The Law Society

Enhancing consumer protection, reducing regulatory restrictions

The Law Society response

4 November 2011

supporting solicitors

Introduction

The Law Society is the representative body for over 140,000 solicitors in England and Wales. The Society represents and supports solicitors, negotiates on behalf of the profession and lobbies regulators, government and others. The Law Society welcomes the opportunity to comment on the Legal Services Board's (LSB) discussion document on 'Enhancing consumer protection, reducing regulatory restrictions'.

Regulation exists for a number of reasons but particularly to:

- protect the public interest by ensuring integrity in the provision of legal services and
- ensure protection of the public in matters of significant importance to them

It is essential that both aspects feature in any discussion of regulation. Professor Stephen Mayson puts forward strong arguments as to why there is a strong modern justification for reservation with which we agree.

The regulatory objectives identify a range of objectives for the LSB which need to be balanced against each other carefully. We believe that protecting and promoting the public interest should be an overriding objective as it is integral to all other objectives. The regulation of law needs to put the public interest foremost because it must ensure that the rule of law is upheld and the administration of justice protected.

Much of the paper discusses standards. However, the use of the term 'standards' masks the important ethical dimension that is embedded in the professional principles. The professional principles underpin much of the regulation of legal services. Unlike ordinary standards or rules they do not set targets or requirements for practitioners to meet. Instead they require that practitioners apply the principles to every aspect of their practice, so that they behave in an ethical manner. Standards and rules guide practitioners in how they may meet these principles but frequently practitioners must rely on their own ethical judgment to decide how best to meet them.

These principles do not always align with regulation predicated primarily on the interests of consumers. An advocate cannot knowingly mislead a court even if it might be in the best interests of his client. To allow conduct that responded solely to the wishes of the client would be to undermine the administration of justice. These principles set regulation of legal services apart and are fundamental to ensuring the integrity of the legal system. They must underpin any examination of the extent to which legal services should be regulated.

It is inappropriate for the LSB to use of the term ‘professional monopolies’. The term appears intended to be disparaging. It is in any event inaccurate, particularly as it seems to be applied to only certain types of authorised persons, namely solicitors and barristers. Solicitors and barristers compete with each other and with other authorised persons, as well as with unregulated providers in the legal services market. That market is far wider than the narrow legal activities that are reserved.

To describe reservations of certain legal services to lawyers as a professional monopoly appears designed to mislead. Whilst solicitors do not hold a monopoly over

the legal services market, solicitors remain the first choice for many consumers. This is because most solicitors provide a professional service that clients trust and value, and solicitors work is effectively regulated so that there is outstanding client protection. Research amongst consumers of legal services demonstrates the very strong levels of satisfaction reported by solicitors' clients.

We note that this document is a discussion paper and as such does not put forward any firm policy proposals. However, any proposals arising from this discussion paper should be subject to a full and thorough equality impact assessment as well as further consultation.

We have answered the consultation questions in more detail below.

Question 1: 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?

The regulation of solicitors provides consumers with strong protection that they can have trust in. We believe all approved regulators should provide the same level of protection.

We are disappointed that the wider public interest is not also considered specifically. The regulation of legal services has never been predicated solely on consumer protection but has also always had the dual role of ensuring the public interest is protected. As, Professor Stephen Mayson's paper highlights, one of the overriding reasons for the reservation of many legal activities is the public interest in the integrity and fairness of the justice system. This needs to underpin regulation. In the legal services market, this is because there are frequently two or more sides in matters that the law seeks to regulate. There is a significant danger that the LSB's focus on consumer protection may prevent it from understanding the importance of regulation to the justice system as a whole and thus to the public interest. The importance of ensuring the public interest is protected and that public confidence in our legal system is maintained are core regulatory objectives and should be at the centre of any vision on the regulation of legal services.

We agree that the principles of better regulation need to be at the core of a vision of regulating a legal services market. These principles should be fundamental to any regulatory system. We also agree that regulation should not be 'gold-plated'. For regulation to be successful there is a need for it to be consistent for all providers of the same types of service. Lack of consistency around the scope and enforcement of the regulation of legal services causes confusion for consumers, and undermines confidence of those consumers and the wider public. This will, over time, negate one of the main aims of regulation. We have particular concerns, for example, about the differences between the rules governing licensed conveyancers and solicitors in respect of conflicts of interests. These differences are unlikely to be understood by the public but may well affect the quality of services and the outcomes that are achieved.

