulated providers. There is also the issue of services falling outside of regulation due to creative delivery models. There are examples in the Legal Ombudsman's annual report, for example where firms sub-contract the narrow reserved part of an activity to an authorised firm. Another issue is multiple redress channels, for example when banks provide ancillary legal services, such as will-writing, clients may complain to the Financial Ombudsman Service.

23. All this suggests that specific steps can be taken within the Legal Services Act to reduce consumer confusion. The Office for Legal Complaints should extend its scheme rules. Ombudsmen in different markets should co-operate more closely to provide joined-up redress. Regulators should retain the separate business rule to prevent firms from escaping regulation. The LSB should take forward work to make it simpler for consumers to know whether a provider is regulated. However, while valuable, these initiatives would not address the underlying issue of redress gaps resulting from the narrow list of reserved activities.

24. The Office for Legal Complaints has powers to establish a voluntary scheme; this could be used to extend redress across a wider range of legal activities on a case-by-case basis or more generally across the market. In a competitive market this should be attractive to any legal business wanting to signal its commitment to consumer protection. We can envisage how the LSB, working alongside the OLC, could negotiate with a trade association or group of unregulated businesses to enter a wide voluntary scheme established by the OLC. Of course, the key limitation of voluntary schemes is that they are voluntary. In this case, the LSB might establish a limited form of reservation where the consumer protections put in place are solely confined to redress arrangements.

25. Widening the Legal Ombudsman's ambit would be consistent with government policies to encourage alternatives to the courts for resolving disputes. In addition to giving consumers access to fast and fair redress, this would act as a deterrent against poor practices and provide a more level playing field in the market as a whole. Finally, if consumers had access to the Legal Ombudsman, this would be likely to reduce calls to regulate firms in a more comprehensive fashion.

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

26. One benefit of regulating through protected title is that consumers can tell regulated and unregulated providers apart and thus gain assurance about the quality of work and ethical standards they can expect. Approved regulators can make this assurance real by closely controlling entry requirements for each individual they regulate. A struck-off practitioner has nowhere else to register, which should act as powerful behavioural constraint. Of course, regulation does not always deliver these benefits in practice.

27. Another benefit is that consumers receive blanket protection across the full range of legal services provided by authorised persons. This reinforces standards of behaviour across the market and enables consumers to obtain redress on a similarly wide basis. This argument would be less easy to justify if the reserved activities had been chosen on consumer protection grounds as the coverage of regulation would be disproportionate to the known risks. However, in the absence of such a consumer-centred analysis, protection through title provides an important catch-all safety net for consumers.

28. There are important downsides, however. One is that protecting title can limit choice for consumers, especially when the entry bar is set too high. The lengthy qualification routes in some parts of the profession pose a high entry barrier; the price of legal services must in part reflect the investment in training that titled professionals have to make. An issue in legal services, especially as specialisation becomes increasingly common, is that training requirements for solicitors often bear a weak relation to the services they end up delivering once qualified. For example, requiring someone who only wishes to write wills to undergo the full solicitors training regime creates unnecessary entry barriers. Equally, the current system creates a misleading impression of what a protected title offers consumers as compulsory training on wills for solicitors is quite minimal.

29. The consumer clarity benefits of regulating through title are less relevant in the newly liberalised market as consumers receive identical protections when buying services from an ABS firm authorised and regulated by the SRA as they would from a solicitor. Similarly, consumers may draw false meaning from a professional title, given it is quite common for routine work to be passed on to paralegals or this is outsourced. We agree with the Legal Services Institute that use of a professional title as part of a business name should be reviewed.[8]

30. The Legal Services Act is crafted so that a 'person' may be an entity as well as an

individual. There is now a greater appreciation of the importance of organisational-level systems and controls in mitigating risks to consumers. The focus on entities is very welcome, but it is desirable to retain a strong focus on individual responsibility within an entity-based system in order to reinforce the importance of professional ethics in the relationship between practitioner and client – and the prospect of personal consequences if these conduct standards lapse. In this context, we are alert to the possibility that the best interests of clients may not be in the best interests of the entity. The ABS reforms include fitness to own tests and allocates responsibility for ensuring the vital consumer protection safeguards to two compliance officers – the Head of Legal Practice and Head of Finance and Administration. However, a strong focus on individual responsibility should apply throughout the firm with codes of conduct providing the key hook. Whether or not it is necessary to retain protection of title to preserve this dynamic is unclear.

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

31. The Panel would like to see a shift towards activity-based regulation. This reflects that legal services are changing, with firms increasingly specialising in particular areas of law. The existing blanket approach is also not risk-based failing to respond to a market which is hugely varied in terms of its provider base and range of activities. As seen in the case of will-writing above, the system both imposes unnecessary entry requirements for specialists and yet the general professional qualification is not sufficient to deliver competence. There are important questions to address, namely: in which circumstances are the general professional qualification necessary (for example to develop a broad understanding of the legal issues); and in which additional or alternate circumstances are subject and skill-specific qualifications necessary.

32. The Panel considered these issues in its report, *Quality in legal services*. We concluded there is a case for additional qualification requirements in practice areas where it is necessary to demonstrate knowledge, skill or experience as a pre-requisite to provide competent advice. We noted this is already a feature in the market as the Quality Assurance Scheme for Advocates will be mandatory for anyone wishing to undertake criminal advocacy work; this may expand into other areas. Moreover, ILEX and the Council for Licensed Conveyancers already operate a system of licensing by activity. At the same time, we recognised that specialists are not needed in all practice areas, especially in transactional work such as conveyancing where much of the process is carried out by paralegals (under supervision). Moreover, too much specialisation might narrow the expertise of legal advisors, meaning they fail to recognise the full range of client issues and fail to provide holistic advice.

33. We do not consider it can be left to the market to send signals about professional competence in specialist areas of law. A forthcoming report by the Panel explores the role of voluntary quality schemes. While credible schemes could harness market forces to help consumers this should not be a substitute for regulators setting minimum entry standards when the risks demand. Such schemes are currently a weak influence on consumer choice and it is unrealistic to expect ordinary consumers to know when they should use a member of a voluntary quality scheme in order to obtain adequate legal advice. Putting too great a reliance on voluntary schemes to safeguard quality would transfer too much risk to consumers.

34. Entry controls should vary depending on a case-by-case rather than a blanket basis. Also, the legal services market should be open to any business that can demonstrate the ability to meet the required standards not just the traditional professions. The precise mechanism for achieving this is something that the Panel wishes to give more consideration to as part of the joint regulators' education and training review.

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

35. The Act leads the LSB to redraw the regulatory boundaries section by section, but of course government could decide to rip up the existing framework and start over. There is a view that anyone wishing to provide legal services should be authorised. Such a model would not preclude lawyers from being differently regulated depending on the risk they present. At one extreme regulation might be limited to a simple registration requirement plus being brought within the Legal Ombudsman's jurisdiction with tiers built above this aligned to the LSB's regulatory menu concept. There could be exemptions to deal with situations when regulation would be disproportionate, for example when a person is already subject to adequate regulation.

36. This approach has some attractions. It would recognise the role of providers as trusted advisors and reflect the importance of legal services to its users and society more widely. There can be few legal activities where the potential consequences of poor advice are not serious, which regulation could help to prevent (although not eliminate). This system would in fact reflect the whole-market regulation to which existing authorised persons are already subject by virtue of the professional rules attached to their title. It would also align legal services more closely with the financial services sector where the regulatory net is widely cast: if most money advice is regulated, why not legal advice? Regulating legal advice broadly would address some limitations of activity-based regulation from demand and supply sides: consumers experience problems in clusters and often need holistic advice, while business structures are not divided into neat parcels. It would better deal with the issue of firms escaping regulation by exploiting loopholes that are present in the current piecemeal system.

37. However, this approach has significant drawbacks. It is not immediately obvious what a broad definition of legal advice would cover and therefore who would be captured. Setting unnecessary entry controls is likely to make legal services more expensive, as is arguably the case in the United States where the regulatory net is drawn very widely. There is a risk that a more general approach could reduce choice between different types of provider. A closer look at individual markets often reveals a wider provider base than is first imagined, for example will-writing providers include: accountants, banks, building societies, charities, community interest companies, independent financial advisors, solicitors and other authorised persons, trade unions and unregulated will-writing businesses. Regulation could unwittingly drive some of these actors from the market or deter new actors from entering.

38. We recommend however that the LSB undertake a mapping exercise of the unregulated legal services market in order for stakeholders to have a better shared understanding of the full range of actors, the legal services they provide and the consumers they serve. Since some legal services are credence goods – when quality is not observable even after the event – the LSB should not rely on complaints data as a trigger to act, but instead proactively explore the full landscape to work out where the key risks to consumers lie.

39. The Panel's comfort in persisting with a case-by-case approach partly depends on decisions relating to other parts of this discussion paper. For example, removal of the separate business rule would potentially greatly increase the size of the unregulated market and make the need for a general recasting of the boundaries more urgent. Extension of consumer redress through widening the Legal Ombudsman's jurisdiction would create a less immediate need to control entry to additional areas, as consumers could at least be compensated if they receive a poor service.

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

40. We think the proposed approach is sensible and welcome the focus on evidence balanced by an acknowledgement of the need to exercise judgement in the absence of a comprehensive evidence base. The Panel also welcomes the publication of prioritisation principles; such transparency enables stakeholders to frame requests for reviews appropriately and promotes more efficient use of resources for all.