The LSB states that it has a mandate to put consumers at the heart of the regulatory system. We do not consider that accurately describes the LSB's statutory duties. The regulatory objectives identify a range of objectives for the LSB which need to be carefully balanced against each other. Protecting and promoting the public interest is the overriding objective that should be integral to all other objectives.

Another key element of the legal services market is the professional principles. These form the bedrock of the regulatory systems associated with the legal services market and apply to all legal professionals. They embody the ethical principles that all legal professionals must uphold. These principles should be at the centre of any vision of the regulation of legal services and a vision of the wider market in general.

Question 2: 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?

The role of professional regulation goes beyond the highlighted protections. It must serve the public interest, as well as the interest of consumers. This was recognised by Dr Decker and Professor Yarrow in their paper on 'Understanding the economic rationale for legal services regulation'. Certain regulatory standards are essential if the rule of law is to be maintained. The paper speculates that changes in the regulatory framework, beyond those implemented by the Legal Services Act 2007, may increase competition and lower costs. However, the paper offers little evidence to support this claim and we are unaware of any empirical evidence to support these conclusions.

As the main functions of a regulator are to protect the public interest and, where relevant, the consumer interest, the regulator should set the minimum standards needed to ensure protection. It is not the role of legal regulators to seek to control the market. Decker and Yarrow highlight that there is no current rationale for competition regulation in the legal services over and above that provided by EU competition law. As they have highlighted, where regulators and others do seek to control or change markets it often has unintended consequences, as organisations will seek to manipulate regulatory interventions to their own advantage. We therefore think it is unwise, as well as outside its intended purpose, for the LSB to seek a role in market regulation beyond ensuring a level playing field between regulated bodies and that there are no unjustifiable barriers to competition.

We note that throughout the paper there is underlying theme that there is no competition in the legal services market and that it is a ‘closed shop’. This is wholly inaccurate. There is currently a full and diverse range of legal service providers within the market (both regulated and unregulated) and there is fierce competition for work in all sectors of the market. There is no lack of innovation within the regulated market and there are a range of ways in which consumers can access legal services. The European Commission will confirm that the market for legal services in England and Wales is amongst the most competitive in the EU.

The LSB assumes as an objective, the need to have a range of options for consumers at different prices. However, it is not clear what this means in practice. Differing prices often indicate different offerings and products. This was shown in the LSB Consumer Panel's paper on will writing. Consumers who bought online wills or 'off the shelf' wills were buying a very different product, at a very different prices, and often a product that was unsuitable for their needs. It is legitimate for the LSB to seek to ensure that authorised regulators enforce acceptable standard for regulated services; that there is scope for providers to offer enhanced levels of service at additional cost; and that consumers are fully aware of the level of service they are purchasing. Beyond that, we do not think there is a proper role for the LSB.

Question 3: In light of the changing market do you think that specific action may be needed to ensure that more legal services activity can unequivocally be included within the remit of the Legal Ombudsman and, if so, how can this best be achieved?

The Law Society has previously highlighted the need for some activities, such as will writing to be reserved, and therefore to fall under the remit of the Legal Ombudsman (LeO).

We believe that difficulties will arise where activities come within the remit of LeO without them becoming reserved and, therefore, regulated. If the provider is not

regulated, there will be significant difficulties in enforcing co-operation, enforcement of adjudications and payment for the Ombudsman's services without expensive court action. We are aware that LeO has suggested that it might work with trade associations rather than individual unregulated entities. However, trade associations have limited powers over their members and normally the only sanction they can apply is to revoke their membership. Trade associations cannot prevent members continuing to practise under the same name nor do they usually provide compensation where a member is no longer able to do so.

Those regulated under the Legal Services Act 2007 currently pay for the Ombudsman's service. The Act ensures that they cannot be expected to subsidise unregulated providers.
We are concerned that there is a risk that unregulated providers might sign up voluntarily to the Ombudsman's service, only to ignore their adjudications at a later date, leaving consumers badly let down. It is important to recognise that the right to complain does not exist in a vacuum. Regulated providers must provide a proper complaints process alongside positive requirements with regards to service and cost, and there are disciplinary sanctions for failure. While having a complaints handling service is a helpful addition for consumers, regulation which ensures a proper standard of services in the first place is likely to be far more important to them.