41. We caution against an overreliance on evidence of consumer detriment, because its extent is not always apparent, and sometimes it is difficult to even identify. However, the LSB should have appropriate regard to the risks of consumer detriment, taking into account the severity of impact as well as frequency. It is important to assess the risks of a failure to regulate as well as assessing the costs of regulation. The Panel also recognises that there may be a wider public interest case to regulate that goes beyond a consumer detriment analysis. For example, a pure evidence-based approach would lead to the deregulation of the conveyancing market

given high levels of consumer satisfaction, but no-one is seriously suggesting this.

42. The review process involves multiple stages and so there is a danger of progress being too slow. For example, the statutory period for Section 24 and 26 investigations is up to 21 months after the start of the formal investigation notice, plus 90 days for a decision by the Secretary of State and then there is a transitional period for implementation in which bodies have to apply and become approved by the LSB as regulators. In the case of will-writing the decision to reserve might take 26 months after the LSB requested advice from the Consumer Panel. This is of particular concern where new markets emerge posing serious risks to consumers and action needs to be taken urgently. By contrast, a new claims management regulator was up and running less than two years after the government decided to regulate the sector – and this required primary legislation. However, we acknowledge that much of the process is derived from the Act giving the LSB little freedom to adapt. We hope this will be addressed when the legislation is next reviewed.

43. The clear commitment to involve the Panel early on and throughout the review process is very welcome. Ensuring that a review begins with a strong consumer focus makes it more likely it will end that way. We also welcome the acknowledgement that the threshold for determining whether to conduct a full Section 24 or Section 26 investigation will likely be lower when the request is made by the Panel or other bodies named in Schedule 6. This appropriately recognises our statutory status and the limited resources at our disposal to obtain evidence. There are parallels with the super-complaint process, which is intended to be a fast-track system for designated consumer bodies to bring to the attention of the OFT and other regulators, market features that appear to be significantly harming the interests of consumers. The guidance for consumer bodies states the objective of presenting the case is to help the receiving authority undertake a full appraisal and bodies are not expected to provide the level of evidence necessary for the OFT or a Regulator to decide that immediate action is appropriate. However, they should present a reasoned case for further investigation.[9]

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

44. The Panel recognises the consumer benefits of legal professional privilege (LPP), in particular allowing people to discuss their legal rights and duties in confidence with a trusted advisor. These benefits mean that competition in the legal services market could be distorted if the ability to offer advice protected by LPP is withheld from suitably qualified persons in the absence of a clear and defensible rationale. There is also an issue of consumer confusion as people not unreasonably assume that regulated legal advisors can offer equivalent protections.

45. We are aware of the Supreme Court case, and the LSB's intervention, and would welcome an early resolution of the issue.

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

46. See question 12.

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

47. The Panel sees the attractions of the regulatory menu as offering a more flexible and risk-based approach. The legal services sector has great variety and so the risks to consumers in one area may differ from other activities. This can impose unnecessary costs on authorised persons which ultimately increase prices for consumers. For example, the minimum level of professional indemnity insurance for solicitors is £2 million, yet the work of some providers is limited to activities that carry a far lower risk. Other solicitors do not handle client money, yet they must still contribute to the Compensation Fund.

48. The LSB needs to balance the benefits of tailoring regulation according to the legal activity with the need for a simple and coherent system that consumers (and providers) can make sense of. Adding the concept of menu-based regulation to a market in which there are already multiple regulators, some of whom operate in the same legal areas, risks creating confusion. Unless handled with care, the LSB may end up rationalising the list of reserved activities but making the regulated part of the legal services market more complex to navigate. At the very least, a menu-based system is likely to require providers to make clear to consumers which activities they are authorised in and how the protections differ. There is a separate yet related issue of helping consumers to know when a person is regulated or not. The LSB has previously accepted the Panel's recommendation to examine how best to achieve this including the feasibility of a single regulatory badge.[10]

49. We also encourage the LSB to consider how regulatory competition should operate within a menu-based system. Presumably, organisations wishing to regulate certain activities may propose to include different ingredients within their respective menus. Consumer bodies will be keen to avoid a race to the bottom and have to trust that the LSB will insist on the same core minimum ingredients being present in all regimes. Above this floor, we question how desirable it is from a cost, confusion and competition perspective for a plethora of regulatory systems operating for the same activity. Indeed, should regulatory competition lead to a race to the top – an arms race over who offers the toughest regulation – would not this lead to gold-plating of regulation? These tensions are present now but arguably they become more acute in a menu-based environment.