The Legal Services Act 2007 provides a route for legal activities to become regulated (and those providing them to come under LeO's remit) through reservation.

Regulation of online legal services is a developing area of some complexity. Online legal services provide an alternative means of accessing legal services for consumers. However, while these services can be cheaper and easier for some consumers to access there are often issues about the suitability, limitations and quality of the products provided. This was clearly seen in the consumer panel's report on will writing. Often problems stem from the inappropriateness of the product for the user. It can often be difficult for consumers to identify whether an online product is right for them. Some online services have led to a significant number of complaints, including those offering online divorces. There are also questions as to whether services can always be provided properly via an online provider. For examples, in will writing, a practitioner will need to consider whether they have identified who the client is; whether the instructions fully reflect their wishes and capacity issues amongst other factors (see example in annex A for full explanation). Otherwise the will may be subject to challenge at a later date and the testator’s wishes may not be fulfilled. This would be detrimental to the client and their beneficiaries. The most appropriate way to regulate such services is through reserving the work so that authorised and regulated practitioners can develop suitable online products which enable compliance with the regulatory objectives.

Question 4: What are your views of our diagnosis of the weakness of the existing system and the problems within it?

As noted by the LSB, there are gaps in the regulation of legal services. The Law Society has drawn attention to this in the context of will writing.

We do not believe that, as implied by the paper, unregulated providers are the only driving force behind changes in the market. Competition between regulated entities (not only solicitors) has always been present and direct price competition supported by advertising has been permitted for over 20 years. This, with other technological

advances, has driven better services and improved efficiency. There is no persuasive evidence that unregulated providers or ABS will necessarily be more innovative in the provision of legal services than current regulated providers. We do not believe that unregulated provision is always significantly cheaper. In fact hidden extras, such as storage costs for wills, may make such services more expensive in the long run. Without regulation, providers do, of course, have the freedom to market and deliver services without meeting any professional standards and detriment to consumers or, very frequently, their families or other third parties in areas of major significance to their lives can be the result.

The LSB points out that solicitors currently use unauthorised persons to provide legal services and also outsource some work. This is not a new phenomenon, nor has it been driven by unregulated providers. Where this does occur the work remains the responsibility of the regulated person which must ensure that it meets the required standards. Thus clients are entitled to expect the same level of protection and service. It is surprising that this is not recognised by the LSB

As noted above, it is quite inappropriate for the LSB to use the term 'professional monopolies', which is inaccurate and disparaging. Solicitors and barristers compete with new entrants and numerous other authorised persons in the legal services market as well as unregulated providers. There is also strong competition between solicitors. Solicitors do not, and never have, held a monopoly over the legal services market. As noted in the paper, very little legal work is reserved only to authorised persons and no regulator, save the Master of Faculties, has exclusive rights over any reserved activity.

Solicitors are the first choice for many consumers. We believe that this is because the overwhelming majority of solicitors provide a professional service that clients trust and value and are part of a system that provides significant protection both for consumers and for the justice system. A professional service is not only about providing a good standard of client care but also about acting with integrity and in the best interests of clients. Use of the services and skills of solicitors is not just due to lack of confidence in other providers. The solicitors' brand is a strong brand due to the hard work of the profession in maintaining its reputation through high standards of work and conduct. The LSB appears to express subjective and contradictory views about brands. On the one hand, the LSB highlights the importance of new but well-known brands entering the market and attracting new consumers into the market in order to increase access to justice. On the other hand, there seems to be an objection to consumers using the trusted brand of 'solicitor' as a decisive factor when deciding about the purchase of legal services. It is undesirable for the LSB to give the impression that it resents the success of solicitors in providing trusted services to their clients. One of the LSB's regulatory objectives is to encourage an independent, strong, diverse and effective legal profession. By taking such a negative approach it is difficult to see how the LSB is working towards this objective.

We believe that, where possible, required regulatory standards should be consistent across the entire section. Otherwise we fear that there will be greater consumer confusion and a further complexity of the regulatory maze. We do not agree that having different standards for different activities will necessarily decrease the burden on providers. Many providers are likely to provide more than one reserved activity. Having to operate with numerous differing regulatory standards and layers of them would add to the regulatory burden.

The Law Society has already set out what we believe are the required regulatory standards for will writing. However, in all areas of law the courts have set out, through decisions in negligence cases, the minimum standards a client can expect from a qualified legal professional. These standards have generally been codified by the profession into rules. It would seem to us that these requirements should apply across the board.

Question 5: What do you see as the benefits and downsides of regulating through protected title such as solicitor and barrister?

We do not accept that it is a legitimate role for the LSB to seek to regulate the use of professional titles such as solicitor and barrister. We do not believe that the LSB has any remit in this area. We believe, however, that the grant and use of a professional title carries with it a number of substantial benefits for consumers, including:

- strong qualifications requirements ensuring minimum standards;
- clear standards governing regulated persons,
- the maintenance of a professional ethos
- client protections; and
- a clearly recognised brand.

There is no doubt that the advantages of professional regulation are still apparent to many within the regulatory field, as there is a constant flow of new professions and professional regulators still forming. Nor are professional titles confined to barristers and solicitors in the legal field; many others also have established and traditional titles. When these fail in popularity or relevance they will fall out of use. This is for the market to determine, not a supervising regulator.

Being a qualified entrant into a profession is more than just joining a brand. It means that an individual has qualified through training and experience to a minimum level, has been assessed as suitable and will be expected to meet certain ethical standards. This is necessary because the work they carry out as a professional will put them in a position of trust. Consumers are aware that by going to a professional, they will be seeing someone who will adopt ethical standards, act in their best interests and, in the case of solicitors and barristers, maintain their confidentiality. The ethical values bound up in the titles of 'solicitor' and 'barrister' are widely recognised.

Lawyers also play a crucial role in upholding the rule of law. The fact that they are regulated enables them to provide both the courts and consumers with the necessary guarantees to facilitate the operation of the system of administration of justice and the doctrine of legal professional privilege, itself a fundamental human right. Solicitors are also Officers of the Court and as such owe duties to the court to ensure the proper administration of justice. These wider duties are based very much on the notion of individual regulation and responsibility that is not and cannot be entirely replicated by entity regulation.

Solicitors can provide a wide range of services and some practise in several areas, providing a holistic service, though many specialise. Through their basic training solicitors are enabled to transfer their skills and expertise to different areas of law, at different stages of their career. This is essential in modern day conditions and enables solicitors to respond to market changes as well as to changes in personal circumstances. However, it has always been the case that (and is confirmed by the

new Code, recently approved by the LSB) solicitors must only undertake work where they are competent to do so. There is a regulatory system to ensure that solicitors only act within their competence. We do not believe that the current system is confusing or disadvantages consumers. Most professions (e.g. doctors, accountants, vets, pharmacists) have some generalists and others that specialise. However, they are normally regulated under the same set of overarching rules. This approach has stood the test of time.

While there are some disadvantages to individual regulation, for solicitors at least, they are compensated for by the existence of entity regulation and the two complement each other.

We do believe that there is a current need for clarification about the use of the term 'solicitors' in relation to firms. Our legal advice is that only firms where the significant majority of those controlling the firm are solicitors may properly use the term.

Question 6: 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?

The use of titles is often governed by statutory provision, and so the scope for LSB initiatives is limited. It is not clear what linking titles to activities might mean in practice. While it is simple to link one activity to a title, once there is more than one activity linked to a title it becomes more difficult. An obvious example of this is licensed conveyancers who are now looking to broaden the activities they can undertake and become more generalised.

We believe that the granting of titles should be linked to the relevant professional body.

Question 7: 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?

Looking at areas on a case-by-case basis is likely to be the most practical approach, especially as the Act is based on the concept. Also, given that the opportunity for substantial change in the provision of legal services permitted by the Act is only just coming into place, it would be wise to see the effects of these changes first before attempting another general recasting of regulation.

We note that legal advice will be considered in future. This covers a broad area and may need to be broken down into specialised areas in order for it to be considered in any meaningful way.

Question 8: What are you views on our proposed stages for assessing if regulation is needed, and if it is, what regulatory interventions are required?