50. Our will-writing investigation has confirmed to us the desirability of open markets: the evidence shows that will-writing companies have a valuable role in the market, but this legal activity presents risks which justifies its regulation. Moreover, the performance of solicitors in this exercise was disappointing. On this basis, should regulation be introduced it is important to ensure that a wide range of providers continue to offer choice for consumers. This is best achieved through a regulatory system focused on

entities rather than professional titles. We hope that existing approved regulators will open their doors to a wider range of entities as the Act foresees.

51. The Panel recognises it is easier for regulators to create a menu-based regime for new areas of legal activity compared to retrofitting this for existing authorised persons providing services in currently reserved areas. The key challenge perhaps lies in the qualifications regime given this sets the most significant entry hurdle, so it is important to align work on the boundaries of regulation with the joint regulators' education and training review.

52. It is important that approved regulators respond positively to this challenge as there may not be a suitable alternative body to fill the gap and the prospect of the LSB as regulator of last resort is unappealing. The LSB has levers through the requirement for existing approved regulators to apply to regulate new reserved areas, but what will it do if there is insufficient will on the part of the approved regulators to change? There is the possibility of stalemate.

53. This leads to a wider point: that the sustainability of the current framework depends on the ability of its participants to use the flexibility contained within the Act to modernise legal services regulation for the newly liberalised market. This involves a shift from regulation through title towards a more flexible system focused on the varying risks that different legal activities present to consumers. If regulators are unable to meet this challenge then the Panel will look to legislators to develop a brand new regulatory framework.

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

54. Questions 10 and 12 are taken together. The prioritisation principles in Annex 4 of the discussion document should apply to the reserved and unreserved activities alike. Therefore the key consideration should be the scale and severity of consumer detriment, or the potential for such detriment when the evidence base is limited. This should include analysis of consumer vulnerability issues using the framework provided by the BSI standard, as described in paragraph 12.

55. A contributory factor in the LSB's analysis of priorities should include the role of regulatory agencies other than the approved regulators and quasi-regulators. For example, for legal aid work the Legal Services Commission provides a valuable quality monitoring role through the checks and controls that it requires as part of the contract process. Proposals to narrow the scope of legal aid provision, which is likely to see withdrawal of public funding from areas of social welfare law, would remove this quasi-regulatory support. Commenting on which areas of law should be included within legal aid goes beyond the Panel's jurisdiction, but we have an interest in the impact of such decisions on consumer protection. For the purposes of the LSB's discussion paper, its prioritisation process should take into account the reduction of quality regulation in legal services serving the most vulnerable client groups. Another factor here is to what extent social welfare

work will be carried out by authorised persons or unregulated providers in future.

56. The discussion paper highlights that some of the reserved activities are narrowly defined. For example, the entirety of the conveyancing process is not regulated, only the transfer of land or property. Similarly, reservation of probate is limited to applying for or opposing the grant of probate or a grant of letters of administration. The Panel is aware of unregulated companies which provide the unreserved elements of these activities and refer the reserved bits to an authorised person thus escaping regulation. These are major areas of economic activity with serious consequences for consumers and others if legal advice is substandard. Given the risks to consumers extend beyond the reserved elements of these activities we consider there is a strong case to review them as an early priority. In the case of conveyancing, these services are also used by small businesses which may be in an equally vulnerable position as individual consumers moving home, and so any review should also include their needs.

57. We agree that the LSB should also consider where activities should no longer be reserved as restrictions on competition are also a cause of consumer detriment. However, we see no urgent reason why any of the existing reserved areas should be reviewed. The Panel will be commenting separately on the case of probate.

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

58. The Panel is naturally pleased that the LSB has initiated the formal Section 24 and Section 26 investigations following our advice. We have no further comments to make at this stage.

November 2011

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1 BS 18477:2010, *Inclusive service provision. Requirements for identifying and responding to consumer vulnerability*.

2 IFF Research, *Understanding the consumer experience of will-writing services*, June 2011.

3 Legal Services Consumer Panel, *Consumer Impact Report 2011*, June 2011.

4 Department for Business, Innovation and Skills and Cabinet Office, *Better Choices: Better Deals, Consumers Powering Growth*, 2011.

5 AIA Research, *Legal Advice for Small Businesses: Qualitative Research*, Legal Services Board, May 2010.

6 MVA Consultancy for the Consumer Panel, forthcoming.

7 Legal Services Consumer Panel, *Quality in Legal Services*, November 2010.

8 Legal Services Institute, *The Regulation of Legal Services: What is the Case for Reservation?*, July 2011.

9 Office of Fair Trading, *Super-complaints – guidance for designated consumer bodies*, 2003.

10 Legal Services Board, *Quality in legal services: Response to advice from the Legal Services Consumer Panel*, May 2011.