We agree, in general, with the process but not the basis on which it is predicated. The process should not be centred on consumer protection being the only reason for reservation. We believe that where there is a clear public interest in reservation,

evidence of consumer detriment is not necessary. A key regulatory objective is that the public interest should be protected and promoted.

We recognise that non-regulatory approaches may be appropriate in some cases where only limited protection is necessary. However, if one aim is to provide access to LeO for more users of legal services then, as noted above, non-regulatory approaches may not work.

There will also be a need to consider other unintended consequences and impacts flowing from regulatory intervention. For instance, should regulatory interventions lead to more regulators being formed, then this may cause significant confusion in the market, variation of standards and, indeed, a race to the bottom in terms of regulatory arbitrage.

Question 9: What are your views on the implications of our approach for professional privilege?

Professional privilege previously applied to dealings with barrister and solicitors. Under the Legal Services Act 2007, it also applies to dealings with other authorised persons with regard to the following activities:

- advocacy
- litigation
- conveyancing
- probate

We think it is right that legal professional privilege should apply to clients of authorised persons, since it is only in those circumstances that the service is subject to regulation by a legal regulator.

It is important to remember the reasons for restricting privilege. Privilege forms an exception to the general rule that the courts can investigate any evidence in a case. The courts have recognised that it is essential that clients should be able to speak frankly to their advisers without being afraid that what they say will be revealed elsewhere. This is recognised in all developed jurisdictions as a fundamental human right. However, the fact that this forms a substantial exception to the court's ability to investigate a case means that the circumstances in which it can be claimed need to be limited to advice from people who can be trusted not to abuse the concept. Clients of solicitors and barristers have benefited from this because their advisers are answerable to the courts and are subject to a regulatory regime which can investigate whether the claim of privilege was abused or not. The Law Society has no objection to privilege applying to advice given by other types of lawyer, but it is crucial that they must be subject to the same level of training and regulation, in respect of the advice that they give, as are solicitors.

Question 10: Do you believe that any of the current reserved legal activities are in need of urgent review? If so, which activities do you think should reviewed and why?

We believe that, as well as considering the reservation of will writing, the LSB should also consider widening the current reservation relating to the grant of probate to

- the administration of an estate following a grant of probate or letters of administration.

We think that there is also scope for a review of conveyancing. We believe this is an area where damage has occurred through high levels of fraud and abuse of the land registration system. There is considerable scope for consumer and public detriment if the entire process is not properly regulated. We endorse Stephen Mayson's view that this is an area where the scope of reservation needs to be broadened.

We also believe the scope of the current reserved activity of litigation needs to be considered. We believe that reservation should include work in contemplation of litigation, as well as the issue of proceedings. Since 1998, court rules have extended to pre-issue work thus this work should come within the scope of regulation. If pre-action work is incorrectly undertaken this can damage or even prevent clients achieving redress, leading to significant detriment. Even an early letter of claim can be significant in the later stages of a claim and may have a bearing on the outcome of a claim. If a client is prevented from pursuing a valid claim because of mistakes made early on in the litigation process, this also becomes a public interest matter, as justice may not be done. Furthermore, a greater number of unregulated individuals in the market offering to take forward speculative claims, that regulated providers would not pursue, is likely to be costly to insurers and the courts. These costs will ultimately be passed on to the public. It is likely that certain of the Jackson reforms concerning claimant costs will increasingly lead claimants to find the cheapest provider, meaning clients may choose unqualified practitioners to pursue their claims in the early stages, leading to low standard advice and under settlement of claims. Accordingly, this means that this issue should be considered as a priority.

We would emphasise our comments in response to question 8, that the methodology and criteria for review need to be considered carefully and we will be observing closely the way in which the LSB carries out its review of wills and probate to ensure that appropriate considerations are taken into account.

In tandem with reservation, the 'separate business rule' ensures that clients are fully protected when buying a legal service from a regulated entity. The rule ensures that parts of a legal service cannot be 'hived off' to an unregulated entity leaving the client unprotected for that part of the service. We believe that this rule should apply to all regulated entities.

Question 11: What are your views on our analysis of the regulatory menu and how it can be used?

The current system is much more inclusive than is implied by the LSB. It is not a monopoly run by solicitors and barristers. There are entry requirements. These apply to all authorised persons not just to solicitors and barristers, and these ensure that authorised persons have the requisite knowledge and are suitable to undertake the activities that they are authorised to carry out.

The LSB's emphasis is on a variety in regulation with the concept of a regulatory menu. However, as is noted in the paper, it is the LSB's role under the Act to have regard to the principles of better regulation including the consistency of regulation.

We believe that having widely varying standards of regulation for legal service providers is likely to result in consumer confusion. It may also have the effect of lowering standards as regulators compete for authorised individuals.

It is important that regulation is built around the core professional principles and all authorised persons meet the minimum requirements.

We recognise that certain activities such as advocacy require some targeted regulation. However, many providers (not just solicitors) are qualified to offer a range of services and in these cases applying specialist regulation in each area is likely to be difficult and ultimately more expensive for providers and consumers.

We appreciate that all approved regulators, including the Law Society, will need to apply to be approved regulators in respect of additional reserved activities. We do not make an assumption that the current 'status quo' is always the best option. However, there should not be the assumption that new regulators or new regulatory systems will always be a better option. There are strong arguments against the proliferation of regulators. Furthermore, many current regulatory arrangements, including those of the Law Society, have already been closely scrutinised by the LSB. It will be crucial that the LSB does not restrict the current regulated market unnecessarily, and inhibit competitiveness of currently regulated providers, in favour of new entrants.

We are aware that the LSB has a preference for outcomes-focused regulation (OFR). The Law Society recognises that OFR can, in principle, be a mechanism by which the overly prescriptive regulation hitherto applied to the profession can be made more proportionate. However, this new form of regulation has yet to be fully implemented and is therefore still untested. The LSB should consider regulatory arrangements on the basis of their suitability to achieve the proper regulation of authorised persons rather than assuming that only one approach is legitimate.

Accreditation has a role to play in helping consumers identify specialists. The Law Society administers several accreditation schemes. We believe these types of schemes are of great benefit to consumers. However, accreditation of this sort, by its nature, should be non-mandatory and should not be seen as a substitute for effective regulation. As has been seen in the will writing market, numerous accreditation schemes have been set up by unregulated providers and some are of unproven standard and quality. These types of accreditation schemes can be misleading to consumers who have difficulty distinguishing between legitimate schemes and those set up to give a veneer of credibility to less competent or honest providers. Consumers often do not recognise differences (and cannot distinguish) between voluntary accreditation and statutory regulation or understand the levels of protection that are available under different schemes.

Question 12: 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?

Please also see our response to question 10.

We note that the LSB has taken on the role of oversight body for authorised persons providing immigration advice. The regulation of immigration by two oversight bodies does lead to some differences in regulations, some of which can lead to client detriment. Recently, we have been particularly concerned with the ability of the Office of the Immigration Services Commissioner to manage firms which cease. Under the current framework there is no power akin to intervention. This has meant that administrators, often with little or no experience of the legal services market, have been responsible for dealing with live client files. Given the importance to clients of these matters and the time sensitivity in immigration work, this is of great concern. We understand that, while most of the live files have now been distributed, many of those who have received them have been unable to contact the relevant clients and many clients are still unable to locate the firm which has been given its files. This has caused client detriment and would not have occurred if the firms in question had been authorised and any intervention or administration carried out by an experienced practitioner.

As noted above we do not believe that it is practical to regulate general legal advice and instead consider that specific areas should be investigated on a case-by-case basis.

We are unconvinced by the LSB's view that there are concerns regarding regulation of those providing services to corporate clients. We do not see this as an area where there is any evidence of emerging client or public detriment. It needs to be recognised that the risks posed by the failure or incompetence of a major corporate firm are not of the same order as those attached to the failure of a major financial services provider. There may be considerable incidental inconvenience to clients (who will, however, tend to be able to manage this and will often have their own in-house lawyers and alternative providers and thus are not irretrievably affected by any single failure) but they are unlikely to affect the stability of the legal system or cause significant detriment to the bulk of vulnerable consumers. We recognise that firms providing advice to corporate clients pose different risks and we believe that the Solicitors Regulation Authority's (SRA's) new system of regulation generally allows for this to be reflected in their approach. We are aware that certain rules, such as those on providing information on complaints handling arrangements are inappropriate for these types of firms and are working with the SRA to see if we can resolve this issue.

Given that the transitional arrangements for special bodies will end in 2013, we would expect that the LSB would need to consider this issue in 2012.

Question 13: Do you have any comments on the approach that we have adopted for reviewing the regulation of will- writing, probate and estate administration?

We note that the approach taken by the LSB focuses narrowly on consumer protection. As indicated in our responses above, we believe that much greater consideration needs to be given to the public interest.

We believe that, in order to be effective there is a need to widen the reservation beyond the scope of will writing to:

- the preparation of a will or other testamentary instrument;
- the preparation or lodging of a power of attorney; and
- the administration of an estate following a grant of probate or letters of administration.

There should be consistent regulatory standards amongst all approved regulators and the following standards should be applied as a minimum:

- training requirements and monitoring of training providers;
- compulsory indemnity insurance cover;
- compulsory compensation fund;
- a code of conduct including requirements to meet the professional principles, follow an advertising code, foster equality and diversity and be transparent about costs;
- a system to ensure clients and their wills are protected should a will writer cease practising.
- a complaints management system; and
- a disciplinary mechanism including supervision, monitoring and sanctions.

We are responding in more detail on this issue in our response to the LSB's call for evidence regarding the investigation into will-writing, estate administration and probate activities.

Annex A

Example of issues a practitioner should consider when taking instructions for a will

Lack of knowledge and experience when drafting a will can lead to mistakes which lead to a will being challenged. The risks are particularly acute when undertaking will writing services remotely, where there are no or few face-to-face dealings, some of the key risks include:

Who is the client and Is it the client actually giving the instructions?

If an online service prepares a will, it is difficult for the service provider to verify whether the person providing the instructions will be the person signing it. If someone comes in with a testator and gives the instructions, the person advising should see the client on their own to make sure that the instructions from the other person are in accordance with the testator's wishes. There may be a challenge to the will if it is not clear who has given instructions or signed it.

Is there any undue influence being exerted on the client?

Any person preparing the will needs to be alert to undue influence. For instance, if the testator is accompanied to a meeting by an intended beneficiary, or someone related to an intended beneficiary, the person preparing the will should have a private conversation with the client to try and discover why the person wishes to make the bequests that they do. Where a will is made wholly online or instructions are given via e-mail it is impossible for the person writing the will to know whether someone is seeking to influence those instructions.

Does the client have satisfactory testamentary capacity?

The law around capacity is complex and wills are often challenged on the basis of a testator lacking capacity. Further, where the testator has the capacity to sign the will, there is also an issue as to whether the testator has the capacity to make the testamentary dispositions that they wish to do. This is a separate capacity question, and if there are any unusual testamentary dispositions e.g. leaving everything to one child and nothing to another, the person preparing the will needs to investigate, respectfully but fully, to determine if the testator's wishes reflect the reality of the family dynamic. For instance, if the child to whom nothing is left is the kind and affectionate carer of the elderly and somewhat confused testator, and the child to whom all is left has nothing to do with them, it is possible that the disinherited child would be able to challenge the will on the grounds that the testator lacked capacity to make the bequests in the will. It is therefore important that the person drafting the will has the understanding and experience to judge capacity. Where there are no face-to-face meetings between the client and the drafter, making these types of judgement will be more difficult.

Is there any form of fraud being perpetrated?

If the person drafting the will has not verified who their client is then it does create the risk of fraud being perpetrated. For instance, a third party may create a will without

the knowledge of the 'testator' of the will. If this is carried out through a regulated service provider the will is likely to be seen as more credible and less likely to be challenged.

Is the execution of the Will by the client properly supervised?

If the execution of a will is not properly supervised then mistakes can be made. For instance, beneficiaries may act as witnesses thus invalidating bequests made to them. A person in a position of trust supervising the execution of a will can also help rebut any later claims of fraud or undue influence.

Does the client have knowledge and have they fully approved what was signed, especially if complex trust clauses are involved?

It will be important to ensure that the testator understands the contents of the will and its consequences. This is more difficult where a will has more complex provisions including provisions for avoiding inheritance tax or for making provision for dependant a disabled child while not making their son or daughter ineligible for the benefits they would otherwise be entitled to. The person drafting the will needs to understand fully the provisions of the will and be able to explain them to the testator clearly. This is more likely to be difficult where there are no face-to-face meetings.